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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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JUDGES

OF THE

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

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Hon. EDWARD WHITSON, District Judge, E. D. Washington.....Spokane, Wash.
Hon. CORNELIUS H. HANFORD, District Judge, W. D. Washington.....Seattle, Wash.

[1] Appointed November 16, 1907.

CASES REPORTED.

CASES

ARGUED AND DETERMINED

IN THE

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

BUTLER BROS. SHOE CO. v. UNITED STATES RUBBER CO.

(Circuit Court of Appeals, Eighth Circuit. October 25, 1907.)

No. 2,496.

1. EQUITY—PLEA OR ANSWER—OBJECTIONS—WAIVER.

Filing a replication and taking the proofs waives no substantial insufficiency of the facts set forth in a plea or answer to constitute a defense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 664, 665.]

2. CORPORATIONS—FOREIGN CORPORATION—POWER OF STATE TO EXCLUDE OR CONDITION ITS BUSINESS NOT UNLIMITED—EXCEPTIONS.

The broad statement in Paul v. Virginia, 8 Wall. 168, 181, 19 L. Ed. 357, that a state may exclude a foreign corporation from business, or may condition its admission to do business within its borders by such terms as it may deem proper, has been qualified by the decisions of the Supreme Court, and the following exceptions to it are established:

(a) Every corporation empowered by the state of its creation to engage in interstate commerce may carry on that commerce in sound and recognized articles of commerce in every other state in the Union. Every prohibition, obstruction, or burden which the other states attempt to impose upon such business is unconstitutional and void.

(b) Every corporation of every state which is in the employ of the United States, has the right to exercise the necessary corporate powers and to transact the requisite business to discharge the duties of that employment in every other state in the Union, without let or hindrance from the latter.

(c) Every corporation of every state has the absolute right to institute, maintain, and defend in the federal courts, and to remove to those courts its suits in any other states in the cases and on the terms prescribed by the acts of Congress.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Commerce, §§ 7, 100; vol. 13, Courts, § 860; vol. 42, Removal of Causes, § 64.]

3. SAME—PROHIBITION WITHOUT DISCRIMINATION OF ALL BUSINESS, UNCONSTITUTIONAL AS TO INTERSTATE COMMERCE.

Where a corporation of one state is engaged in both interstate and intrastate commerce in any other state, the prohibition or the conditioning by the latter state of its exercise of its right to do business within its borders, without discriminating between that which constitutes interstate commerce and that which constitutes intrastate commerce, is unconstitutional and void, so far as it relates to the former.

4. COMMERCE—INTERSTATE COMMERCE IN SOUND ARTICLES FREE FROM STATE REGULATION WHERE CONGRESS HAS NOT ACTED.

Interstate commerce in sound and well-recognized articles of commerce must be free, and any prohibition, obstruction, or burden of it by a state by any method is unconstitutional. Such commerce may not be regulated by a state at all. The exclusive power to regulate commerce among the states is vested in the Congress.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Commerce, § 7.]

5. SAME—FACTORAGE CONTRACTS BETWEEN CITIZENS OF DIFFERENT STATES ARE TRANSACTIONS OF—CONDITIONAL SALE AND FACTORAGE CONTRACT DISTINGUISHED.

A manufacturing corporation of New Jersey made annual contracts with a corporation of Colorado engaged in the wholesale business in that state, whereby the former agreed to send from its mill and warehouse in Eastern states to the latter in Colorado, upon its orders, rubber boots, shoes, and other rubber goods during the year for sale, and the latter agreed to receive, to store, and to sell them in its name as consignee, and to pay to the former for the goods which the latter sold certain agreed prices, which were so much less than its selling prices to its customers that it secured thereby the expenses of carrying on the business and a liberal commission. The contracts provided that the latter was appointed the agent of the former to sell the goods, that the latter should make advances when requested, that to the amount of its profits it guaranteed the sales, that the goods and their proceeds, until the latter paid the agreed prices, should be the property of the former, and that the latter assumed the risk of the receiving, storing, handling, and selling. The manufacturing corporation shipped the goods as agreed. It had no office, warehouse, or place of business in Colorado, and it neither incurred nor paid any of the expenses of receiving, storing, and selling the goods. The Colorado corporation ordered, received, stored, and sold the merchandise at its own expense, in consideration of the factorage secured to it by the contracts. *Held*:

(a) The agreements were factorage contracts, and they were not contracts for conditional sales.

(b) The making of the contracts and their performance by the New Jersey corporation were transactions of interstate commerce, which could not be lawfully prohibited or trammeled by the legislation or action of the state of Colorado.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 1335; vol. 10, Commerce, § 29.]

6. CORPORATIONS—FOREIGN CORPORATION—CONSTITUTION AND STATUTES OF COLORADO REGARDING, IF LITERALLY CONSTRUED, UNCONSTITUTIONAL—THEY SHOULD BE INTERPRETED TO RELATE TO INTRASTATE COMMERCE AND THE COLORADO COURTS ONLY.

The Constitution and statutes of Colorado by their plain terms prohibit every foreign corporation from doing any business whatever, from exercising any corporate power, and from prosecuting or defending any suit in that state, unless it files certain writings, pays certain fees to certain officers and an annual license fee of 2 cents for each $1,000 of its capital stock, and they provide that a failure to pay the annual license fee shall constitute an absolute defense to all actions and proceedings brought by it in any court within the limits of the state, upon any transaction growing out of such business, until the license fee is paid. *Held*:

(a) This legislation, if literally interpreted, is unconstitutional and void, in so far as it prohibits or conditions the exercise by a corporation of another state of its right to carry on the business of interstate commerce in Colorado, and in so far as it prohibits or limits the exercise in that state by a foreign corporation of its right to institute and defend in the national courts suits for and against it arising out of that commerce.

(b) The true construction of this legislation is that it was intended to govern intrastate commerce and suits in the state courts in Colorado only,

and it is inapplicable to the business of interstate commerce in that state and to the right of a foreign corporation to institute, maintain, and defend suits in the federal courts.

(c) In the making and performance of the factorage contracts in suit the New Jersey corporation was not doing business in Colorado within the true meaning of the Constitution and statutes of that state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 2519, 2524.]

7. COURTS—JURISDICTION OF NATIONAL COURTS—STATE LEGISLATION MAY NOT REVOKE OR IMPAIR.

While the national courts may enforce rights created and remedies granted by state statutes according to their terms, the jurisdiction and power of those courts was not granted by, and it may not be revoked, annulled, or impaired by, state legislation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 795.]

8. CORPORATIONS—FOREIGN CORPORATION—CONSIGNMENT OF GOODS TO FACTOR IN ANOTHER STATE NOT DOING BUSINESS THEREIN.

A foreign corporation, which has no warehouse, office, or place of business, and which neither incurs nor pays any of the expenses of receiving, handling, storing, or selling its goods, in a state to which it consigns them to its factor, who conducts all the business there, assumes and pays all the expenses of receiving, selling, handling, and storing the goods, is not doing business in the latter state within the true meaning of the statutes relative to the admission of foreign corporations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 2524.]

9. EQUITY—JURISDICTION—CONTROVERSY OVER EXTENDED ACCOUNT INVOKES.

An action at law is not as practicable, efficient, or adequate a remedy as a suit in equity, where the controversy involves an account which consists of many items, and a federal court has jurisdiction of it in equity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 151; vol. 1, Account, § 65.]

(Syllabus by the Court.)

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

See 132 Fed. 398.

The United States Rubber Company, a corporation of New Jersey, was a large manufacturer of rubber goods, and its principal office was in New York. It had a factory in one of the Eastern states and a warehouse in Chicago, from which it shipped its merchandise to consignees and purchasers. The Butler Bros. Shoe Company, a corporation of Colorado, was a wholesale merchant engaged in the purchase and sale of rubber goods and other merchandise at Denver, in that state. In January, 1901, in January, 1902, and in January, 1903, it made similar factorage contracts with the rubber company for the shipment of the goods of the latter from its mill and warehouse to the shoe company at Denver upon its orders. By the contract of January, 1903, the rubber company appointed the shoe company its agent to sell, and agreed to consign to it at Denver, certain of its goods at agreed prices, and the shoe company agreed to receive the goods and assume the risk thereof; to pay freight and expenses of handling, carting, storing, selling, and delivering to its customers; to make advances to the rubber company in cash, or in notes, if requested; to guarantee the rubber company against all losses from sales to the extent of the shoe company's profits; to pay the rubber company at agreed prices, which were so much below the prices at which the shoe company sold to its customers that it thereby secured a liberal factorage or commission, and at specified times, for all consigned goods it sold to its customers; to purchase, at the option of the rubber company, at the termination

of the contract, all of the consigned goods then in its possession, except original and unbroken packages, at the prices that should then be ruling; to keep separate account books of the goods, of their receipt and sales; to keep a separate bank account under the name of the "Butler Bros. Shoe Company Consignee Account," in which the proceeds of the sales, including the consignee's profits or factorage should be deposited, and from which the consignee should check out the amounts due the consignor, the freight charges, and the consignee's profits or factorage; to bill the goods to the purchasers as consignee, and that all goods then on hand and those subsequently consigned should be the property of the consignor until they were sold to the consignee's purchasers; and that the books, accounts, bills receivable, and cash derived from the sales of the consigned property should be the property of the consignor. Pursuant to this contract the consignee ordered for sale to its customers, and the consignor shipped from its warehouse in Chicago, and from its mill, to Denver, Colo., goods of the value of many tens of thousands of dollars. After a few months the rubber company demanded an advance in cash from the factor. The latter failed to make this advance, but at the same time ordered the rubber company to send to it from $15,000 to $20,000 worth of rubber goods to fill orders it had previously taken from its customers therefor. In this state of the case, on October 22, 1903, the parties made a supplemental agreement to the effect that the consignor would waive its demand for the advance and would fill the factor's orders, and that the factor would pay the consignor for all the goods which it sold to its customers 60 days after the accounts for them fell due. The contracts provided that they should terminate at the end of one year from January, 1903. At the end of the year the factor made default in its payments, and in March, 1904, the rubber company exhibited its bill against the shoe company in the court below for an accounting, for a receiver of the property in the hands of the factor under the contract, for an injunction, for a recovery of its property remaining in the possession of the shoe company, and for a recovery of the moneys which the shoe company owed to it. The defendant answered, among other things, that the complainant had not qualified itself to do business in Colorado and had not paid the annual license tax prescribed by the statutes of Colorado for the doing of business in that state by a foreign corporation. To this portion of the answer the complainant excepted, its exception was overruled, and it then filed a general replication. Evidence was taken, there was a final hearing on the merits, and the court below rendered a decree that the complainant should receive $8,276.47 which remained in the bank in the "Butler Bros. Shoe Company Consignee Account," $29,647.09 which the receiver had realized from the goods, bills receivable, and accounts that accrued under the consignment and were taken from the shoe company by the receiver, and that the rubber company should recover of the shoe company $14,856.27 which the latter owed it, and the costs of the suit. From this decree the shoe company appealed.

J. E. Robinson (Charles J. Hughes, Jr., on the brief), for appellant.

Henry T. Rogers (Lucius M. Cuthbert, Daniel B. Ellis, and Pierpont Fuller, on the brief), for appellee.

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

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

Counsel for the appellant first assail the decree on the ground that, by filing the replication after its exception to the defense that the complainant had been doing business in the state of Colorado without a license was overruled, the complainant estopped itself from again questioning the sufficiency of that defense. This is not a case in which complainant waived its objections to the answer by failing

to file any exception to it (Story's Equity Pleading [10th Ed.] § 877; Slater v. Maxwell, 73 U. S. 268, 275, 18 L. Ed. 796; Hughes v. Blake, 6 Wheat. 463, 472, 5 L. Ed. 303; Farley v. Kittson, 120 U. S. 303, 314, 7 Sup. Ct. 534, 30 L. Ed. 684); and, even if it were, the facts alleged therein, if proved, would avail the defendant, under equity rule No. 33, only so far as in law and equity they ought to avail it. In the national courts the complainant in equity does not waive any substantial insufficiency of the facts set forth in a plea or answer to constitute a defense by filing a replication and taking the proofs. Pearce v. Rice, 142 U. S. 28, 42, 12 Sup. Ct. 130, 35 L. Ed. 925; Green v. Bogue, 158 U. S. 478, 500, 15 Sup. Ct. 975, 39 L. Ed. 1061; Soderberg v. Armstrong (C. C.) 116 Fed. 709.

The second and chief objection of counsel to the decree is that the contracts of factorage were illegal, and therefore void, because the complainant was a foreign corporation, and it carried on business in the state of Colorado without a license in violation of the statutes of that state. The contract of January, 1903, when reduced to its lowest terms, was that for one year the complainant would send on the orders of the defendant from its factory and warehouse in Eastern states shoes, boots, and rubber goods to the shoe company in Colorado, that the latter would make such advances to the complainant as it requested and would conduct the business and pay all the expenses of selling the goods for the factorage or commission, which consisted of the difference between the agreed prices between the parties to the contracts and the selling prices to the purchasers from the factor. The question has been exhaustively argued whether this was a contract for a conditional sale or a contract of agency. It did not evidence a conditional sale, because there was no obligation of the rubber company to transfer the title to the shoe company for an agreed price, and no obligation of the shoe company to pay an agreed price for the goods. There was no vendor or vendee named in the agreement. It was a contract of bailment for sale, not a contract of sale. In re Columbus Buggy Co., 143 Fed. 859, 74 C. C. A. 611. It was a contract of factorage. The supplemental contract of October, 1903, relieved the factor of making advances and bound it to guarantee payment for the goods it sold. It transformed the factor into a del credere factor. Were these contracts illegal and void?

The Constitution and the statutes of Colorado by their terms prohibit any foreign corporation from doing any business, exercising any corporate power, acquiring or holding any property, or prosecuting or defending any suit in the state, unless it has first filed with the Secretary of State a certificate of its incorporation, a written appointment of an agent in the state to accept service of process, and a written specification of a principal place of business in the state, has paid to the Secretary of State $30 for its first $50,000 and 50 cents for each additional $1,000 of its capital stock, a fee of $5, and numerous other fees for filing papers and issuing his certificate, and has paid to the Auditor of the State an annual license fee of 2 cents for each $1,000 of its capital stock. Const. Colo. art. 15, § 10; 1 Mills' Ann. St. §§ 499, 500; Sess. Laws Colo. 1901, p. 121, c. 52, § 10;

Sess. Laws 1902, p. 73, c. 3, § 64. The statutes of Colorado further provide that a failure to file this certificate of incorporation shall render each officer, agent, and stockholder of the foreign corporation liable for all contracts made in Colorado while it is in default (1 Mills' Ann. St. § 501), and that a failure to pay the annual license tax shall deprive the corporation absolutely of all rights and privileges to do business in the state, and shall constitute an absolute defense to all actions, suits, and proceedings in law or equity brought by the corporation in any court of competent jurisdiction within the limits of the state, until the tax is paid. Sess. Laws Colo. 1902, p. 74, c. 3, § 66. It is obvious that by the literal terms of this Constitution and these statutes no foreign corporation may lawfully exercise any corporate power, maintain any suit in any state or federal court, or do any business of any kind whatever in the state of Colorado, unless it first pays the license fees which that state has prescribed for permission to do business therein. Is this the true meaning of this statute? Is a contract by a manufacturer or owner of articles of commerce to send them from one state to a factor in another to be sold by him for an agreed commission doing business in the latter state, within the true intent and meaning of such laws? If a California corporation ships a car load of fruit to a commission merchant in New York to be sold by him on agreed factorage, is the California corporation doing business in New York within the meaning of its statutes of this character? If it contracts to ship 1,000 car loads during a year on the same terms, is it violating the statutes of New York, unless it obtains a license to do business there? Counsel for the appellant insist that the appellee was doing business in Colorado under these contracts, and that they were void because it thus violated the laws of that state. They quote and rely upon the remarks of Mr. Justice Field, in Paul v. Virginia, 8 Wall. 168, 181, 19 L. Ed. 357, where he said:

"Now a grant of corporate existence is a grant of special privileges to the corporators, enabling them to act for certain designated purposes as a single individual, and exempting them (unless otherwise specially provided) from individual liability. The corporation, being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created. As said by this court in Bank of Augusta v. Earle, 13 Pet. 519, 10 L. Ed. 274: 'It must dwell in the place of its creation, and cannot migrate to another sovereignty.' The recognition of its existence even by other states, and the enforcement of its contracts made therein, depend purely upon the comity of those states—a comity which is never extended where the existence of the corporation or the exercise of its powers is prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely, they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion."

From the statements in this quotation, counsel argued that the power and purpose of the state of Colorado were unrestricted, and that a foreign corporation cannot lawfully exercise any corporate power or do

any business whatever in the state of Colorado without a compliance with the requirements of its statutes. But the contention fails to give due weight to the Constitution of the United States, to the opinions of the Supreme Court which have construed it, and to the actual decision in Paul v. Virginia. In that case Paul had been convicted of delivering an insurance policy as agent of a foreign corporation in violation of the laws of the state of Virginia, which prescribed the terms on which such corporations might do business in the state. He insisted that these laws were unconstitutional, because they deprived the foreign corporation of the privileges and immunities of the citizens of the several states, and because they constituted a regulation of commerce among the states. The Supreme Court decided that a foreign corporation was not a citizen, within the true intent of the clause of the Constitution which declares that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states" (8 Wall. 177–180, 19 L. Ed. 357); that such a corporation was within the provision of the Constitution that Congress shall have power "to regulate commerce with foreign nations and among the several states," but that an issue of a policy of insurance was not a transaction of commerce. "It is undoubtedly true, as stated by counsel," said the court, "that the power conferred upon Congress to regulate commerce includes as well commerce carried on by corporations as commerce carried on by individuals. * * * The language of the grant makes no reference to the instrumentalities by which commerce may be carried on. It is general, and includes alike commerce by individuals, partnerships, associations, and corporations." 8 Wall. 182, 183, 19 L. Ed. 357.

In Pensacola Telegraph Company v. Western Union Telegraph Company, 96 U. S. 1, 8, 24 L. Ed. 708, the state of Florida had granted to the Pensacola Telegraph Company the exclusive right to establish and maintain lines of electric telegraph in certain counties of the state, and the Western Union Telegraph Company, a foreign corporation, sought to erect a line of telegraph therein. Chief Justice Waite opened the opinion of the court in that case in these words:

"Congress has power 'to regulate commerce with foreign nations and among the several states' (Const. art. 1, § 8, par. 3) and 'to establish post offices and post roads' (Id. par. 7). The Constitution of the United States and the laws made in pursuance thereof are the supreme law of the land. A law of Congress made in pursuance of the Constitution suspends and overrides all state statutes with which it is in conflict. Since the case of Gibbons v. Ogden, 9 Wheat. 1, 6 L. Ed. 23, it has never been doubted that commercial intercourse is the element of commerce which comes within the regulating power of Congress."

And he announced the unanimous opinion of the court that the grant of the exclusive right by the state of Florida to the Pensacola Company, and its attempt thereby to exclude the foreign corporation from certain portions of the state, were futile. Of the case of Paul v. Virginia he said:

"We are aware that in Paul v. Virginia, 8 Wall. 168, 19 L. Ed. 357, this court decided that a state might exclude the corporation of another state from its jurisdiction, and that corporations are not within the clause of the Constitution which declares that 'the citizens of each state shall be entitled to all

privileges and immunities of citizens in the several states.' Article 4, § 2. That was not, however, the case of a corporation engaged in interstate commerce; and enough was said by the court to show that, if it had been, very different questions would have been presented."

In Cooper Manufacturing Company v. Ferguson, 113 U. S. 727, 5 Sup. Ct. 739, 28 L. Ed. 1137, a corporation of the state of Ohio, in the face of the constitutional and statutory prohibition against doing business in Colorado, without filing its certificate of incorporation, appointing its agent for service, and specifying its principal place of business in that state, made a contract in the state of Colorado, with citizens of that state, to sell and deliver to them in Ohio a steam engine and other machinery for an agreed price. The purchasers refused to pay the price, and pleaded in answer to an action for it the invalidity of the contract, because the Ohio corporation had failed to comply with the qualifying statute, and the court dismissed the action. The Supreme Court reversed that judgment. It held that the Constitution and the statutes of Colorado could not be so literally construed as to prohibit a single act of business within the state, and added:

"So it is clear that the statute cannot be construed to impose upon a foreign corporation limitations of its right to make contracts in the state for carrying on commerce between the states, for that would make the act an invasion of the exclusive right of Congress to regulate commerce among the several states."

Mr. Justice Matthews and Mr. Justice Blatchford delivered a concurring opinion (pages 736, 737, of 113 U. S. page 742 of 5 Sup. Ct. [28 L. Ed. 1137]), in which they announced the rule upon this subject which has ever since prevailed in that court. They said:

"In the present case, the construction claimed for the Constitution of Colorado and the statute of that state passed in execution of it cannot be extended to prevent the plaintiff in error, a corporation of another state, from transacting any business in Colorado which of itself is commerce. The transaction in question was clearly of that character. It was the making of a contract in Colorado to manufacture certain machinery in Ohio, to be there delivered for transportation to the purchasers in Colorado. That was commerce; and to prohibit it, except upon conditions, is to regulate commerce between Colorado and Ohio, which is within the exclusive province of Congress. It is quite competent, no doubt, for Colorado to prohibit a foreign corporation from acquiring a domicile in that state, and to prohibit it from carrying on within that state its business of manufacturing machinery. But it cannot prohibit it from selling in Colorado, by contracts made there, its machinery manufactured elsewhere, for that would be to regulate commerce between the states."

In Pembina Mining Company v. Pennsylvania, 125 U. S. 181, 190, 8 Sup. Ct. 737, 741, 31 L. Ed. 650, the Supreme Court held that a state might exact a license fee for allowing a corporation, which was not engaged in interstate or foreign commerce, to maintain an office for its officers, stockholders, agents, and employés, but added that the power to exclude a foreign corporation from doing business within its limits, or to exact conditions for allowing it so to do, or for allowing it to hire offices therein did not exist, "where the corporation is in the employ of the federal government, or where its business is strictly commerce, interstate or foreign. The control of such com-

merce, being in the federal government, is not to be restricted by state authority."

In Fritts v. Palmer, 132 U. S. 282, 283, 10 Sup. Ct. 93, 33 L. Ed. 317, a foreign corporation which was not engaged in commerce purchased, took, and conveyed a title to real estate in Colorado without filing the certificate of incorporation and appointments required by the Constitution and statutes of that state, and the Supreme Court sustained the title upon the ground that the only penalty for the violation of the statutes was the liability of the officers and stockholders imposed in such cases.

In Lyng v. Michigan, 135 U. S. 161, 166, 10 Sup. Ct. 725, 726, 34 L. Ed. 150, the state of Michigan imposed an annual tax of $300 upon the business of selling brewed or malt liquors. Citizens of Wisconsin were engaged in manufacturing such liquors at Green Bay, in that state. They owned a warehouse at Iron River, in the state of Michigan, to which they shipped and in which they stored their liquor for sale in the original packages, and they employed Lyng as their agent to sell it there. Neither they nor their agent paid the tax; but he sold the liquor, and was arrested and convicted for a violation of the law. The Supreme Court reversed the conviction, citing Le Loup v. Mobile, 127 U. S. 640, 648, 8 Sup. Ct. 1380, 32 L. Ed. 311, and Bowman v. Chicago & Northwestern Railway, 125 U. S. 465, 8 Sup. Ct. 689, 31 L. Ed. 700, and said:

"We have repeatedly held that no state has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress."

In Norfolk & Western R. R. Co. v. Pennsylvania, 136 U. S. 114, 115, 118, 120, 10 Sup. Ct. 958, 960, 34 L. Ed. 394, the state of Pennsylvania had prohibited every foreign corporation, except insurance companies, which did not invest and use its capital in that commonwealth, from having any office or offices in that state, unless it paid an annual tax or license fee of one-fourth of a mill upon each dollar of its authorized capital to the auditor of the state. The Norfolk & Western Railroad Company was a foreign corporation. It had no railroad, and with trifling exceptions no capital, in the state of Pennsylvania; but its line of railroad in Virginia and West Virginia connected with other railroads, so that it formed a link in a through line of railroad over which, as a part of the business thereof, freight and passengers were carried into and out of the state. It had offices in Pennsylvania for the use of its officers, stockholders, agents, and employés. The Auditor assessed the annual tax upon it, and the state recovered a judgment therefor, which was affirmed by the Supreme Court of Pennsylvania. The Supreme Court of the United States reversed that judgment and said:

"It is well settled by numerous decisions of this court that a state cannot, under the guise of a license tax, exclude from its jurisdiction a foreign corporation engaged in interstate commerce, or impose any burden upon such commerce within its limits. * * * One of the terms of the contract by which

the plaintiff in error became a link in the through line of road referred to in the findings of fact provided that 'it shall be the duty of each initial road, member of the line, to solicit and procure traffic for the Great Southern Despatch [the name of said through line] at its own proper cost and expense.' Again, the plaintiff in error does not exercise, or seek to exercise, in Pennsylvania any privilege or franchise not immediately connected with interstate commerce and required for the purposes thereof. Before establishing its office in Philadelphia it obtained from the Secretary of the Commonwealth the certificate required by the act of the state Legislature of 1874 enabling it to maintain an office in the state. That office was maintained because of the necessities of the interstate business of the company, and for no other purpose. A tax upon it was, therefore, a tax upon one of the means or instrumentalities of the company's interstate commerce, and as such was in violation of the commercial clause of the Constitution of the United States. Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 5 Sup. Ct. 826, 29 L. Ed. 158; Philadelphia Steamship Co. v. Pennsylvania, 122 U. S. 326, 7 Sup. Ct. 1118, 30 L. Ed. 1200, and cases cited; McCall v. California, 136 U. S. 104, 10 Sup. Ct. 881, 34 L. Ed. 392."

In Crutcher v. Kentucky, 141 U. S. 47, 57–59, 11 Sup. Ct. 851, 853, 854, 35 L. Ed. 649, the Legislature of that state had prohibited any agent of a foreign express company from doing business in the state unless the express company first filed with the Auditor of the State a statement of its articles of association and satisfactory evidence that it had $150,000 invested in some safe dividend paying stock and had paid to the Auditor of State fees to the amount of $20. Crutcher, the agent of a foreign corporation which was engaged in both interstate and intrastate commerce in Kentucky, was convicted and fined for a violation of this statute, and his conviction was affirmed by the Supreme Court of the state. But the Supreme Court of the United States reversed that conviction, and held that the state statute was unconstitutional and void, with declarations of the law which bear with compelling force upon the issue in this case. It said:

"If a partnership firm of individuals should undertake to carry on the business of interstate commerce between Kentucky and other states, it would not be within the province of the state Legislature to exact conditions on which they should carry on their business, nor to require them to take out a license therefor. To carry on interstate commerce is not a franchise or a privilege granted by the state. It is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States; and the accession of mere corporate facilities, as a matter of convenience in carrying on their business, cannot have the effect of depriving them of such right, unless Congress should see fit to interpose some contrary regulation on the subject. It has frequently been laid down by this court that the power of Congress over interstate commerce is as absolute as it is over foreign commerce. Would any one pretend that a state Legislature could prohibit a foreign corporation—an English or a French transportation company, for example—from coming into its borders and landing goods and passengers at its wharves, and soliciting goods and passengers for a return voyage, without first obtaining a license from some state officer, and filing a sworn statement as to the amount of its capital stock paid in? And why not? Evidently because the matter is not within the province of state legislation, but within that of national legislation. * * * And the same thing is exactly true with regard to interstate commerce as it is with regard to foreign commerce. * * * We do not think that the difficulty is at all obviated by the fact that the express company, as incidental to its main business (which is to carry goods between different states), does also some local business by carrying goods from one point to another within the state of Kentucky. This is, probably, quite as much for the accommodation of the people of that state as for the advantage of the company. But, whether so or not, it does not obviate the objection

that the regulations as to license and capital stock are imposed as conditions on the company's carrying on the business of interstate commerce, which was manifestly the principal object of its organization. These regulations are clearly a burden and a restriction upon that commerce. Whether intended as such, or not, they operate as such."

In Horn Silver Mining Company v. New York State, 143 U. S. 305, 315, 12 Sup. Ct. 403, 405, 36 L. Ed. 164, a corporation of Utah, which alleged in its answer that it was a manufacturing corporation carrying on manufactures in the state of New York, and which was found by the courts to have been engaged in business independently of interstate commerce, was held to be subject to a franchise tax levied upon all corporations, domestic and foreign, by a law of the state of New York. But Justice Field, who delivered the opinion of the court in that case and also in Paul v. Virginia, after quoting the unrestricted terms he used in the latter case, declared that two qualifications or exceptions to the power of a state to destroy or limit the right of a foreign corporation to do business within its limits had been established—one, that it could not exclude or condition the right of a foreign corporation to transact the business of interstate or foreign commerce within its borders; and another, that it could not exclude or condition the right of such a corporation to do business in the state when it was in the employ of the general government.

In Osborne v. Florida, 164 U. S. 650, 655, 17 Sup. Ct. 214, 41 L. Ed. 586, the Supreme Court of that state held that one of its statutes, which imposed a license fee upon all express companies doing business in the state, did not apply to or affect in any manner the business of a company which was interstate in its character, and that, so long as an express company confined its operations to interstate or foreign commerce, it was wholly exempt from this statute, and the Supreme Court sustained that decision, and in reviewing Crutcher v. Kentucky, 141 U. S. 47, 11 Sup. Ct. 851, 35 L. Ed. 649, made these remarks which are pertinent to the Colorado Constitution and statutes here under consideration:

"The statute herein differs from the cases where statutes upon this subject have been held void, because in those cases the statutes prohibited the doing of any business in the state whatever, unless upon the payment of a fee or tax. It was said as to those cases that, as the law made the payment of the fee or the obtaining of the license a condition to the right to do any business whatever, whether interstate or purely local, it was on that account a regulation of interstate commerce, and therefore void. Here, however, under the construction as given by the state court, the company suffers no harm from the provisions of the statute. It can conduct its interstate business without paying the slightest heed to the act, because it does not apply to or in any degree affect the company in regard to that portion of its business which it has the right to conduct without regulation from the state. The company in this case need take out no license and pay no tax for doing interstate business, and the statute is therefore valid."

In Miller v. Ammon, 145 U. S. 421, 422, 12 Sup. Ct. 884, 36 L. Ed. 759, cited by the appellant, a citizen of Wisconsin purchased of the plaintiff in Chicago, on credit, and the plaintiff delivered to the purchaser in Chicago, wine, in violation of the ordinance of the city of Chicago, which prohibited such a sale in that city without a license, under a penalty of from $50 to $100. There was no interstate commerce

in the transaction, and the Supreme Court held that the liquor traffic was freighted with peril to the general welfare, that the contract of sale was unlawful, and that the plaintiff could not recover the purchase price.

In Missouri, Kansas & Texas Trust Company v. Krumseig, 172 U. S. 351, 19 Sup. Ct. 179, 43 L. Ed. 474, the Supreme Court of Minnesota had held that a statute of that state which declared that, whenever it satisfactorily appeared to a court that any evidence of debt was usurious, the court should declare it void, required the court to declare it void, without requiring the moneys borrowed upon it to be repaid, and the Supreme Court held that this construction must be given to the statute in a suit in equity in the federal court, based upon the statute. But that court added:

"Of course, these views are not applicable to cases arising out of interstate commerce, where the policy to be enforced is federal."

In Diamond Glue Co. v. U. S. Glue Company, 187 U. S. 611, 23 Sup. Ct. 206, 47 L. Ed. 328, a foreign corporation, without qualifying to do business according to the law of the state of Wisconsin, made a contract to supervise the plans for a glue factory to be built upon a site in that state, to manage the manufacturing in the factory, to operate it for the defendant, and to do various other things. After the factory had been erected and put in operation, the defendant failed to comply with some of its terms, and the foreign corporation brought a suit upon it. The Supreme Court held that the contract was not for the carrying on of interstate commerce, but for the doing of a local business in the state of Wisconsin, and that it could not be enforced. This case is cited and much relied upon by counsel for the appellant; but it fails to govern the issue here in controversy, because the contract of the foreign corporation in that case was to carry on a local business in the state of Wisconsin.

In Chattanooga Building & Loan Ass'n v. Denson, 189 U. S. 408, 23 Sup. Ct. 630, 47 L. Ed. 870, cited by appellant, no question of interstate commerce arose, and the Supreme Court followed the opinion of the highest judicial tribunal of Alabama, to the effect that loaning money and taking a mortgage upon property in that state constituted doing business therein, and made the note and mortgage void where it had been taken by a foreign corporation without complying with the qualifying statute of the state.

In Pennsylvania Lumbermen's Mutual Fire Insurance Co. v. Meyer, 197 U. S. 407, 25 Sup. Ct. 483, 49 L. Ed. 810, and Board of Trade v. Hammond Elevator Co., 198 U. S. 424, 441, 25 Sup. Ct. 740, 49 L. Ed. 1111, no question of the regulation of interstate commerce arose, and the only issue was whether the foreign corporations had been doing business in the state to such an extent that the service of process upon one of their directors or agents therein was a lawful service upon the corporation.

In Caldwell v. North Carolina, 187 U. S. 622, 623, 23 Sup. Ct. 229, 47 L. Ed. 336, an ordinance of the city of Greensboro prohibited every person from engaging in the business of selling or delivering picture frames, pictures, photographs, or likenesses of the human face, unless

he first paid a license tax of $10 for each year. A foreign corporation, without paying this license tax, obtained contracts for pictures and frames through its solicitors in the city of Greensboro. It secured rooms in a hotel in the city, and shipped the pictures and frames from Chicago in large and separate packages to itself at Greensboro, where one of its agents took the packages from the railway freight station to the company's rooms, broke them open, put the pictures in their respective frames, and then delivered them to the purchasers. He was convicted of a violation of the ordinance, and the Supreme Court of the state sustained his conviction on the familiar ground that the ordinance made no discrimination between foreign and domestic corporations, or between interstate and intrastate commerce. The Supreme Court answered this contention in these words, quoted from an earlier opinion:

"It is strongly urged, as if it were a material point in the case, that no discrimination is made between domestic and foreign drummers—those of Tennessee and those of other states; that all are taxed alike. But that does not meet the difficulty. Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the state. This was decided in the case of The State Freight Tax, 15 Wall. 232, 21 L. Ed. 146. The negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce. A New Orleans merchant cannot be taxed there for ordering goods from London or New York, because in the one case it is an act of foreign and in the other of interstate commerce, both of which are subject to regulation by Congress alone."

It then quoted the opinion of the Supreme Court of North Carolina, that the transaction was not interstate commerce because the pictures and frames were shipped to the foreign corporation itself in Greensboro, were taken to its rooms in the hotel, there taken out of their original packages and put together, and then delivered by its agent, although it conceded that if the pictures had been placed in their frames in Chicago, and then shipped directly to the purchasers in original packages, that business might have been interstate commerce, and said:

"We are not persuaded by their reasoning. It seems to proceed upon two propositions: First, that the pictures in question were not completed before they were brought to Greensboro; and, second, that the articles were not shipped directly to the purchasers, but to an agent of the sender in Greensboro. But it certainly cannot be pretended that, if the pictures and the disconnected frames had been directly shipped to the purchasers, the license tax could have been imposed, either on the vendor out of the state, or on the purchaser within the state. If the pictures and the frames intended for them had been shipped directly to the purchasers, whether in the same or separate packages, such a transaction would, beyond question, be interstate commerce, beyond the reach of the taxing power of the state. It is too plain for argument that the supposed incomplete condition of articles of commerce, if shipped directly to the purchasers, cannot subject them to the license tax. * * * Nor does the fact that these articles were not shipped separately and directly to each individual purchaser, but were sent to an agent of the vendor at Greensboro, who delivered them to the purchasers, deprive the transaction of its character as interstate commerce. * * * That the articles were sent as freight by rail, and were received at the railroad station by an agent who delivered them to the respective purchasers, in no wise changes the character of the commerce as interstate. Transactions between manufacturing companies in one state, through agents, with citizens of another, constitute a large part of interstate commerce; and for us to hold, with the court below, that

the same articles, if sent by rail directly to the purchasers, are free from state taxation, but, if sent to an agent to deliver, are taxable through a license tax upon the agent, would evidently take a considerable portion of such traffic out of the salutary protection of the interstate commerce clause of the Constitution."

In the light of the foregoing decisions there can be no doubt that no state in the Union retains the power to exclude a foreign corporation from, or to condition or burden its exercise of its constitutional right to carry on interstate commerce in recognized staple articles of commerce within the limits of the state.

There is yet another exception to the power of a state to condition the right of a foreign corporation to do business within its borders. It may not limit that right by requiring the corporation, as a condition of doing business, to waive or surrender its right to a determination of its controversies with citizens of other states in the national courts.

In Insurance Company v. Morse, 20 Wall. 445, 455, 456, 22 L. Ed. 365, the state of Wisconsin had enacted a law which by its terms conditioned the exercise by an insurance corporation of its right to do business in the state by requiring a contract on its part not to remove any suit against it to the federal court. The corporation made the agreement, but subsequently filed a petition and gave a bond for the removal of the action against it, brought by a citizen of Wisconsin, from the state court to the federal court. The court of the state denied the petition and gave judgment for the plaintiff, which was affirmed by the Supreme Court of the state. The Supreme Court of the United States again quoted and qualified the broad statement of the power of a state to exclude a foreign corporation, found in Paul v. Virginia, 8 Wall. 168, 19 L. Ed. 357. It said of that statement:

"The general language of the learned justice is to be expounded with reference to the judgment before him."

Speaking of the case of Paul v. Virginia, it declared that:

"It had no reference to the clause giving to citizens of other states the right of litigation in the United States courts, and certainly had no bearing upon the right of corporations to resort to those courts, or the power of the state to limit and restrict such resort."

Discussing the question upon its merits, the opinion proceeded in this way:

"The Constitution of the United States declares that the judicial power of the United States shall extend to all cases in law and equity arising under that Constitution, the laws of the United States, and to the treaties made or which shall be made under their authority, * * * and to controversies between a state and citizens of another state and between citizens of different states. The jurisdiction of the federal courts under this clause of the Constitution depends upon and is regulated by the laws of the United States. State legislation cannot confer jurisdiction upon the federal courts, nor can it limit or restrict the authority given by Congress in pursuance of the Constitution. This has been held many times. Railway Company v. Whitton, 13 Wall. 270, 20 L. Ed. 571; Payne v. Hook, 7 Wall. 427, 19 L. Ed. 260; The Moses Taylor, 4 Wall. 411, 18 L. Ed. 397, and cases cited. It has also been held many times that a corporation is a citizen of the state by which it is created and in which its principal place of business is situate, so far as that it can sue and be sued in the federal courts. This court has repeatedly held that a corporation was a citizen of the state creating it, within the clause of the Constitution

extending the jurisdiction of the federal courts to citizens of different states." 20 Wall. 453, 22 L. Ed. 365.

The Supreme Court reversed the judgment below, and held (1) that the Constitution of the United States secured to corporations of other states the absolute right to remove their cases into the federal courts upon compliance with the national statutes, and (2) that the statute of Wisconsin was an obstruction to that right, was repugnant to the Constitution of the United States and the laws in pursuance thereof, and was illegal and void.

The question arose again in Barron v. Burnside, 121 U. S. 186, 200, 7 Sup. Ct. 931, 936, 30 L. Ed. 915, and the former decision was affirmed. The court said:

"As the Iowa statute makes the right to a permit dependent upon the surrender by the foreign corporation of a privilege secured to it by the Constitution and laws of the United States, the statute requiring the permit must be held to be void. * * * In all the cases in which this court has considered the subject of the granting by a state to a foreign corporation of its consent to the transaction of business in the state, it has uniformly asserted that no conditions can be imposed by the state which are repugnant to the Constitution and laws of the United States."

The review of the decisions of the Supreme Court relating to the power of a state to trammel or destroy the right of a corporation of another state to do business within its borders in which we have indulged may have been tedious; but it may be profitable, if it serve to correct the erroneous view that such a corporation has no such right, and that all its powers and privileges without the limits of the state of its creation are at the mercy of any state in which it attempts to do business. It is not now, and it never has been, the law that no corporation of one state has any absolute right of recognition in other states, or that other states may exclude all the corporations of any state from doing any business within them, or that they may condition their transaction of such business by such terms as they may think proper to impose.

The Constitution of the United States and the acts of Congress in pursuance thereof are the supreme law of the land. Under that Constitution and those laws a corporation of one state has at least three absolute rights which it may freely exercise in every other state in the Union, without let or hindrance from its legislation, or action:

(1) Every corporation, empowered to engage in interstate commerce by the state in which it is created, may carry on interstate commerce in every state in the Union, free of every prohibition and condition imposed by the latter. Pensacola Telegraph Company v. Western Union Telegraph Company, 96 U. S. 1, 8, 24 L. Ed. 708; Cooper Manufacturing Company v. Ferguson, 113 U. S. 727, 736, 737, 5 Sup. Ct. 739, 28 L. Ed. 1137; Pembina Silver Mining Company v. Pennsylvania, 125 U. S. 181, 190, 8 Sup. Ct. 737, 31 L. Ed. 650; Lyng v. Michigan, 135 U. S. 161, 166, 10 Sup. Ct. 725, 34 L. Ed. 150; Norfolk, etc., Ry. Co. v. Pennsylvania, 136 U. S. 114, 115, 118, 120, 10 Sup. Ct. 958, 34 L. Ed. 394; Crutcher v. Kentucky, 141 U. S. 47, 57, 59, 11 Sup. Ct. 851, 35 L. Ed. 649; Horn Silver Mining Company v. New York, 143 U. S. 305, 315, 12 Sup. Ct. 403, 36 L.

Ed. 164; Osborne v. Florida, 164 U. S. 650, 655, 656, 17 Sup. Ct. 214, 41 L. Ed. 586; Missouri, K. & T. Trust Co. v. Krumseig, 172 U. S. 351, 19 Sup. Ct. 179, 43 L. Ed. 474; Caldwell v. North Carolina, 187 U. S. 622, 623, 23 Sup. Ct. 229, 47 L. Ed. 336.

(2) Every corporation of any state in the employ of the United States has the right to exercise the necessary corporate powers and to transact the business requisite to discharge the duties of that employment in every other state in the Union without permission granted, or conditions imposed by the latter. Pembina Mining Co. v. Pennsylvania, 125 U. S. 181, 186, 8 Sup. Ct. 737, 31 L. Ed. 650; Horn Silver Mining Co. v. New York, 143 U. S. 305, 315, 12 Sup. Ct. 403, 36 L. Ed. 164.

(3) Every corporation of each state has the absolute right to institute and maintain in the federal courts, and to remove to those courts for trial and decision, its suits in every other state, in the cases and on the terms prescribed by the acts of Congress. Insurance Company v. Morse, 87 U. S. 445, 453, 456, 22 L. Ed. 365; Barron v. Burnside, 121 U. S. 186, 200, 7 Sup. Ct. 931, 30 L. Ed. 915.

Every law of a state which attempts to destroy these rights or to burden their exercise is violative of the Constitution of the United States and void. The Constitution and statutes of Colorado prohibit every foreign corporation from doing business and from exercising any corporate power in that state until it pays the fees and the annual license tax and complies with the other requirements of its statutes. The result is that in so far as this Constitution and these statutes forbid or obstruct the exercise by a foreign corporation of it right to use the necessary corporate powers to carry on interstate commerce and to maintain and defend its suits in the federal courts, they are repugnant to the Constitution and laws of the nation and ineffective.

We come, then, to the question: Were the contracts in suit transactions of interstate commerce? The contract of January, 1903, was made in New York, and that of October, 1903, in Colorado; but the place of their execution is immaterial here, because the right of the rubber company was as absolute to make and to perform a contract of interstate commerce in Colorado as in New Jersey.

The contention that the rubber goods ceased to be articles of interstate commerce, and became a part of the mass of the property in the state, upon their delivery to the consignee, is likewise immaterial. The soundness of this contention is not conceded. But, if it were, neither that concession nor the numerous authorities upon the taxation of property in the state would be either decisive or persuasive here, for the question is, not whether or not the goods were taxable within the state, but whether or not the state could lawfully prohibit their importation and annul all contracts therefor. If a part of the goods or of the business of the rubber company has been or is within the state of Colorado, there are adequate methods of taxing it, without restraining or prohibiting its interstate commerce, and that fact furnishes no support for such a prohibition. Le Loup v. Port of Mobile, 127 U. S. 640, 647, 8 Sup. Ct. 1380, 32 L. Ed. 311; Crutcher v. Kentucky, 141 U. S. 47, 59, 11 Sup. Ct. 851, 35 L. Ed. 649.

Nor is the fact that these contracts did not evidence sales of the goods determinative of this question. A sale is not the test of interstate commerce. All sales of sound articles of commerce, which necessitate the transportation of the goods sold from one state to another, are interstate commerce; but all interstate commerce is not sales of goods. Importation into one state from another is the indispensable element, the test, of interstate commerce; and every negotiation, contract, trade, and dealing between citizens of different states, which contemplates and causes such importation, whether it be of goods, persons, or information, is a transaction of interstate commerce. "Since the case of Gibbons v. Ogden, 9 Wheat. 1, 6 L. Ed. 23," said Chief Justice Waite in Pensacola Telegraph Co. v. Western Union Telegraph Co., 96 U. S. 8, 24 L. Ed. 708, "it has never been doubted that commercial intercourse is an element of commerce which comes within the regulating power of Congress." The contracts before us constituted and caused commercial intercourse between citizens of different states. Their chief purpose and their principal effect were the importation of sound articles of commerce into the state of Colorado from other states, and they necessarily constituted transactions of interstate commerce. Caldwell v. North Carolina, 187 U. S. 622, 629, 23 Sup. Ct. 229, 47 L. Ed. 336; Wagner v. Meakin, 92 Fed. 76, 33 C. C. A. 577, 581, 584; Allen v. Tyson-Jones Buggy Co., 91 Tex. 22, 40 S. W. 393, 714; Chattanooga R. & C. R. Co. v. Evans, 66 Fed. 809, 814, 14 C. C. A. 116; Gunn v. White Sewing Machine Co., 57 Ark. 24, 20 S. W. 591, 18 L. R. A. 206, 38 Am. St. Rep. 223; Keating Implement & Machine Co. v. Favorite Carriage Co., 12 Tex. Civ. App. 666, 35 S. W. 417. The decision of the Supreme Court of Kentucky to the contrary in Commonwealth v. Parlin & Orendorff Co., 118 Ky. 168, 80 S. W. 791, has been thoughtfully read, but it does not commend itself to our judgment.

As the contracts were transactions of interstate commerce, any prohibition or obstruction to the making of them, or to the enforcement of them in the national courts, by the legislation or action of the state of Colorado, was beyond the power of the state and futile. Where the Congress has passed no law regulating interstate commerce in well-recognized articles of commerce, that fact is conclusive evidence that it intends such commerce to be free, and any law of a state which prohibits or restrains it at all is unconstitutional and void. Caldwell v. North Carolina, 187 U. S. 622, 629, 23 Sup. Ct. 229, 47 L. Ed. 336; Brown v. Houston, 114 U. S. 622, 631, 5 Sup. Ct. 1091, 29 L. Ed. 257; Bowerman v. Rogers, 125 U. S. 585, 587, 8 Sup. Ct. 986, 31 L. Ed. 815; Walling v. Michigan, 116 U. S. 455, 456, 6 Sup. Ct. 454, 29 L. Ed. 691; Welton v. The State of Missouri, 91 U. S. 275, 282, 23 L. Ed. 347; State Freight Tax, 15 Wall. 232, 21 L. Ed. 146; Brennan v. Titusville, 153 U. S. 289, 302, 14 Sup. Ct. 829, 38 L. Ed. 719; Robbins v. Shelby County Taxing District, 120 U. S. 489, 493, 7 Sup. Ct. 592, 30 L. Ed. 694; Le Loup v. Mobile, 127 U. S. 640, 647, 648, 8 Sup. Ct. 1380, 32 L. Ed. 311; Lyng v. Michigan, 135 U. S. 161, 166, 10 Sup. Ct. 725, 34 L. Ed. 150; Leisy v. Hardin, 135 U. S. 100, 119, 10 Sup. Ct. 681, 34 L. Ed. 128.

The declaration of the Colorado statute that the fact that a foreign corporation has been doing business in the state without its license shall constitute an absolute defense to any action arising out of such business is ineffectual to restrain or modify the power or duty of the national courts to hear and decide the controversies of such corporations arising from its transactions of interstate commerce according to the very right of the matter. A Circuit Court of the United States may administer a new right or remedy granted by the statute of a state to its citizens according to the terms of that statute. Missouri, K. & T. Trust Co. v. Krumseig, 172 U. S. 351, 19 Sup. Ct. 179, 43 L. Ed. 474; National Surety Co. v. State Bank, 120 Fed. 593, 603, 56 C. C. A. 657, 61 L. R. A. 394; Barber Asphalt Paving Co. v. Morris, 132 Fed. 945, 949, 66 C. C. A. 55, 67 L. R. A. 761. But the power of the Circuit Courts of the United States to administer rights and remedies in equity was vested in them as part of the judicial power of the nation under the Constitution of the United States and the judiciary act of 1789, and as it was not granted by, it may not be revoked, impaired, or destroyed by, the legislation or act of any state. Payne v. Hook, 7 Wall. 425, 430, 19 L. Ed. 260; Green's Adm'x v. Creighton, 23 How. 90, 105, 16 L. Ed. 419; Insurance Co. v. Morse, 87 U. S. 445, 458, 22 L. Ed. 365; Suydam v. Broadnax, 14 Pet. 66, 74, 10 L. Ed. 357; Union Bank of Tennessee v. Jolly's Adm'rs, 18 How. 503, 507, 15 L. Ed. 472; Hyde v. Stone, 20 How. 170, 175, 15 L. Ed. 874; Blodgett v. Lanyon Zinc Co., 120 Fed. 893, 897, 898, 58 C. C. A. 79; National Surety Co. v. State Bank, 120 Fed. 593, 603, 56 C. C. A. 657, 61 L. R. A. 394; Hervey v. Illinois Midland Co. (C. C.) 28 Fed. 169, 175; Farmers' Loan & Trust Co. v. Chicago & N. P. R. Co. (C. C.) 68 Fed. 412, 417; Sullivan v. Beck (C. C.) 79 Fed. 200, 202; Jarvis-Conklin Mtg. Trust Co. v. Willhoit (C. C.) 84 Fed. 514, 517; Eastern B. & L. Ass'n v. Bedford (C. C.) 88 Fed. 7, 12. The unavoidable result is that, if the Constitution and statutes of Colorado are to be interpreted to mean, as they clearly read, to prohibit every foreign corporation from exercising any corporate power whatever, or doing any business whatever, in the state, unless they pay the fees and the annual license tax which this legislation requires as a condition thereof, they are unconstitutional and void, so far as they apply to interstate commerce conducted by foreign corporations or suits for and against them in the national courts.

There is, however, another view of this case which is both reasonable and persuasive. The law upon the subject which has been considered was the same when the Colorado Constitution was adopted and when her statutes were enacted that it is to-day, and the legal presumption, in the absence of persuasive evidence of another purpose, is that the people and the Legislature of that state intended in the adoption of this Constitution and the enactment of these laws to obey the supreme law of the land, that they intended to prohibit the doing of intrastate business only, and the exercise by foreign corporations of corporate power unauthorized by the Constitution and laws of the United States, and that only, without a license from their state. Hence this Constitution and these statutes should be read and interpreted, if possible, in the light of this presumption, so that they will not conflict

with the Constitution and the laws of the United States. The Supreme Court seems to have been inclined to a liberal interpretation of this nature, for in Fritts v. Palmer, 132 U. S. 282, 10 Sup. Ct. 93, 33 L. Ed. 317, the foreign corporation had clearly violated the plain terms of the Colorado statute. It had exercised corporate power in that state. It had acquired, held, and conveyed real estate in violation of the legislation of that state, and yet the court sustained the title. The Supreme Court of Colorado construed this legislation in this rational spirit when it held that a single act of business did not come within the purview of some of these statutes (Kindel v. Lithographing Co., 19 Colo. 310, 35 Pac. 538, 24 L. R. A. 311; Roseberry v. Valley Building & Loan Ass'n, 83 Pac. 637), although by their express terms they prohibited a single exercise of corporate power and a single act of business as imperatively as they forbade many. An interpretation of this legislation so that it may conform to the national law, and so that acts done in undoubted violation of its plain terms may be held to be without its true meaning and purpose, is rational and just, and it is supported by high authority. Harris v. Runnels, 12 How. 79, 84, 13 L. Ed. 901; National Bank v. Matthews, 98 U. S. 621, 25 L. Ed. 188; Coit v. Sutton, 102 Mich. 324, 60 N. W. 690, 25 L. R. A. 819; Oakland Sugar Mill Co. v. Fred W. Wolf Co., 118 Fed. 239, 243, 55 C. C. A. 93; Watrous & Snouffer v. Blair, 32 Iowa, 58; Pangborn v. Westlake, 36 Iowa, 546, 548; Chattanooga, R. & C. R. Co. v. Evans, 66 Fed. 809, 815, 816, 14 C. C. A. 116, 121, 122.

Let us now turn to the contracts, observe what the rubber company agreed to do and what it actually did under them, and determine, if possible, whether or not in making or in performing these agreements it was guilty of doing any business within the meaning of the Constitution and statutes of Colorado. It agreed to ship the goods from its warehouse, or its mill, upon the orders of the appellee, to that company in Denver; and it did so. It contracted to do, and it did, nothing more. It never had any office or place of business in Colorado. It never received, stored, handled, or sold any goods, or collected any money for the sales of any goods, in that state under this contract. It never incurred, assumed, or paid any expenses of doing all these things, or of conducting any of the business. The shoe company had and maintained a place of business in Colorado, it rented or owned the place in which the business in Colorado was done, and it agreed to bear all the expenses and losses of receiving, storing, and selling the goods; and it did so. The purchasers of the goods were purchasers from it, solicited and secured by it. They were its customers, and liable to it for the purchase price of the goods. The goods were billed to them in the name of the shoe company as consignee. The profits of the business and the work of the business, the labor of receiving, storing, and selling the goods, were the shoe company's. The profits constituted its factorage, its compensation, for carrying on the business. There is no question here between the state and the shoe company, or between the shoe company and the purchasers of the goods, or between the rubber company and the purchasers of the goods. The question here is between the consignor and the factor, and it is whether the consignor, which did not agree to do, and did not in fact, do the business of receiving, storing, and

selling these goods, or the factor who did contract to do, and did actually do, the business of receiving, storing, and selling these goods, in Colorado, and who received the factorage therefor, was doing that business. In a simple transaction the true answer seems clear. A farmer sends to a commission merchant in a city a dozen barrels of apples for him to sell. The factor puts them in his store, sells them, receives the proceeds, and remits them, less his factorage. The farmer from time to time sends 1,000 barrels during the season, and they are sold and the proceeds are remitted in the same way. The farmer is not carrying on the business of selling apples in the city, but the factor is. The transaction in hand is larger, but in every element which conditions its legal character and effect it is not different. The transaction between the parties to this suit was interstate commerce. The rubber company did not agree to do, and did not actually do, any of the business of receiving, storing, and selling the goods in Colorado. The shoe company did agree to do, and did do, that business. These facts have driven our minds with compelling force to the conclusion that, within the true intent and meaning of the Constitution and statutes of Colorado, the rubber company was not doing business in that state, and the contracts between these litigants are valid and enforceable.

Many authorities have been examined which relate in some degree to the question which has now been decided. They are numerous, various, and conflicting, and any attempt to reconcile them must fail. The reasons for the conclusion reached have been stated, and some of the authorities examined are here cited for reference: Nutter v. Wheeler, 2 Lowell, 346, 18 Fed. Cas. 497; In re Hovey's Estate, 198 Pa. 385, 48 Atl. 311, 315; Chattanooga, R. & C. R. Co. v. Evans, 66 Fed. 809, 815, 816, 14 C. C. A. 116, 121, 122; Allen et al. v. Tyson-Jones Buggy Co., 91 Tex. 22, 40 S. W. 393, 714; Keating Implement & Machine Co. v. Favorite Carriage Co., 12 Tex. Civ. App. 666, 35 S. W. 417; Gunn v. White Sewing Machine Co., 57 Ark. 24, 20 S. W. 591, 18 L. R. A. 206, 38 Am. St. Rep. 223; Bertha Zinc & Mineral Co. v. Clute, 27 N. Y. Supp. 342, 7 Misc. Rep. 123; U. S. v. American Bell Teleph. Co. (C. C.) 29 Fed. 17, 40; Wolff Dryer v. Bigler, 192 Pa. 466, 43 Atl. 1092; Ammons v. Brunswick Co., 141 Fed. 570, 575, 72 C. C. A. 614; Blodgett v. Lanyon Zinc Co., 120 Fed. 893, 58 C. C. A. 79; Iowa Lillooet Gold Mining Co. v. U. S. F. & G. Co. (C. C.) 146 Fed. 437; Osborne & Co. v. Josselyn, 92 Minn. 267, 99 N. W. 890; Davis & Rankin Building, etc., Co. v. Caigle (Tenn. Ch. App.) 53 S. W. 240; Southern Cotton Oil Co. v. Wemple (C. C.) 44 Fed. 24; People ex rel. v. Wemple, 131 N. Y. 64, 69, 29 N. E. 1002, 27 Am. St. Rep. 542; Chicago M. & L. Co. v. Sims, 101 Mo. App. 569, 74 S. W. 128; Fertilizer Co. v. Kelly, 10 Pa. Super. Ct. 565; Elliott v. Parlin & Orendorff Co., 71 Kan. 665, 81 Pac. 500, 502; John Deere Plow Co. v. Wyland, 69 Kan. 255, 76 Pac. 863; D. M. Osborne & Co. v. Shilling (Kan.) 88 Pac. 258; Pennsylvania L. M. Fire Ins. Co. v. Meyer, 197 U. S. 407, 415, 25 Sup. Ct. 483, 49 L. Ed. 810; Commonwealth v. Parlin & Orendorff Co., 118 Ky. 168, 80 S. W. 791; New Haven Pulp & Board Co. v. Downingtown Mfg. Co. (C. C.) 130 Fed. 605; Wilson Moline Buggy Co. v. Priebe (Mo. App.) 100 S. W. 558; Pittsburgh Const. Co. v. West Side Belt R. Co. (C. C.) 151 Fed. 125; Brewing

Co. v. Peimeisl, 85 Minn. 121, 88 N. W. 441; Nursery Co. v. Aughenbaugh, 93 Minn. 201, 100 N. W. 1101; Thomas Mfg. Co. v. Knapp (Minn.) 112 N. W. 989.

Finally, counsel for the shoe company argue that the decree should be reversed and the bill dismissed because the complainant had an adequate remedy at law. The adequate remedy at law which will deprive a federal court of jurisdiction in equity must be as certain, practical, prompt, efficient, and complete as the remedy in equity. Boyce's Executors v. Grundy, 3 Pet. 210, 215, 7 L. Ed. 655; Castle Creek Water Co. v. City of Aspen, 146 Fed. 8, 14, 76 C. C. A. 516. The relief which the complainant sought was the immediate possession and ultimate recovery of the goods in the hands of the defendant which subsequently realized $29,647.09, the recovery from the bank of the $8,276.47 which it owed upon the "Butler Bros. Shoe Company Consignee Account," and the recovery from the shoe company of the $14,856.27 which it owed on account of the goods it had sold. The shoe company denied by its answer that the complainant was entitled to any of this relief. To obtain such relief at law an action of replevin and of assumpsit against the defendant, and an action against the bank, would have been necessary, and the remedy by two or three actions at law might not have been as prompt and efficient as a single suit in equity. In order to determine the issues presented by the pleadings it was necessary to take and state an account of many items, to the end that the quantities and selling prices of the goods which the defendant had sold and the amounts due to the complainant therefor might be determined. No action at law furnishes as efficient, practical, or adequate a remedy for the decision of such a controversy as a suit in a court of equity, which, with its deliberate methods, its power to select men trained in the science of accounting to take the evidence and state the result, its authority to consider and modify their reports after exceptions and hearings, is alone really competent to justly determine such an issue. Gunn v. Brinkley Car Works & Mfg. Co., 66 Fed. 382, 384, 13 C. C. A. 529, 531; Hayden v. Thompson, 71 Fed. 60, 64, 17 C. C. A. 592, 595; Fechteler v. Palm Bros. & Co., 133 Fed. 462, 465, 66 C. C. A. 336; M'Mullen Lumber Co. v. Strother, 136 Fed. 295, 303, 304, 69 C. C. A. 433.

The complainant had no adequate remedy at law, and the decree below must be affirmed.

It is so ordered.

NATIONAL SURETY CO. v. STATE SAVINGS BANK.

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

No. 2,478.

1. COUNTIES—DEPUTY AUDITOR—LIABILITY ON OFFICIAL BONDS—MISCONDUCT IN OFFICE.

A deputy county auditor in Minnesota, authorized by law to act in the name of his principal and for whose official acts the auditor and his bondsmen were responsible, not only to the county, but to any person injured by his "misconduct in office" (Gen. St. Minn. 1894, §§ 710, 5951), issued

spurious refund orders on the county treasurer in favor of fictitious payees, purporting to be for the refunding of taxes received through redemption from tax sales. He procured the orders to be authenticated by the chairman of the board of county commissioners, forged the names of the fictitious payees to assignments thereof, and sold the same to a bank. *Held*, that any loss sustained by the bank through its purchase of the orders could not be attributed to the official misconduct of the deputy in issuing the same, but that its proximate cause was his individual acts in forging the assignments and selling the orders as genuine; that, the orders being nonnegotiable, the bank was put on inquiry, and acquired no greater rights than the supposed payees, and had no claim to recover any such loss, either from the county or the surety on the auditor's bond.

2. SUBROGATION—PAYMENT OF DEBT BY SURETY.

A year after the issuance of such orders they were presented to the county treasurer and paid, with interest. Upon the discovery of their fraudulent character the county brought suit against the auditor on his bond, and by the final judgment of the Supreme Court of the state recovered a judgment, which was paid by the surety. *Held*, that the bank was primarily liable to the county for the amount received from its treasurer as money had and received to the county's use, and that the surety of the auditor, having paid the debt to the county, was entitled by equitable subrogation to enforce its right of recovery against the bank.

3. SAME—SCOPE OF DOCTRINE—RIGHTS OF SURETY.

Subrogation is not a matter of strict right, but is purely equitable in its nature, dependent upon the facts and circumstances in each particular case, and intended to serve the purpose of compelling the ultimate discharge of a debt or obligation by him who in good conscience ought to pay it. The doctrine is sufficiently broad to entitle a surety who has paid the debt of his principal to the remedies which the creditor had, not only against the principal, but against others.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Subrogation, §§ 17, 18.]

Hook, Circuit Judge, dissenting.

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

W. B. Bourne having been duly appointed deputy auditor of Ramsey county, Minn., by W. R. Johnson, the auditor, and being as such authorized to sign all papers and do all other things that the auditor himself might do, purporting to act by authority of the statute of that state providing for refunding to the holders of invalid certificates of sale for nonpayment of taxes the amounts paid by them therefor, drew seven spurious refunding orders, some purporting to be in favor of William Mannering, a fictitious person, and some purporting to be in favor of E. J. Trowbridge, another fictitious person, upon the treasurer of the county, requiring him to refund to those fictitious persons the different sums specified in each order, which aggregated in all $7,352.49. Bourne in some way procured the chairman of the board of county commissioners to authenticate the orders as genuine. They did not purport to be negotiable or transferable. One of them, which may be referred to as a sample of all, is in the following words:

"Treasurer of Ramsey County, Minnesota:

"Refund to William Mannering, the sum of fifteen hundred and $^{54}/_{100}$ dollars as follows: [Here appears a description of the lands against which the taxes purported to have been assessed and a statement of several particulars, including the amount assessed against each tract, the penalties, costs, etc.] —being tax refunded. Sec. 1697, Laws of 1894.

"[Signed] W. R. Johnson, Auditor of Ramsey County, Minn.
"Per W. B. Bourne, Deputy.

"By order of Board of Co. Com.
"[Signed] A. R. Kiefer, Chairman."

The deputy sold the fictitious orders, with an assignment on the back of each of them, signed by him in the names of the myths to whom they were payable, to the State Savings Bank, for their full face value, which was, in a way unnecessary now to state, paid to him. They bore interest at the rate of 7 per cent. per annum. The bank held them for about a year, then presented them to the county treasurer for payment, and received from him their full face value, with accrued interest, amounting to $7,866. Thereafter, on discovering the fraud perpetrated upon it, the county instituted its suit against the National Surety Company, surety on the auditor's official bond, and recovered judgment for the amount paid the State Savings Bank. After paying the judgment the surety company filed its bill in the court below to be subrogated to the rights of Ramsey county against the State Savings Bank and to recover the amount it had been required to pay as surety for the auditor. From an order sustaining a demurrer to the bill, and dismissing the same, the surety company prosecutes its appeal to this court.

Edmund S. Durment (Albert R. Moore and W. J. Griffin, on the brief), for appellant.

John D. O'Brien, for appellee.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

ADAMS, Circuit Judge (after stating the facts as above). The bank purchased nonnegotiable orders or drafts upon the county treasurer, payable to fictitious persons, and by them apparently assigned to it. The orders being nonnegotiable, the bank acquired no greater right to them than its assignors had. The assignors being fictitious persons, and the orders themselves without consideration, fraudulent, and void, the assignee acquired no right against the county. When it presented the orders to the treasurer for payment, and secured payment thereof, it received moneys of the county without consideration, and unquestionably thereby became liable to the county for money had and received to its use. The surety company, as surety for the auditor, whose official misconduct, through the act of his deputy, subjected it to liability (Board of Co. Com'rs v. Sullivan, 89 Minn. 68, 93 N. W. 1056), having restored to the county the amount of its loss, now claims to be subrogated to the county's right of action against the bank to recover from the latter the amount paid by it to the county. Can this be done? The bank places some reliance, in denying the claim of the surety company, upon section 5951, Gen. St. Minn. 1894, which reads as follows:

"The official bond or other security of a public officer to the state or any municipal body or corporation, whether with or without sureties, is to be construed as security to all persons severally for the official delinquencies against which it is intended to provide as well as to the state, body or corporation designated therein."

This section is in pari materia with section 710 of the same Statutes. The latter reads as follows:

"An action may be brought against the county auditor and his sureties in the name of the state of Minnesota and for its use or for the use of any county or person injured by the misconduct in office of the auditor or by the omission of any duty required of him by law."

These sections of the statute must be read into and treated as a part of every official bond contemplated by them. Accordingly, if the bank had been injured by reason of its purchase of the orders from Bourne, and that injury had been occasioned by Bourne's official delinquency or

misconduct in office, it might have recovered its loss from the surety company. If, by virtue of these statutes, the bank could have recovered from the surety company, as a matter of course the surety company cannot now recover from the bank.

We are therefore to inquire whether, if the bank had failed to secure payment of its refunding orders from the county treasurer, its loss or injury would have been so produced by the misconduct in office of Deputy Auditor Bourne as to subject the surety of the auditor to liability for it. It is true the bank could not have lost any money, or could not have been injured, if Bourne had not in his official capacity signed the spurious refunding orders. That act, being performed in the line of his official duty, was a misconduct in office, within the meaning of the statutes referred to; but the question still remains whether it or some other cause produced the bank's assumed injury.

The misconduct of Bourne in much of what he actually did and in what was necessarily involved, namely, in falsely representing to the bank that the orders were genuine, that the payees had paid money to the county treasurer for taxes, and were entitled under the law to an order refunding the amount so paid, that they were actual persons, instead of myths, and his further misconduct in fraudulently signing the mythical names to the assignments, in negotiating with the bank, and wrongfully securing its money, were altogether personal in their character. They were in no sense representative or official. No duty arising out of his official relation required him to make any of the representations or commit any of the crimes just alluded to. On the contrary, the nonnegotiability of the orders, and possibly the intervention and activity of Bourne, as shown by the bill, should have attracted the attention of the bank, and warned it against purchasing the orders without making diligent inquiry concerning their validity. Bourne's personal representations and acts were well adapted to be the effective cause of the bank's injury, and, giving to the original official misconduct its natural force and effect only, were, in our opinion, the direct moving cause of the injury, without which it could not have occurred. They did not in a mere incidental and subordinate way work out the natural and probable consequences of the original official misconduct, but were, as between the deputy and the bank, the proximate and all-sufficient cause of the latter's injury. An act is the proximate cause of those results only which are its natural and probable consequences, and which ought to have been foreseen in the light of the attending circumstances. Milwaukee, etc., Railway Co. v. Kellogg, 94 U. S. 469, 474, 24 L. Ed. 256; Travelers' Ins. Co. v. Melick, 12 C. C. A. 544, 65 Fed. 178, 184, 185, 27 L. R. A. 629; Citizens' Gas & Electric Co. v. Nicholson (C. C. A.) 152 Fed. 389, and cases cited. Within the fair and reasonable meaning of the bond and statutes in question, Bourne's personal, as distinguished from official, acts caused the assumed injury which the bank sustained.

But it is urged that the Supreme Court of Minnesota in Board of Com'rs v. Sullivan, supra, sustained a recovery by the county against the surety company for its loss made in paying the forged orders on the ground that Bourne's wrongful acts constituted "misconduct in of-

fice," within the meaning of the Statutes of Minnesota, and that the same rule of law would have been applicable if the bank had sued the surety company for its assumed loss. We cannot agree to this. The orders in question were apparently lawfully drawn, lawfully countersigned, and genuine. The natural and probable consequence of their issue was their presentation to the treasurer, to whom they were addressed, and payment of them by him. The statutes of the state made it his duty to pay authorized orders of that kind. The surety company was liable to the county, because the presentation to the treasurer and the payment of the orders by him were the natural and probable consequence of their issue, and might have been reasonably anticipated by any prudent person. Right here is the radical and decisive difference between the position of the county and that of the bank. While the payment by the county was, in the ordinary course of business, reasonable and probable, the purchase of the orders by the bank on the assignments made in the name of myths by Bourne was not the natural or probable consequence of their issue. No one could have reasonably anticipated that a bank or any rational person would disregard the law which makes a nonnegotiable chose in action in the hands of an assignee subject to every defense existing in favor of the maker against the assignor, purchase a nonnegotiable order of the kind in question, and pay the purchase price thereof to one who was not the payee named therein, without inquiring into the genuineness of the assignment and the genuineness of its execution. Such a purchase would be out of the ordinary course of business, unnatural, improbable, incapable of anticipation, and in no legal sense the natural and probable consequence of the issue of the orders. For these reasons the purchase by the bank cannot be held to have so resulted from the "misconduct in office" of Bourne as to subject the surety company to liability to the bank for any loss it might have sustained by reason of its purchase.

Again, it is elementary that no liability could exist in favor of the bank against the surety on the bond of the auditor, unless it existed against the principal in the bond, the auditor himself, or the county of Ramsey, for which he was acting. If any argument is necessary to demonstrate that the bank never could have recovered its loss from the auditor himself, the following observations will be sufficient: The bank purchased nonnegotiable refunding orders, made nonnegotiable obviously for the purpose of preventing fraudulent practices and fraudulent dealings with them, and took them by assignment of the rights of the supposed payees. All it got by such assignment was the right which the supposed payees themselves had; and that, according to the undisputed facts in this case, was nothing. The bank took them subject to all the equities existing between the supposed payees and the auditor, or the county, whom the auditor represented; and those equities, according to the undisputed facts of the case, were unquestionably sufficient to defeat any claim of the bank against either of them. Taking an assignment of nonnegotiable securities, it was bound to inquire, not only whether all steps had been taken to create a legal liability against the county, but also as to the genuineness of the assignment of the right of the original payees. If such inquiry had been made

at the places and of the officers plainly suggested on the face of the securities themselves, the bank would have unquestionably learned the fact that they were bogus and fraudulent, and saved itself from any possible loss. In such circumstances failure to make inquiry was culpable negligence. In no view, therefore, could the bank, by virtue of the statutes referred to, have maintained an action against the surety company, which incurred no greater liability than the principal in the bond, to recover its loss, if the county treasurer had not honored and paid the orders.

Having now disposed of the proposition that defendant is not protected by the Minnesota Statutes relied on, we are brought to the meritorious equitable question in the case, whether the surety company, which, as surety for the auditor, paid the county the amount of its loss, is entitled to be subrogated to the rights of the county against the bank, which improperly received its money and occasioned its loss. Subrogation is not a matter of strict right, but is purely equitable in its nature, dependent upon the facts and circumstances of each particular case, and intended to serve the purpose of compelling the ultimate discharge of a debt or obligation by him who, in good conscience, ought to pay it. American Bonding Co. v. National Mechanics' Bank, 97 Md. 598, 55 Atl. 395 (see note to same case in 99 Am. St. R. 474); Crippen v. Chappel, 35 Kan. 495, 499, 11 Pac. 453, 57 Am. Rep. 187; Barnes v. Mott, 64 N. Y. 397, 401, 21 Am. Rep. 625; Arnold v. Green, 116 N. Y. 566, 571, 23 N. E. 1; McCormick's Adm'r v. Irwin, 35 Pa. 111. The bank had a fund in its possession, so obtained from the county that it became liable to the latter as for money had and received to its use. Most naturally the county, when it found its money was gone, should have proceeded against the person or persons who had it, and thus simply have retaken its own; but, instead of doing so, it resorted to and recovered from the surety company on its contract of indemnity. Had the county, upon receipt of its money from the surety company, assigned its claim against the bank which had the lost money (a thing which equity and good conscience certainly would have approved, if not required), no one could doubt the right of the surety company to recover on the claim so assigned; and, inasmuch as in equity and fair dealing such an assignment should have been made, we cannot doubt the justice and equity of treating that done which ought to have been done. Subrogation is nothing more than an equitable assignment. When equity and good conscience requires the assignment to be made, subrogation, if necessary, will be allowed.

The general proposition that a surety, upon paying to a creditor the debt of his principal, is entitled to be subrogated to all the rights of the creditor against the principal, and to the benefit of all securities for the debt held by the principal, is universally acknowledged. According to this doctrine the surety company in the present case could have proceeded against the auditor to enforce any rights or securities held by the county against him. But the question now is whether its rights can be extended beyond the general rule, and it be subrogated to a claim and cause of action which the county had against the bank for appropriating the money which made the surety company liable to

the county. However limited the right of subrogation originally was, the remedy now has been so broadened that it has been called—

"the mode which equity adopts to compel the ultimate payment of a debt by one who in equity, justice, and good conscience should pay it." Arnold v. Green, 116 N. Y. 566, 571, 23 N. E. 1, and cases cited.

In Baylies on Sureties and Guarantors, p. 358, it is said:

"The right of subrogation to the remedies of the creditor on payment of the debt of the principal is not restricted to the remedies which the creditor had as against the principal, but extends to all the remedies which he had against the principal and others liable for the debt."

In the case of Lidderdale v. Robinson, 12 Wheat. 594, 6 L. Ed. 740, the Supreme Court, after referring to the principle that a court of equity lends its aid to compel a creditor to assign a cause of action which it has against a third person to sureties who have paid the debt of their principal, says:

"This fully affirms the right to succeed to the legal standing of their principal; and, after establishing that principle, it is going but one step farther to consider that as done which the surety has a right to have done in his favor, and thus to sustain the substitution, without an actual assignment."

In Rooker v. Benson, 83 Ind. 250, 255, the doctrine as announced by Baylies (supra) is held to be the law.

In Fox v. Alexander, 1 Ired. Eq. (N. C.) 340, it is held that a surety of a guardian, who pays a debt of the guardian to the ward, stands in the shoes of the ward, and may follow the trust fund wherever it goes.

In Blake v. Traders' Bank, 145 Mass. 13, 12 N. E. 414, the facts are that a trustee pledged to a bank certain shares of stock belonging to a trust estate as security for the payment of his individual debt to the bank. The bank, or its successor, afterwards sold the shares and applied the proceeds on the debt of the trustee. The bank knew, or could have known from an inspection of the papers, that the shares were held by its debtor as trustee. A surety on the trustee's bond was compelled to pay to the trust estate the value of the stock converted by the bank. It was held that the surety was subrogated to the rights of the trust estate and could maintain a bill in equity against the bank to recover the amount paid by him. The court in its opinion, among other things, said:

"In this case the defendant and the surety were both liable to the trustees for the amount of the trust property—the former, in consequence of participating in the wrongful act of the first trustee; and the latter, by his contract to indemnify the estate against such act. The cases are analogous where one owner of property has claims for a loss against an insurer and a tortfeasor. The insurer is in the nature of a surety, and, upon paying the loss, he is subrogated to the rights of the owner to recover for the tort"—citing Hart v. Western Railroad, 13 Metc. (Mass.) 99, 46 Am. Dec. 719; Clark v. Wilson, 103 Mass. 219, 4 Am. Rep. 532; Mercantile Ins. Co. v. Clark, 118 Mass. 288.

See to the same effect, Sheldon on Subrogation, § 89.

It is said in American Bonding Co. v. National Mechanics' Bank, 97 Md. 599, 606, 55 Atl. 395, 397, 99 Am. St. Rep. 466:

"That the doctrine of subrogation does go to the extent of giving to the surety, who has paid the debt of the principal, the benefit of the rights and

remedies of the creditor against all persons who were liable for the debt is both asserted by text-writers and sustained by the authority of many decided cases. * * * This is especially held to be true of the sureties of a fiduciary who are compelled to answer for his breach of trust, and they have repeatedly been subrogated to the rights and remedies of both the trustee and the cestui que trust against the fiduciary and those participating in the wrongful act."

It is held in an elaborate and well-considered opinion (Railway Company v. Fire Association, 55 Ark. 163, 175, 18 S. W. 43) that an insurance company, after paying the amount of a fire loss, may be subrogated to the assured's right of action against the person or corporation who caused the fire. The court said:

"Both were responsible to the assured. The loss for which they were responsible was one and the same, and the assured was entitled to but one satisfaction. It had a right to demand and receive payment of the loss from the insurer by virtue of its contract, as it did, without seeking to recover it of the wrongdoer. As it did so, and received payment of the insurer, the wrongdoer was not thereby discharged from liability; but the insurer succeeded to and became entitled to the assured's rights to relief against him to the extent of the amount paid as an indemnity, he being primarily liable, and the assured holds the claim against him in trust for the insurer."

The same conflagration which was the subject of the last-mentioned case was considered by the United States Supreme Court in St. Louis, etc., Railway Co. v. Commercial Ins. Co., 139 U. S. 223, 11 Sup. Ct. 554, 35 L. Ed. 154, and Mr. Justice Gray, speaking for that court, said:

"In fire insurance, as in marine insurance, the insurer, upon paying to the assured the amount of a loss of the property insured, is doubtless subrogated in a corresponding amount to the assured's right of action against any other person responsible for the loss."

In Boone Co. Bank v. Byrum, 68 Ark. 71, 56 S. W. 532, the facts are that a collector of state taxes deposited money in a bank, which, with knowledge that the deposit consisted of taxes collected by him, appropriated a part of it to satisfy the collector's individual debt. The surety on his official bond, after paying to the state the amount of the misappropriation, was subrogated to the right of the state to the deposit against the bank.

Reason and authority, as disclosed by the foregoing citations, conduce to only one result; and that is that a surety, after paying the debt of his principal, is entitled to be subrogated to remedies which the principal had against third parties for the claim which the surety paid.

But it is argued, that, because the bank did not have actual knowledge and did not participate in the wrong perpetrated upon the county by Bourne, it is not brought within the principle of the foregoing cases, and should not be held liable to the surety. This view seems to have been adopted by the learned trial judge; but, after a full and patient consideration of the subject, we are unable to give it our sanction. The bank may not have been morally culpable; but its failure to discharge the duty of making inquiries suggested by the nonnegotiable character of the orders which it purchased, and by other circumstances attending the transaction, was an act of omission equally as effective to occasion injury to the county as many affirmative acts of commission could have been. Such inquiry at the audit-

or's or treasurer's office would have quickly disclosed that the payees were entitled to nothing, that they were myths, and that misrepresentation, fraud, and forgery were being practiced upon the county. Ignorance in fact occasioned by indulging indifference to almost obvious danger and negligence of the grossest sort is entitled to little consideration by a court of conscience. The bank's negligence operated as effectually to defraud the county as any willful or intentional participation in the fraudulent scheme could have done. If the bank did not have actual knowledge of the fraud, it did have, under well-recognized law, constructive knowledge of all the facts which reasonable inquiry would have disclosed, and therefore of the fraud itself. Such knowledge in ordinary civil actions subjects its possessor to all the consequences of knowledge in fact, and we see no reason why it should not do so in the present case. Notwithstanding the contrary contention, we think a brief reference to the authorities will support our conclusion.

In Hall & Long v. Railroad Companies, 13 Wall. 367, 370, 372, 20 L. Ed. 594, it is held that an insurer of goods destroyed by fire in course of transportation by a common carrier is entitled, after he has paid the loss, to recover what he has paid by suit against the carrier. In delivering the opinion of the court, Mr. Justice Strong makes use of the following language:

"Standing thus, as the insurer does, practically, in the position of a surety, stipulating that the goods shall not be lost or injured in consequence of the peril insured against, whenever he has indemnified the owner for the loss, he is entitled to all the means of indemnity which the satisfied owner held against the party primarily liable. His right rests upon familiar principles of equity. It is the doctrine of subrogation, dependent not at all upon privity of contract, but worked out through the right of the creditor or owner. * * * It has been argued, however, that these decisions rest upon the doctrine that a wrongdoer is to be punished; that the defendants against whom such actions have been maintained were wrongdoers; but that, in the present case, the fire by which the insured goods were destroyed was accidental, without fault of the defendants, and therefore that they stood, in relation to the owner, at most in the position of double insurers. The argument will not bear examination. * * * The law raises against him [the carrier] a conclusive presumption of misconduct, or breach of duty, in relation to every loss not caused by excepted perils."

In The Potomac, 105 U. S. 630, 634, 26 L. Ed. 1194, considering a similar subject, the Supreme Court makes the following observation:

"The mere payment of a loss by the insurer does not, indeed, afford any defense, in whole or in part, to a person whose fault has been the cause of the loss, in a suit brought against the latter by the assured. But upon familiar principles, often recognized by this court, the insurer acquires by such payment a corresponding right in any damages to be recovered by the assured against the wrongdoer, or other party responsible for the loss. * * *"

To the same effect are Phœnix Ins. Co. v. Erie & Western Transportation Co., 117 U. S. 312, 320, 6 Sup. Ct. 750, 29 L. Ed. 873; Wager v. Providence Ins. Co., 150 U. S. 99, 108, 14 Sup. Ct. 55, 37 L. Ed. 1013; Norwich Union Fire Ins. Soc. v. Standard Oil Co., 8 C. C. A. 433, 59 Fed. 984; Chicago, etc., Railroad Co. v. Pullman Car Co., 139 U. S. 79, 11 Sup. Ct. 490, 35 L. Ed. 97; Atlantic Ins. Co. v.

Storrow, 5 Paige (N. Y.) 285. In the last-mentioned case it is held that where the master or shipowners are liable for a loss by theft for which underwriters are also liable, if the underwriters pay the loss to the assured, they are entitled in equity to be subrogated to his rights against the master or shipowners; and this, notwithstanding the fact that the thieves were in no way connected with the ship.

In Browne v. Fidelity & Deposit Co. of Maryland, 98 Tex. 55, 80 S. W. 593, the facts are that a guardian sold real estate belonging partly to himself and partly to his wards, and took notes payable to his own order for deferred payments, then sold and assigned the notes to a third party (Lee), and converted the proceeds to his own use. He was afterwards removed, and a new guardian appointed, who collected the amount of the defalcation from the Fidelity & Deposit Company, a surety on the defaulting guardian's bond. Thereupon the surety brought his action against Lee, the purchaser of the notes, claiming that the assignment of the notes to Lee were forbidden by statute, and therefore that he did not get good title by his purchase. The court held that, the assignment to Lee being unauthorized, the title to the notes did not pass, and he was liable to the new guardian for the value thereof, notwithstanding the fact he had paid the same to Lee. In that case there was no showing that Lee, the purchaser of the notes, was a party to the guardian's wrong, or that he had actual knowledge that the notes purchased were the property of the ward. He was affected with constructive knowledge only.

In Skiff v. Cross, 21 Iowa, 459, the facts are that the sheriff levied an execution in favor of Cross against John Mosier on a county warrant as the property of the defendant in execution and delivered the same, as permitted by Iowa statutes, to Cross, who received it in full satisfaction of the execution. Daniel Mosier claimed the warrant as his property, and sued the sheriff and sureties on his official bond for conversion of it, and recovered judgment, which the sureties paid. It was held that the sureties were entitled to be subrogated to the rights of Daniel Mosier against Cross, who got his property. Dillon, Judge, afterwards United States Circuit Judge for this circuit, delivered the opinion of the court. He said as follows:

"Now, if Cross would be liable in respect to the order if he had been proceeded against directly by Daniel Mosier, what good reason can be given why he should not be liable to the plaintiffs? We can discover none. Daniel had his election to go against Cross or against the sheriff and his sureties. He chose to proceed against the sheriff and his sureties, and the sureties were compelled to pay him. Is it any greater hardship on Cross to pay the amount of the order to the sureties than it would have been to have paid it directly to Daniel? Is it not equitable to treat the sureties who have paid to Daniel, as substituted by operation of law to Daniel's right as against Cross? The ground of Cross' liability is that he has received money to which he has no right or claim, and for which plaintiffs have been compelled to account."

The case does not disclose that defendant Cross had any actual knowledge of the ownership of the warrant in question when he took it in satisfaction of his execution. Whether he knew it or not seems from the opinion to have been quite immaterial, as the court appears to be totally indifferent to that fact.

In Edmunds v. Venable, 1 Patt. & H. (Va.) 121, a trustee or committee, holding two bonds showing on their face that they belonged to the estate of a lunatic, sold them to a third person, who thought he was engaged in an innocent and lawful transaction. The purchaser afterwards realized on them, and was held bound to account to the estate for what he received, notwithstanding the fact he had paid for them their full value; and it was further held that sureties of the trustee, who had been decreed to answer for his defaults, were entitled to be subrogated to the rights of the lunatic against the purchaser. The Court of Appeals held, in the language of one of the judges, that the right of subrogation existed, although the purchaser of the bonds—

"did not intend to commit a fraud, and did not suspect that he was engaged in a transaction not perfectly innocent, but unwarily had done that which may subject him to loss, but to no imputation upon his motives."

It appears from the foregoing that what seems to us to be the natural equities between the parties is supported by abundant authority. The case was disposed of below on demurrer to the bill, which set out the facts as already discussed. The trial court sustained the demurrer, and entered a final decree dismissing the bill. This, from what has been said, was error.

The decree is reversed, and the cause remanded to the Circuit Court, with directions to permit an answer to be filed and otherwise proceed in harmony with this opinion.

HOOK, Circuit Judge (dissenting). The case in brief is this: A deputy county auditor of Ramsey county, Minn., for whose official conduct and integrity the surety company stood sponsor, fabricated some orders on the county treasurer payable to fictitious persons. He forged the names of the payees to indorsements of the orders and disposed of them to the bank for face value. In form the orders were nonnegotiable, but it is conceded that in fact the bank acted innocently in buying them. Afterwards the county treasurer, being in funds, paid to the bank the amount of the orders and accrued interest. When the criminal conduct of the deputy auditor was discovered, the county, acting through its board of county commissioners, cast about to recover its loss. It sued the auditor and the surety company, his official bondsman, and obtained judgment which met with the approval of the Supreme Court of Minnesota. Board of Co. Com'rs v. Johnson, 89 Minn. 68, 93 N. W. 1056. The surety company paid the judgment and now seeks reimbursement from the bank. It invokes the equitable doctrine of subrogation, and claims that the county could have maintained an action against the bank for the recovery of the money paid on the spurious orders, and therefore it should be put in the place of the county. It is admitted at the threshold of this proposition that if the bank had sustained the loss, instead of the county, and could in such case have recovered from the surety company, of course, the latter cannot now recover from the bank.

Could the bank have recovered from the surety company? I said at the beginning that the surety company stood sponsor for the of-

ficial conduct and integrity of the deputy. The Minnesota court so decided, and its decision to that effect lies at the root of the judgment which the county obtained and the surety company paid. A statute of Minnesota made the bond of the surety company available, not only to the county, but also to every person damaged by the official misconduct of the auditor; and in this connection we may substitute the deputy for the auditor, because the auditor and the surety company were responsible for whatever the deputy did by virtue of his office. The sole test of the liability of the surety company to the county was loss resulting from official misconduct of the deputy. Precisely the same test applies between the surety company and the bank and every other person seeking indemnity for loss caused by the deputy. Now the Supreme Court of Minnesota held in effect that the loss sustained by the county by the payment of the money to the bank in redemption of the orders was due to the official misconduct of the deputy. The recovery by the county upon the bond of the surety company could have proceeded upon no other theory. The swindling scheme of the deputy commenced with his forgery of the spurious orders, and it must be conceded that this was done under color of his office; in other words, that it was official misconduct. He was convicted and sent to prison for it. State v. Bourne, 86 Minn. 426, 90 N. W. 1105. The final act in the transaction was the payment by the county treasurer to the bank; and the Supreme Court of Minnesota in effect held in the action brought by the county that the loss of funds so caused was likewise due to the official misconduct of the deputy, and for that reason a recovery by the county upon the bond was sustained. The conclusion of my associates, therefore, exhibits this situation: The surety company, being answerable to every person injured by the official misconduct of the deputy auditor, is liable for loss caused by the forging of the orders, and also for loss caused by the payment of them by the county to the bank; but it is not liable for any intervening loss, because all intervening acts of the deputy were his personal acts, not done under color of his office. It seems to me that this is a short-circuiting that is not at all in harmony with the decision of the highest court of the state upon a matter peculiarly within its province to decide. If the county could recover from the surety company for the loss of the money it paid to the bank, and it was held that it could, I am unable to see why the bank, equally protected by the bond, would not, if the orders had remained on its hands, be entitled to recover the money it paid to the deputy auditor. That the bank might recover from the surety company seems clear, unless it is held that the decision of the Supreme Court of Minnesota is wrong, and that no recovery by the county from the surety company should have been allowed because, after the deputy, acting under color of his office, had forged the orders, he did some personal acts in furthering his scheme of obtaining moneys from the treasury, such as indorsing and selling them, which were not covered by the bond. That is what we are brought to. Can the conduct of the deputy properly be characterized as official delinquency towards the county, and at the same time be called mere personal, unofficial conduct as to third persons, who are equally protected by the

bond? What is there that makes the same conduct official in one view and personal in the other? Ordinarily the test is the scope of the officer's powers and duties and the nature of the transaction in question.

It is also said that loss by the bank could not have been caused by the official misconduct of the deputy, because such loss does not naturally follow the forgery of nonnegotiable orders. With the greatest respect for the views of my associates, I think this conclusion results from a misapplication of an admixture of rules of commercial paper with the doctrine of remote and proximate cause. They say in effect: If a county officer forges negotiable bonds and sells them the purchaser who sustains loss may recover from a surety which has contracted to protect everyone against official misconduct; but if he forges nonnegotiable county orders the purchaser who sustains loss may not recover. It cannot be denied that the officer is equally guilty of official misconduct in each case; but it is said that in the latter case the loss is too remote from the original cause, for the reason that it could not reasonably have been foreseen in the light of attending circumstances. This latter proposition is qualified by the observation that a purchase of nonnegotiable orders without inquiry as to their genuineness is out of the ordinary course of business, unnatural, improper, and incapable of anticipation. If this observation is vital to the position taken, it may be said that two answers suggest themselves: (a) The case before us is presented upon bill and demurrer. There is not the remotest suggestion in the bill that the bank purchased the orders without making inquiry as to their genuineness. (b) Nor is it averred that the purchase of such orders was not pursuant to a well-known business custom. I take it that every banker acquainted with the conduct of the fiscal affairs of counties knows that the purchase for investment of county orders which the county issuing them is not ready to pay is a common course of business. So in the last analysis the proposition is reduced to this: A loss sustained by the purchaser of forged nonnegotiable county orders is as a matter of law so remote from the act of forgery that the latter cannot be regarded as an efficient cause of the loss; that the mere fact that the orders were not payable to order or bearer breaks the otherwise obvious causal connection between the official misconduct and the loss. Even if the case before us can properly be reduced to this status, it seems to me to leap to the common understanding that the conclusion is unsound. It was just as likely that the orders would be dealt in by innocent parties as it was that the county treasurer would be finally so deceived as to pay them; and it is admitted that the payment by the treasurer was a proximate result of the forgery.

There is another view of the case: Even conceding that the surety company would not be liable to the bank, it does not necessarily follow that the former is entitled to the subrogation sought and to a recovery from the latter. There remain to be considered the equities of the parties as between themselves, in view of their relations to the entire transaction. The final question in a case of this character is: Who in good conscience ought to stand the loss? In answering it, I am unwilling to say that the surety for a forger should

be allowed to indemnify himself at the expense of an innocent victim. The surety company says to the bank:

"The indorsement and sale of the orders by the deputy were his personal acts. I am not responsible for them. Therefore, because you bought the orders, you should stand the loss."

But the bank may reply:

"You are responsible for his forgery, which was the first act and the dominant one in his scheme to defraud. Without it no one would have suffered loss. For a paid consideration you guaranteed the county and the public, including myself, against his official misconduct; and as between us you should not visit the loss upon one who acted innocently, and so wholly escape every consequence of a conceded breach of your bond."

The bank, which is a defendant here, is in possession of and holds the legal title to the money it got from the county. At law the surety company has no right against the bank, but must make a case that challenges the conscience of a court of equity—not one that merely follows the devious technicalities of the law. When equities are equally balanced, the position of the defendant or the possessor of the thing in controversy is the better. The legal title added to an equity prevails over an equal equity that is not so supported. In Insurance Co. v. Clark, 203 U. S. 64, 27 Sup. Ct. 19, 51 L. Ed. 91, a man and his sister conspired to defraud an insurance company. The former, having insured his life, disappeared. The latter, as beneficiary, sued and obtained judgment, which was paid. Interests in the policies had been assigned to attorneys under contingent fee contracts, and they got their portions of the judgment. It was afterwards discovered that the insured was living and that a gross fraud had been perpetrated. The company brought suit in equity against the beneficiary and the attorneys to recover the money paid. In fact, the attorneys acted innocently and had paid for their shares by their services. Recovery from the beneficiary was allowed, but denied as to the attorneys, who held under the assignments from the guilty beneficiary. The company sought to charge the attorneys with notice because of the nonnegotiable character of the policies. The Supreme Court said:

"But notice cannot be established by the mere fact that, while the appellees (the attorneys) held an interest in the policies, they were assignees of choses in action, and took them subject to the equities. This is due to a chose in action not being negotiable. It does not stand on notice."

In a consideration of the equities of the parties, an important feature of the position of the bank is its innocence and good faith. Reference is made in the foregoing opinion to supposed negligence of the bank in buying the orders. The case comes here on bill and demurrer, and if the bank is to be charged with negligence the foundation for it must be found in the bill. I can find no averment in the bill directly or indirectly charging the bank with any negligent conduct whatever. It is not even said that in purchasing the orders it acted irregularly or out of the usual well-known course of business. On the contrary, there is an affirmative admission that it knew nothing of the fraudulent character of the orders. Moreover, the absence of any charge of negligence against the bank is given emphasis by the fact that there are affirmative charges of negligence against

the county treasurer, the chairman of the board of county commissioners, and the depositary of the county funds. It is true that it appears from the bill that the bank purchased nonnegotiable orders and obtained payment of them by the county treasurer; but the status of the parties in such a case results from a fixed rule in the law of choses in action, and not from any supposed negligence of the purchaser in failing to make inquiries. Insurance Co. v. Clark, supra. As bearing upon the assumption of negligence, it is said that an inquiry at the auditor's or treasurer's office would have quickly disclosed the fraud; but the bill fails to charge either that such inquiry was not made or that, if it had been made, it would have resulted in the information. So how can we assume this fact prejudicial to the bank? On the contrary, we know from the averments of the bill and the statutes of Minnesota (Gen. St. Minn. 1878, c. 8, § 169) that about the time of the purchase of the orders they were taken to the treasurer, who indorsed on them a recital of lack of funds for their payment. We also know that about a year later these very orders were paid by the treasurer without question of their validity. The orders were fair on their face, every written evidence of their validity being genuine. When the bank secured them they bore the genuine signature of the deputy auditor, who had authority to execute valid orders; also an impression of the official seal of the auditor's office; also the genuine signature of the chairman of the board of county commissioners to a recital that they were issued by the authority of the board. Under these circumstances, would it not have been an unusual exhibition of diligence had the bank ignored these evidences of regularity and instituted an independent investigation of its own? Are we to say, in the absence of information from the pleader, that the bank omitted to do what ordinarily prudent men engaged in that business would have done under the same circumstances? It is a matter of common knowledge that such orders are widely dealt in by investors, much the same as special tax warrants are in the larger cities. If, when they are presented to the county treasurer, there is no money in the fund upon which they are drawn, the treasurer indorses that fact upon them, and thenceforth they draw interest until funds are available for their redemption. The interest is the inducement to the investors. State v. Bourne, 86 Minn. 432, 90 N. W. 1108.

It is suggested that, if the bank did not have actual knowledge of the fraud (and the bill admits it did not) it had constructive knowledge of all the facts which reasonable inquiry would have disclosed, and therefore of the fraud itself. As to this I need only refer to the rule applied by Mr. Justice Brewer in United States v. Detroit Lumber Co., 200 U. S. 321, 333, 26 Sup. Ct. 282, 285, 50 L. Ed. 499, a case in which conflicting equities were weighed:

"When a person has not actual notice, he ought not to be treated as if he had notice, unless the circumstances are such as enable the court to say, not only that he might have acquired, but also that he ought to have acquired, it but for his gross negligence in the conduct of the business in question. The question, then, when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining and might by prudent

caution have obtained the knowledge in question, but whether not obtaining was an act of gross or culpable negligence."

So when it is said that the orders, being nonnegotiable, were taken subject to the defenses of the county, all is said that is relevant. Negligence, ordinary or gross, and notice, whether actual or constructive, have nothing to do with the case made by the bill in this cause. They are not for our consideration in weighing the equities of the bank, and were not considered by the trial court.

In my opinion the decree should be affirmed.

McELROY v. MASTERSON.

(Circuit Court of Appeals, Eighth Circuit. June 27, 1907.)

No. 2,532.

1. CANCELLATION OF INSTRUMENTS—GROUNDS—IMPROVIDENCE OR UNCONSCIONABLENESS.

An unmarried man 77 years old, and in feeble health, deeded his farm to his nephew on the expressed consideration of $1 and other considerations, the deed reserving to the grantor a life estate. It was also orally agreed that the grantee should furnish support to the grantor at the grantee's own home, which he did so long as the grantor remained with him, and also paid the interest on a mortgage on the farm. Subsequently the grantor returned to the farm and commenced suit for cancellation of the deed. He was shown to have been mentally competent, and there was no evidence to establish coercion or undue influence. *Held*, that the fact that the deed did not impose a positive obligation on the grantee for the grantor's care and support did not authorize the court to set it aside as improvident and unconscionable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Cancellation of Instruments, § 3.]

2. EQUITY—POWERS OF CHANCELLOR—CONTRACT RIGHTS.

There is no comprehensive discretion reposed in the chancellor by modern equity jurisprudence to make and unmake contracts of parties sui juris subject to such limitations only as meet the approval of his conscience, but courts of equity are now required as much as courts of law to enforce contracts free from fraud, and to refrain from making contracts for the parties on which their minds never met.

3. SAME—MODERN JURISPRUDENCE.

In the process of development, equity jurisprudence has assumed the qualities of a composite system of settled rules and principles by which the property rights of parties are measured and limited, and are rendered more certain and stable.

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

William D. Mitchell and Pierce Butler (Jared How, on the brief), for appellant.

A. A. Stone and Thomas Hessian, for appellee.

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

PHILIPS, District Judge. This is a suit in equity to set aside and annul a deed executed by the appellee to the appellant February

3, 1903. The land conveyed consists of about 194 acres, valued at between $9,000 and $10,000. The grounds of attack on the deed are that it was given without consideration and obtained through undue influence and misrepresentation. At the time of the conveyance the appellee was about 77 years of age, and the appellant was about 58. The appellee is the uncle and godfather of the appellant. They were born in Ireland, immigrating to America in 1850. In the party was the sister of the appellee, and mother of appellant, and her husband and perhaps some children. The appellant's parents established a home in the city of New York, and the appellee was a guest in their home for about a year. After that he drifted for a number of years, working as a common laborer, attempting once to establish a homestead in Illinois, until finally, in 1865, he pre-empted the land involved in this suit, in Nicollet county, Minn. Neither he nor this nephew ever married. The latter continued to live in the city of New York, engaged in the trade of a hatter, and succeeded in earning an independent, respectable competence.

While there were other near relatives—a brother and some nieces —the appellee had no communication with them. The father and mother of the appellant died several years prior to 1903. While the said nieces lived in the city of New York, all the information the appellee seems to have had about them came from occasional correspondence with this nephew, the appellant. So much of the correspondence between them as was preserved, ranging from perhaps 1885 to January, 1903, shows that an unusual relation of affectionate attachment existed between this uncle and nephew. In his isolation, in the far away Northwest, the uncle's heart went out with an unceasing tenderness towards this nephew. He seemed to have regarded him as indeed his godchild. He was an illiterate man, and his letters bear evidence that to him writing was indeed a severe labor, and he seems to have assumed the burden of writing only when prompted thereto by the yearning desire to keep in touch with this nephew. Though expressed in crude form, his letters were invariably characterized by a sentimental feeling of unaffected regard for the appellant. He nearly always addressed him as "Dear Patrick," and closed his letters with the words "I remain your loving uncle to death." The solicitation for this correspondence, as a general rule, came from the uncle. He often chided the appellant when he neglected writing to him for a considerable length of time, and expressed himself as being delighted whenever he did receive a letter from him. This fact is of especial moment as indicating the entire absence of any selfish or sinister motive on the part of the appellant in maintaining a correspondence with his uncle. While his letters breathed the most kindly and considerate spirit and a tender solicitude for his uncle's welfare, there does not appear in one line of any of them a word or thought that should suggest to a reasonable, candid person a lurking purpose in the mind of the appellant to obtain aught from his uncle save a continuance of their affectionate relation. Any contrary suggestion is a perversion of the language of a simple-hearted, sincere man. Several years prior to 1903, the appellant visited his uncle, evidently on invitation, and certainly to the deep pleasure of the latter. In his

testimony the appellee himself does not attach to this visit any other motive than that of sincerity and kindness. There was not an incident connected with this visit to justify any imputation of an ulterior design to subserve any selfish purpose on the part of the appellant.

The evidence shows that the appellee was not a successful farmer. Early after the acquisition of this land he placed upon it a mortgage for $1,400. This incumbrance accumulated until, at the time of the execution of the deed in question, the debt amounted to about $2,900. The increase in the value of the farm was despite the appellee's improvidence, and his retention of it intact was attributable to the indulgence of the mortgagee, who was content to let the mortgage run so long as the interest was paid, as the increasing value of the security resulting from the development of the country was deemed ample protection. As appears from the correspondence between these parties, the maintenance of the farm was becoming somewhat of a burden to the appellee, and it is to be gathered from the correspondence that the appellant had suggested to him the advisability of selling it; but he seemed to be adverse to parting with it, and it is quite inferable from the evidence that the underlying purpose of the appellee all the while was to retain this land to the end, and that he designed after his death it should go to the appellant. In 1902, by reason of physical infirmity and business incapacity, the burden of this farm and the loneliness of his situation became such as to induce the appellee to remove from it to a nearby town, and board with some friends. He was sick, and evidently became apprehensive that he was approaching the end of life. Naturally enough in such situation his mind turned to the appellant; and on December 24, 1902, he wrote to him, saying:

"It is so long since i heard from you i thought i would try to write you a few lines to yet you know how i feel i am very feeble this winter i have left my house i was not able to care for myself i have went to stay with a neighbor that has my place rented so there is no person in my house Patrick i wish to here from you if you are alive but i would like much better to see you you told me when you were [here] if anything happened that you would come here to me and i think it very near the time i think i will not be long here i think you had better come on if you are alive so we can talk to each othere do not delay as i cannot tell how i am going to last i have no more to say as i do not feel able to write any more i remain your loving uncle to Death."

It is inferable that the appellant answered this letter expressing the wish that his uncle should go to New York and live with him, as he could better take care of him. On the 9th of January, 1903, the appellee wrote the appellant as follows:

"i wish to inform you that i received your very kind and welcom letter it gave me great comfort to hear that you are still living i thought you were dead it was so long since i heard from you you said in your letter you wished me to go there my business in such shape that it is pretty hard for me to go away and leave everything behind me and has no body to look after it it is a very cold winter and i am not able to go out and see anyone about the matter if i live to spring i hope to be able to find someone that will rent it for a number of years as i would wish to go there and be buried with my people i am staying in lesueur this winter i locked the house i did not want to be found dead there if i find that i get any worse i will let you know so that you will look after my place so that there will be nobody to make any trouble i had a letter from father cauley he said he lived with roberts

daughter Bridget and that she was married to a relation of his he said she would meet me with open arms if i would go there i did not answer his letter as i did not feel good i wish you would let me know if my brothers and sisters are living or dead if i find i cannot stand it this winter i will write to you or have somebody else write to you for me so that you can come on me fix matters i do not intend to give what little there will be to anyone else i think i have no more to say at present i remain your loving uncle to Death."

On receipt of this letter it is but just to say that, prompted by a humane and commendable spirit, the appellant left his business, and on or about the 19th day of January, 1903, arrived at his uncle's boarding house to look after him and take him home with him. Their meeting was mutually most cordial. While somewhat feeble, the appellee was sitting up and was able to move about. It was concluded that he should return to New York City with the appellant and make his home with him. Assisted by the appellant he busied himself in closing up his business affairs, disposing of a little grain and some personal property on the farm, and settling up some debts owing by him.

The only witnesses to what led up to the incident of the execution of the deed are the parties to this suit. There is no essential conflict between them as to the fact that it was the long entertained purpose of the appellee that on his death the land should go to this nephew. He had every reason to so remember and reward him. The appellant had remembered and administered to him in the past when he hungered for sympathy and needed care. He had sent him raiment that protected him in winter. He had sent him clothing that made him presentable in public; and he had come to him in the hour of his extremity to render him needful assistance and cheer. The subject of who should be the beneficiary of the landed estate after the old man's death was broached by him. The only material matter about which they differ in the testimony as to what occurred between them just prior to the execution of the deed is the contention, now advanced on behalf of the appellee, that his plan was to give the land by will to the appellant, that the appellant objected to this as it might be attacked by dissatisfied relatives, and that it was better at once to convey by deed. The testimony of the appellee in chief was that he consented to the substitution of the plan of making the deed on the assurance of the appellant that whenever requested thereto he would reassign the property to the grantor. This is denied by the appellant. On cross-examination the appellee twice stated and admitted that the matter of the reassignment of the land on his request was not broached until some time after they were in the city of New York. He also testified that he made the same statement to Mr. Smullen, who drew the deed in question, that he had made to the appellant. Smullen's testimony was that he drew the deed precisely as directed by the appellee, reserving to him therein a life estate in the land, and that after it was written he read it over to him, that he fully understood it, and he thereupon signed and acknowledged it as his final act and deed. Everything was harmonious when the appellee accompanied the appellant to the city of New York. The former admits in his testimony that in respect of his treatment and comfort the appellant fulfilled his expectations. He was given a comfortable room, wholesome food, $2 per week for spending money, all the whisky he wanted, and was kindly treated. He was left free in the

use and perception of whatever rents accrued from the land. The accrued interest on the mortgage the appellant cared for.

Two causes supervened, in our opinion, to create discontent and this lawsuit: (1) The nieces met the uncle and displayed an inquisitive interest in his landed estate. He had to tell them of the conveyance to this favored nephew. (2) He began to tire of city life and to long for the purer air of Minnesota and the associations of the old home. The appellant thought this was not the best course for the old man, then 78 years of age. But he (the latter) demanded a reconveyance, or reassignment of the land, as he termed it. A wordy altercation ensued. The appellee asked for money to return to Minnesota, and the appellant, who had furnished the money to take him to New York, refused to send him back. Thereat one of said nieces, who had never hitherto given him water or bread, provided him money with which he returned, in August, 1903, to the town from whence he came to New York. He could not have felt seriously angered at anything his nephew said to him in New York, for soon after his return he wrote him a kindly letter, a part of it relative to the condition of the land. He found the income from the land wholly inadequate to his support, and he became almost an object of charity. Some of his neighbors, more lavish with advice than with any serviceable bestowments, made suggestions to him. As soon as he collected the little money arising from the year's rental of the land he invested it in legal advice, the result of which was this lawsuit, the success of which would doubtless further result, after paying the lawyers, in bestowing the remaining interest in the land upon other relatives, leaving the appellant, the hitherto cherished and deserving relative, entirely out of consideration.

There was no tangible evidence of the want of sufficient mental capacity to enable the appellee to fully comprehend and understand the force and legal effect of the deed he was executing. His testimony quite demonstrates that in mentality and quickness of perception, even at the time of the hearing, he was rather the superior of the appellant. He exhibited instances of marked aptitude in the fence and foil of the alert witness on cross-examination. It is the settled law, as expressed in Russell's Appeal, 75 Pa. 269, that a man is permitted "to dispose of all his property by way of bounty to others, and his gifts when made with full intention and knowledge of the act are irrevocable." And time and again the Supreme Court of the United States has declared that:

> "The undue influence for which a will or deed will be annulled must be such as that the party making it has no free will, but stand in vinculis. It must amount to force or coercion, destroying free agency." Conley v. Nailor, 118 U. S. 134, 6 Sup. Ct. 1001, 30 L. Ed. 112; Ralston v. Turpin, 129 U. S. 663, 9 Sup. Ct. 420, 32 L. Ed. 747; Mackall v. Mackall, 135 U. S. 167, 10 Sup. Ct. 705, 34 L. Ed. 84; Towson v. Moore, 173 U. S. 17, 19 Sup. Ct. 332, 43 L. Ed. 597; Kennedy v. Bates, 142 Fed. 52, 56, 57, 73 C. C. A. 237.

The law sets its face sternly against that insidious insistence of disappointed relatives that a preferential donation or bequest of property should be regarded with suspicion when induced by considerate attentions and tender manifestations of the beneficiary toward the benefactor. Any other spirit of the law would transform exhibitions of

affection into sinister hypocrisy, and needful attentions and helpfulness by a near relative to the aged into a badge of fraud. Mr. Justice Brewer, in Mackall v. Mackall, supra, said:

"It would be a great reproach to the law if, in its jealous watchfulness over the freedom of testamentary disposition, it should deprive age and infirmity of the kindly ministrations of affection, or of the power of rewarding those who bestow them. * * * It would have been strange if such a result had not followed; but such partiality towards the one, and influence resulting therefrom, are not only natural, but just and reasonable, and come far short of presenting the undue influence which the law denounces. Right or wrong, it is to be expected that a parent will favor the child who stands by him, and give to him, rather than the others, his property. To defeat a conveyance under those circumstances, something more than the natural influence springing from such relationship must be shown. Imposition, fraud, importunity, duress, or something of that nature, must appear; otherwise that disposition of property which accords with the natural inclinations of the human heart must be sustained."

The learned trial judge in his opinion found that there was no undue influence exerted or fraudulent representations made, within the recognized rules of law, by the grantee to persuade the grantor to the execution of this deed. But he placed his action in decreeing the annulment of the deed principally upon the ground that the making of the deed, although the grantor reserved to himself a life estate in the property, was improvident, because it failed to incorporate into it a positive obligation on the part of the grantee to care and provide for the grantor during his life; and for that reason he concluded that the transaction was unconscionable and ought not to be sustained.

The consideration expressed in the deed is as follows:

"For and in consideration of the sum of other considerations and one dollar."

Without deciding whether or not the express understanding between the parties that in consideration of the making of the deed the grantee was to share his home with the grantor and take care of him during his life was enforceable, as the proof of such consideration would in no wise contradict or be inconsistent with the written instrument, the evidence shows that in every particular the grantee kept his promise, and there is every reason to believe that he would have done so to the end had the uncle been content to remain at his home. The obligation rested upon the owner of the estate in remainder to take care of the mortgage on the land and the taxes thereon, to prevent the destruction of his estate. The interest thereon was being paid by the appellant. So that as the matter stood the appellee had the use and profits of the land during his life, and a home provided for him without charge. And to meet the criticism of the absence in the deed of an express obligation to so care for him, at the hearing before the circuit court, the appellant offered to enter into obligation, to be expressed in the decree of the court, to pay to the appellee in money $300 per annum, or $25 per month, during his natural life. This the trial judge thought ought to be satisfactory to the appellee, and suggested to his counsel its acceptance. This provision could have been made effective by a consent decree of the parties. But it was declined by the appellee's counsel, and the judge felt that he could not so decree against the assent of the complainant.

The bill of complaint should be dismissed, unless it can be maintained that there is a comprehensive discretion reposed by modern equity jurisprudence in the chancellor to make and unmake contracts of parties sui juris, constrained only by no other limitations than those which meet the approval of his conscience. Courts of equity are now as much required as courts of law to enforce contracts free from vitiating elements of fraud, and to refrain from making contracts for the parties on which their minds never met.

In the formative period of equity jurisprudence the English Chancellors, in the absence of established principles and recognized sensible precedents, were much given to the pursuit of their own sense of absolute right and the dictates of their own individual conscience. But in the process of development equity jurisprudence has assumed more the qualities of a composite system of settled rules and principles, by which the property rights of parties are measured and limited, and are rendered more certain and stable. Pomeroy's Eq. Jur. § 48, etc.; Roberson v. Rochester Folding Box Company, 171 N. Y. 538, 64 N. E. 442, 59 L. R. A. 478, 89 Am. St. Rep. 828.

The decree of the Circuit Court must be reversed, and the cause remanded, with directions to dismiss the bill of complaint.

In re EPPSTEIN.

(Circuit Court of Appeals, Eighth Circuit. September 2, 1907.)

No. 62.

1. BANKRUPTCY—JURISDICTION—SUMMARY PROCEEDING.
   A court of bankruptcy may by summary process require those who assert title to, or an interest in, property which has rightfully come into its possession and control as part of the bankrupt's estate, to present their claims to that court, and, the notice being reasonable, may proceed to adjudicate the merits of such claims.

2. SAME—PROPERTY IN CUSTODIA LEGIS—INTERFERENCE WITH MUST BE WITH COURT'S SANCTION.
   While property in the course of administration under the bankruptcy act is not exempted from taxation, or freed from tax liens or claims theretofore fastened upon it, it is nevertheless in custodia legis, and a preexisting tax lien or claim cannot be converted into a full title by the procurement of a tax deed without the court's sanction.

(Syllabus by the Court.)

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

Ernest Morris, Alfred Muller, and M. Summerfield, for petitioner.
E. W. Hurlbut, for respondent.

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

VAN DEVANTER, Circuit Judge. The Colorado Carlsbad Water Company, a corporation existing under the laws of Colorado, was adjudged a bankrupt upon the petition of creditors. Before the petition

was filed certain real property of the bankrupt had been sold for taxes, but the title, the right of possession, and the actual possession remained with the bankrupt, and these passed to the trustee upon his qualification. After the lapse of the three years designated in the redemption statute, and while the property was yet in the custody and control of the court of bankruptcy as part of the bankrupt's estate, the holder of the tax sale certificate, without the leave of that court, applied to the county treasurer and obtained a tax deed purporting to invest him with all the right, title, and interest of the bankrupt as the former owner. Thereafter the trustee, learning of the sale and deed, tendered to the claimant thereunder the amount for which the property had been sold, with statutory interest, penalties, and costs, and demanded a surrender of the tax title. The tender and request were refused, and, upon the trustee's petition, the claimant was ordered to show cause why the deed should not be set aside. He appeared and objected that his right could not be adjudicated in a summary proceeding, whereupon the objection was sustained and the petition dismissed. A petition for revision brings the matter here.

The question of jurisdiction is not free from doubt, but we are of opinion that the result of the cases is that a court of bankruptcy may by summary process require those who assert title to, or an interest in, property which has rightfully come into its possession and control as part of the bankrupt's estate, to present their claims to that court, and, the notice being reasonable, may proceed to adjudicate the merits of such claims. In re Kellogg, 121 Fed. 333, 57 C. C. A. 547; In re Rochford, 124 Fed. 182, 59 C. C. A. 388.

The question of the merits must also, upon authority, be ruled in favor of the trustee. Wiswall v. Sampson, 14 How. 52, 14 L. Ed. 322; Taylor v. Carryl, 20 How. 583, 15 L. Ed. 1028; Barton v. Barbour, 104 U. S. 126, 26 L. Ed. 672; In re Tyler, 149 U. S. 164, 13 Sup. Ct. 785, 37 L. Ed. 689; Ledoux v. La Bee (C. C.) 83 Fed. 761; Clark v. McGhee, 87 Fed. 789, 31 C. C. A. 321; Virginia, etc., Co. v. Bristol Land Co. (C. C.) 88 Fed. 134; Johnson v. Southern, etc., Ass'n (C. C.) 132 Fed. 540. We do not mean that property in the course of administration under the bankruptcy act is exempt from taxation, or freed from tax liens or claims theretofore fastened upon it (Swarts v. Hammer, 194 U. S. 441, 24 Sup. Ct. 695, 48 L. Ed. 1060, and cases supra), but that it is in custodia legis, and that any act interfering with the court's possession, or with its power of control and disposal, and done without its sanction, is void. The general rule is practically conceded, but it is said that the procurement of the tax deed was not such an interference, because it merely perfected an incipient title, and did not disturb the possession. The distinction does not impress us. The issuance of the deed was the principal act connected with the sale. If effective, it extinguished the right of redemption, which was still alive, transferred to the vendee the title and right of possession, became prima facie evidence of the validity of the sale and the proceedings anterior to it, and started the statute of limitations to running against any claim to the contrary. The attempt to thus strip the court of all but the naked possession was plainly an interference with its power of control and disposal, and consequently was of no effect with-

out its sanction, although the possession was not then disturbed. Such is the effect of the ruling in Wiswall v. Sampson, and Barton v. Barbour, supra. The cases of Rice v. Jerome, 97 Fed. 719, 38 C. C. A. 388, and Whitehead v. Farmers' Loan & Trust Co., 98 Fed. 10, 39 C. C. A. 34, relied upon as expressing a contrary conclusion, do not, as we think, go further than to hold that when the question is presented to the court before the tax deed is issued, and it appears that there is no lawful objection to the recognition of the tax claim and that there has been no offer to redeem, the fact that the property is in custodia legis is not of itself enough to warrant the court in withholding its sanction to, or in enjoining, the issuance of the deed.

We are accordingly of opinion that the dismissal of the trustee's petition was error, and the case is remanded to the District Court with directions to vacate the order of dismissal, to grant the claimant reasonable time within which to meet the petition upon the merits, and to take such other proceedings as may be proper in the premises.

MUNSON v. STANDARD MARINE INS. CO., Limited.

(Circuit Court of Appeals, First Circuit. August 2, 1907.)

No. 679.

1. INSURANCE—MARINE POLICY INSURING TUG AGAINST LIABILITY FOR LOSS OF TOWS—EXPENSE OF SUCCESSFUL DEFENSE.

   A marine policy insuring a tug merely against legal liability for loss or damage caused to its tows by collision or stranding creates no liability on the part of the insurer for the expense of successfully defending the tug against a suit to recover for the stranding of tows.

2. SAME—SUE AND LABOR CLAUSE.

   In a marine policy insuring a tug against legal liability for loss or damage caused to its tows or other vessels through collision or stranding, the usual "sue and labor" clause has reference only to the subject-matter of the insurance, and has no application to expenses incurred in defending the tug itself against an unsuccessful suit to establish its liability.

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

For opinion below, see 145 Fed. 957.

G. Philip Wardner (Edward E. Blodgett, on the brief), for plaintiff in error.

James E. Carpenter (Samuel Park, on the brief), for defendant in error.

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

PUTNAM, Circuit Judge. This is a suit at common law on a marine insurance policy attaching on the steamtug Carbonero, indemnifying against liability to her tows. One or more barges in her tow were lost. The tug was libeled. The ultimate decision was in favor of the tug, and this suit was brought to make good the expenses of the litiga-

tion. The Circuit Court decided in favor of the underwriters, whereupon this writ of error was sued out. The only question we need consider is whether, inasmuch as the result showed that the tug was not at fault, any claim can arise on the policy for reimbursement of the expenses of the litigation or any part thereof. As the plaintiff in the Circuit Court is the plaintiff in error, and the defendant in that court is the defendant in error, we will refer to them as plaintiff and defendant respectively.

We desire to remove at the outset from our consideration claims made by the plaintiff to the following effect: He says that, when the tug was libeled, it would have been sold unless stipulated for, and he was obliged to secure a surety on the stipulation at considerable expense. Also, the libel was originally brought in the District Court for the District of Massachusetts. and then appealed to the Circuit Court of Appeals. both courts deciding in favor of the tug; but the Circuit Court of Appeals found that the tug was not free from negligence. though it also found that it was not proven that the loss of the tows was in consequence of that negligence. Under those circumstances, the Circuit Court of Appeals refused costs to the tug. Therefore the plaintiff says that the defense was unsuccessful to some extent. All these propositions are easily disposed of, because whatever may have occurred with reference to these details were but the incidents of litigation, and go the same way as the major elements thereof.

Of course, this policy, like all marine policies, was built up historically on the ancient forms; and so, instead of being drawn strictly as a policy of indemnity, it was undoubtedly adapted from the well-known policies on hull, cargo, or freight. Under such circumstances, some expressions will be found to be inconsistent with the main purpose of the policy, and not easily reconciled with other strong and clear language which it contains which must guide us. These facts are so far from embarrassing the court in its decision that they are easily disposed of by being referred to the historical nature of the policy sued on, by virtue of which old material always remains into which the new is inserted, although the new ordinarily controls the old. There are some expressions which raise a suggestion that it was intended that always, whenever a claim of liability was made, the suit was to be defended at the cost of the underwriters. Many policies of indemnity expressly provide to that effect, especially the usual policies which insure casualties in manufacturing establishments, and other casualties appertaining to various buildings, and liabilities from employers to the employed. What there is in this policy, however, is carefully so expressed as to leave it entirely to the option of the underwriters whether or not they would elect to assume the defense of any litigation which might arise. With these explanations, practically all we need say is that, on their face, the terms of the policy are clear that there is no liability on the part of the underwriters when there is no liability on the part of the tug or its owner. The various portions thereof expressing what we refer to were carefully pointed out in the opinion of the learned judge of the Circuit Court, and need not be rehearsed by us.

Neither does the plaintiff show us any marine insurance usages, or any decisions of the courts, which justify us in relieving him from the express terms of the policy. On the other hand, the only decisions of the court in point are in favor of the defendant. The last case of authority cited by either party is a decision of the Court of Appeal. Cunard Steamship Company v. Marten (1901) 2 K. B. 611. The late leading case may be said to be Xenos v. Fox (1868) L. R. 3 C. P. 630, 4 C. P. 665, also finally decided by the Court of Appeal. We will refer to these again, merely adding here that their true relation to the law of marine insurance can be best understood, as cases can ordinarily be best understood, by examining them as they appear in their proper setting in Arnold on Marine Insurance (7th Eng. Ed., 1901), beginning with section 862 and ending with section 876.

The question we have before us relates to marine insurance, which, although it requires in many respects a broad and liberal treatment, is also in some respects technical, so that attempted analogies to other departments of the law may aid but little, and even not at all, in solving the issue which presents itself. As illustrating this proposition, we refer especially to what is said in Arnold on Insurance in the sections we have cited, and we might, if necessary, take time in referring to other writers on that subject with the same result. The marine insurance doctrine of contributions to "particular averages" and "particular charges," with which averages or charges the claim now presented must classify itself, if it can be recognized at all, might well have been laid upon a broad foundation, so as to be governed by the same rules which apply to contributions to general averages, or to the adjustment of marine salvages; but they never have been. One has always been distinguished from the other in usages of marine insurance by a broad line. "Particular averages" and "particular charges" must sometimes be contributed to by the underwriters, although bringing their liability in excess of the face of the policy, while not necessarily so with reference in general averages and salvages. Therefore even the rules applicable to general averages and salvages cannot be availed of, and so much less can the cases and principles brought to our attention by the plaintiff, but drawn from other departments of the law. For example, he relies on 1 Brandt's Suretyship and Guaranty (3d Ed., 1905) § 238, as establishing a proposition that where a surety is sued on account of an alleged liability for his principal, and defeats the action, he may recover from the principal the expenses involved in defending the suit. Unfortunately the citation he makes does not sustain him, although probably his proposition is sound to a very considerable extent. This arises because, within certain lines, the surety is regarded as the agent of the principal, and entitled to such protection as an ordinary agent is entitled to; and also because equity, which for the most part is looked to to protect the surety, has liberal rules and effective remedies with regard to the entire topic of suretyship. On the other hand, the question before us being peculiar to marine insurance, it happens, as was said by Lord Justice Lindley, in Johnston v. Salvage Association, 19 Q. B. D. 458, 460

(1887), that contracts like that before us are not contracts of indemnity in any proper sense of the term. What the learned lord justice was considering particularly was the sue and labor clause, which we will presently take up; but his observation applied to this class of policies at large. He said:

"Such a contract is not a contract of indemnity in any proper sense. It is a contract to pay the assured expenses which he might incur, but not to indemnify him against any claims made by other people against him."

He then distinguished the broader rules of the equity courts to which we have already referred. All that he said is in line with the observations we have made, that analogies governing this case cannot safely be found in other departments of the law.

The plaintiff, however, relies more especially on the sue and labor clause contained in this policy. That clause is quoted by him as follows:

"It shall be lawful and necessary for the insured, his, her or their agents, factors, servants and assigns, to sue, labor, travel for and make all reasonable efforts in and about the defense, safeguard and recovery of such vessels, crafts and cargoes, or any part thereof, without prejudice to this insurance, and the acts of the insured or this company or their agents, in recovering, saving and preserving the property in case of disaster shall not be a waiver or an acceptance of an abandonment, or as affirming or denying any liability under this policy, but such acts shall be considered as done for the benefit of all concerned, and without prejudice to the rights of either party."

It is first of all to be noticed that this is not the true ancient sue and labor clause. It omits that portion by which the underwriters agree to contribute. It retains only that which the rigid ancient law thought necessary in order to preserve to the insured his right to abandon. Mr. Phillips seemed to think that possibly the underwriters might be held to contribute under the fundamental rules governing marine insurance, or as an implication from the license to sue and labor. Phillips on Insurance (5th Ed., 1867) par. 1742. We do not find that his suggestion is sustained. In fact, the sue and labor clause is so ancient that it is impossible to go back of it. Owen's Marine Insurance Notes and Clauses (3d Ed., 1890) speaks of it as of great antiquity, and always embodied in the policy. Gow's Insurance (1895) 120, places it as far back as the London policy of 1613, and merely adds that it seems to be indigenous to England. It certainly is so ancient that no trace of the English law of contribution goes back of it, so that it is not possible to sustain Mr. Phillips' suggestion. However, this is not important, because the fact that the present policy made a departure from the ordinary policy in this respect indicates a purpose that the underwriters should not contribute. In this particular the case is less favorable to the insured than Cunard Steamship Company v. Marten (1903) 2 K. B. 511, 512, already referred to, where the sue and labor clause contained the usual agreement to contribute. Moreover, a very common running-down clause contained a stipulation for the payment of costs, meaning the expenses of litigation, in resisting claims of the vessel collided with, whether successful or unsuccessful. Owen, ubi supra, 96. The omission of any such provision in the policy before us is a warning that it ought not to be lightly inserted. Therefore,

on these grounds alone, we might properly reject the plaintiff's proposition in reference to this clause.

However, the authorities are all against him. We will not rely on Cunard Steamship Company v. Marten, just referred to, because that decision was put on narrow grounds. Lord Justice Roemer, at page 515, does, indeed, restate what we have already said with reference to the historical construction to be given insurance policies, with regard to the fact that language intended to accomplish a peculiar purpose is inserted in the printed parts of the customary form notwithstanding the printed parts may have little or no application to the precise risk insured. But he let the case turn on the fact that the sue and labor clause ordinarily does, and then did, refer to "the said goods and merchandise and ship," and indicated that it could have no relation, and is inapplicable, to an indemnifying policy. In the present case, Cunard Steamship Company v. Marten, if literally accepted, might compel us to hold that, if the tug had been liable for stranding the tows in question, the tug could not recover from the underwriters any expenditure made in relieving the tows from their stranded position. This we would be reluctant to do. It is sufficient for us that we determine that the sue and labor clause has relation only to the subject-matter of insurance, which in the present case was the liability of the tug to the stranded tows, and nothing else. The cause of the legal expenses involved here arose, not out of the fact that the policy attached, but out of the fact that somebody claimed that it attached when in fact it did not.

Not only does the positive language of the policy lead to the conclusion we have stated, as explained by the learned judge of the Circuit Court, but we repeat that the authorities are decisive, and this even when the complete sue and labor clause is present. They are well summed up in the sections of Arnold on Insurance to which we have referred, and are very crisply stated in Tyser's Marine Insurance Losses (1894) p. 51, as follows:

"The underwriter is not liable under this clause [meaning the sue and labor clause], unless he would be liable for the loss to avert which the labor or expense is incurred."

The earliest case to which we may refer is Biays v. Chesapeake Insurance Company, 7 Cranch, 415, 419, 3 L. Ed. 389 (1813). That was a suit on a memorandum policy limiting liability to a total loss. The court held that the sue and labor clause did not apply, unless, perhaps, in case where the services might have prevented an actual total loss. The principle involved was announced as follows:

"If this clause [meaning the sue and labor clause] be construed with reference to what is most evidently its subject-matter—that is, a loss within the policy—and in connection with other parts of the instrument, it seems impossible to misunderstand it, or that it should receive so extensive an application as the plaintiff is desirous of giving to it. The parties certainly meant to apply it only to the case of those losses or injuries for which the assurers, if they had happened, would have been responsible."

These observations were recognized as representing the law by Mr. Phillips in his work to which we have referred at section 1777.

We can pass over more than half a century to Xenos v. Fox, L. R. 4 C. P. 665, 667 (1869), already referred to. Here the sue and labor clause was in a policy which had a running-down clause. Xenos v. Fox has been many times relied on, both by the courts and the text-writers. Chief Justice Cockburn there said that the sue and labor clause applied to a loss or misfortune happening to the thing insured; and it was held that the underwriters were not liable for the expenses of a suit brought against the owners of the vessel in whose behalf the policy issued, which suit was unsuccessful. We might well have disposed of this case on the authority of the decisions last cited, namely, Biays v. Chesapeake Insurance Company and Xenos v. Fox, which have stood unquestioned; but the propositions submitted to us were of sufficient interest and importance to justify the consideration which we have given them.

The judgment of the Circuit Court is affirmed, and the defendant in error recovers its costs of appeal.

WESTERN TUBE CO. v. RAINEAR.

(Circuit Court, E. D. Pennsylvania. August 8, 1907.)

1. PATENTS—INVENTION—SUBSTITUTION OF MATERIALS.
   While the substitution of one material for another is not as a rule patentable, there may be invention in substituting a different metal in one member of a device where both were previously made of the same, when by the union of the two metals certain hitherto imperfectly attained results are accomplished.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 23.]

2. SAME—ANTICIPATION—CHANCE COMBINATION.
   Prior knowledge and use which will anticipate a later patent is not to be made out by a chance combination made without appreciation of the principle upon which the patent is based.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 70.]

3. SAME—INFRINGEMENT.
   The splitting up or multiplication of parts of a patented device without any new function or result does not avoid infringement.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 378.]

4. SAME—PIPE COUPLING.
   The Hewlett patent, No. 640,197, for a pipe coupling, which consists essentially in the combination in a pipe coupling of ordinary construction of a brass spud and an iron nut and tailpiece, whereby there is brass to iron at the screw joint and at the opposing ends of tailpiece and spud, thereby avoiding the rusting of the joint and securing a closer union of such opposing ends, was not anticipated and discloses invention; also *held* infringed.

In Equity. Bill in equity to restrain the infringement of letters patent issued to Alfred M. Hewlett of Kewanee, Ill., January 2, 1900, for a pipe coupling.

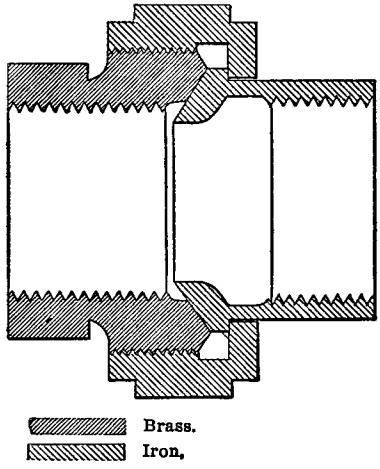
On final hearing.

Thomas W. Bakewell and Charles MacVeagh, for complainant.

Philip C. Dyrenforth, for defendant.

ARCHBALD, District Judge.[1] The patent in suit is for a pipe coupling, to join together the ends of steam, water, or other similar pipes, the connections of which have to be frequently detached or broken. It is made up of the usual three parts or members, consisting of two end pieces, familiarly known as the "spud" and the "tailpiece," which are brought together to form the connection by a coupling ring, nut, or collar; the ring and the tailpiece being provided, respectively, with an opposing flange and shoulder, and the ring and spud having appropriate exterior and interior screw-threads, which fit each other. According to the common construction of such couplings, all the members, indiscriminately, are made of the same material, and when this is iron or steel the several parts are liable to become so fastened together by rust, as to be very difficult to uncouple, the act of uncoupling also frequently causing injury, so that, when put together again, the joint is not tight. To make it tight and prevent leakage, a gasket is also frequently necessary between the abutting ends of the pipe, within the coupling ring, and this, in turn, gathers rust and destroys the efficiency of the union. If the coupling ends are of brass instead of iron, while this avoids the rusting, either a gasket has still to be used, or the abutting ends have to be carefully ground to a fit, which may operate well enough to form a water or steam tight connection at first, but upon repeated screwing and unscrewing, the ends are liable to be worn unevenly, and the tightness of the joint be affected accordingly. All this is set forth in the patent, and the object of the invention is to meet and remedy it. This is accomplished by having the nut or ring and the one coupling-end or tailpiece of a relatively hard material, such as wrought iron or steel, and the other coupling-end or spud of a relatively softer and substantially non-oxidizable metal, such as brass, tin, copper, bronze, aluminum, and the like, brass being usually selected, and the opposing surfaces where the coupling ends come together being preferably beveled, the action of the harder metal on the softer, when they are brought to bear against each other, by the screwing up of the nut or ring, causing them to grind, one on the other, and make a tight joint. By this adaptation of the different materials employed, not only is the coupling easily loosened and detached, the ring being readily unscrewed by reason of the spud being of brass and there being in consequence no rusting of the screw-threads, but, for the same reason, the opposing ends of spud and tailpiece not only

The Hewlett Coupling.



[1] Specially assigned.

drop apart when the coupling is unscrewed, but bind upon each other and bear closely together when it is screwed up, without their having to be machine finished or supplied with a washer or gasket, and without their becoming pitted or eaten with rust. The invention thus consists primarily in the selection of certain materials for certain parts; no other arrangement yielding the same results. Its utility is shown by its complete commercial success, it having virtually supplanted all other similar previous devices, of which there have been not a few, and that, too, with customers who are little influenced by anything except real merit, such as engine works and railroads.

There are three claims to the patent, all of which are relied on, as follows:

"1. In a pipe-coupling, the combination with a member made of relatively hard material and constructed for attachment to the end of a pipe, said member being provided with an integral bearing-surface, of a second coupling member composed of relatively softer and substantially non-oxidizable metal and having formed integrally therewith a bearing-surface arranged to bear against the bearing-surface of the member formed of harder metal, and a coupling-ring also formed of relatively hard metal and detachably connected to the member of softer metal, said ring operating when rotated to bring the bearing-surfaces of the two members into close contact, substantially as described.

"2. In a pipe-coupling, the combination of a member constructed to be secured to the end of a pipe and composed of a relatively hard material, said member being formed with a bearing-surface and a circumferential, external shoulder, a coupling-ring also composed of relatively hard metal and provided with a shoulder arranged to bear on the shoulder of said member, and a second member composed of relatively softer and practically non-oxidizable material constructed to be screwed into said coupling-ring and having a bearing-surface formed integrally therewith, said ring when rotated operating to draw the said bearing-surfaces into close contact, substantially as described.

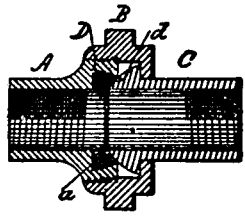
"3. In a pipe-coupling, the combination with a coupling member of relatively hard material and constructed for attachment to the end of a pipe, said member being provided with an integral bearing-surface, of a coupling-ring rotatably arranged on said coupling member, said ring being also composed of a relatively hard material and interiorly screw-threaded, and a second coupling member of relatively softer and substantially non-oxidizable material and externally screw-threaded to engage the internal screw-threads of the coupling-ring, said softer member being provided with a bearing-surface arranged to closely bear against the bearing-surface on the harder member when the coupling-ring is screwed up, substantially as described."

Stripped of verbiage, the invention as so specified may be said to consist in the combination, in a pipe coupling of ordinary construction, of a brass spud and an iron nut and tailpiece, whereby there is brass to iron at the screw joint, and iron to brass at the opposing ends of tailpiece and spud. The defendant denies that there is anything patentable or novel in this, or that he infringes upon it, if there is, and these, therefore, are the questions to be disposed of.

That there is no patentable invention in the device is maintained upon the ground that it consists in the mere substitution or interchange of materials, the principle made use of, that iron in contact with brass will not rust, being old and well-known, as it is said, and having been constantly employed for the same purpose, in similar joints and couplings, for a long period. No doubt the mere substitution of one material for another is not, as a rule, patentable. Hotchkiss v. Greenwood, 11 How. 248, 13 L. Ed. 683; Hicks v. Kelsey,

18 Wall. 670, 21 L. Ed. 852; Brown v. District of Columbia, 130 U. S. 87, 9 Sup. Ct. 437, 32 L. Ed. 863. But there is something more than that here; the contiguous materials for the different members of the coupling being selected and arranged because of their ability to accomplish certain useful and hitherto imperfectly attained results. It may seem a small thing, involving no great ingenuity, in an ordinary pipe coupling to merely make the spud of brass, leaving the other parts unchanged; but, considering the efforts of others in the same direction, and the various expedients resorted to, to obtain an easily detachable, and at the same time a steam and water tight joint, the simplicity of the device confirms rather than detracts from the invention, something more than ordinary mechanical skill being required to go so directly to the mark. Nor is it of any consequence that the well-known principle is made use of, that iron against brass will not rust. It is not necessary, in order to make out invention, that new qualities shall be evolved. It is sufficient if old ones are novelly and inventively applied. The case in this respect is clearly within the decision of Judge Butler in Paynter v. Devlin (C. C.) 63 Fed. 122, affirmed by the Court of Appeals of this circuit in 64 Fed. 398, 12 C. C. A. 188. The patent there as here was for a pipe union, the device consisting simply in having the head and tailpieces with concave and convex interfitting surfaces, respectively, and providing the former with an inserted seat of soft metal, such as lead, against which the end of the tailpiece should abut and bind. The ingenuity so displayed was certainly no greater than in the present instance, and it was sustained.

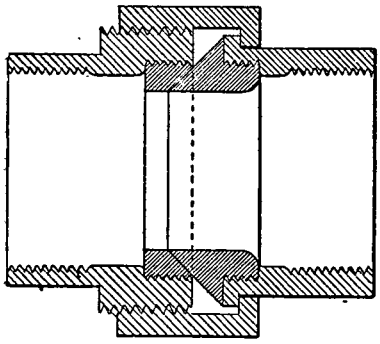
The Paynter Coupling.



Everything but the Gasket is Iron.

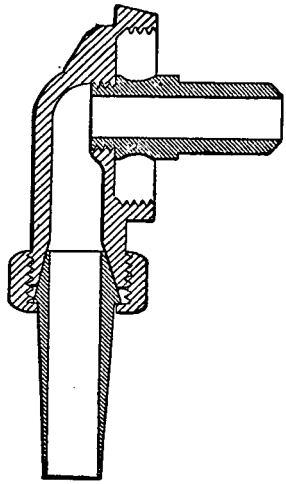
There are a number of devices, patented and unpatented, which are relied on to negative the novelty of the one in suit. The Dart (1890) coupling is not perhaps insisted on as one of these, although the patent at first was rejected on the strength of it; but, as one of the best of previous contrivances, it will not be out of the way to refer to it. The three principal members of this coupling were all of the same material—iron or steel—but at the meeting or seat ends of the head and tailpiece soft metal bushings of brass were screwed into each end, having concave and convex surfaces, respectively, which bore against each other forming the union. When new, this arrangement no doubt makes a close joint; but the objection to it is that, as brass under heat expands faster than iron, by being successively expanded and contracted when

The Dart Coupling.



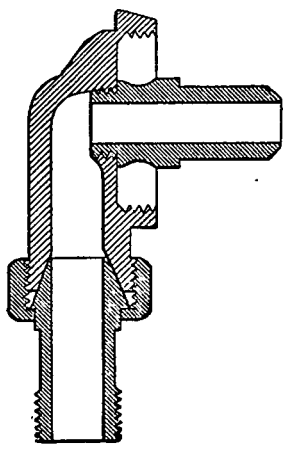
used with steam, the brass seats become loose and leak. Except so far as the head and tailpieces are made to fit into each other—which is really no part of the present invention—there is no correspondence in this with the device in suit. Not only does brass bear upon brass, instead of brass upon iron, at the meeting surface of the two ends, but the screw-thread connection between ring and headpiece is iron to iron, which inevitably rusts, with all the attendant disadvantages; and it also takes five different parts to make up the union, instead of three. The distinctions are obvious and nothing more need be said.

The Murdock Hydrant Bottom



In the Murdock hydrant-bottom (1895) however, as it is claimed, there is a combination closely approximating the one in suit. This is a device for connecting hydrants and lines of water pipe, the hydrant bottom consisting of an elbow, a tailpiece, and a coupling-ring; the tailpiece in practice being made of brass and the other parts of iron, the ends of the elbow and tailpiece being also beveled to fit together. By this arrangement, an iron to brass contact was secured at the meeting ends of bottom and tailpiece, the avowed object of which was to avoid rust, as well as to get a tight joint by the harder metal bearing on the softer. But the ring and elbow were both of iron, and the screw connection between the two was bound to rust, thus differing materially from what we have here. A modification of this was introduced by Nichol, manufacturing under the same patent, by which, at first, on account of delay in getting iron castings, all the parts were made of brass, but later the bottom or elbow was made of iron, the other two parts remaining unchanged, an iron nut, however, at times being also used. Nichol thus put out four different combinations, an iron nut with an iron elbow, an iron nut with a brass elbow, a brass nut with an iron elbow, and a brass nut with a brass elbow; the tailpiece in each case being of brass. In none of these is the precise arrangement of the present patent realized, although with a brass nut, an iron elbow, and a brass tailpiece there is an iron to brass contact at the meeting ends as well as at the screw joint, avoiding rust and making the same character of union, as here, at both. This is only brought about, however, by a decided increase in the amount of brass used, there

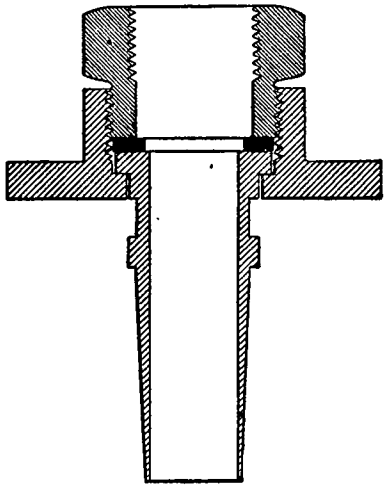
The Nichol Hydrant Bottom.



being two members of that material which, if adopted in the device in suit, would add some 40 per cent. to the cost and be practically prohibitive, the same advantages being secured as the case stands by having the screw-thread and the bearing surface of one and the same piece of brass, and the inventive idea consisting in seeing that this could be done. It is to be noted, moreover, that the Nichol-Murdock combination, which is relied upon, was somewhat a matter of accident, influenced by expediency rather than design; the only thing that can be said to the contrary being that the desirability of avoiding rust at the screw joint was appreciated and a brass nut apparently preferred on that account.

The Ingersoll-Sergeant Hose coupling for steam drills in its original form, came the nearest of any to being an anticipation, having an iron nut, an iron tailpiece, and a brass spud, the exact combination, changing spud and tailpiece, which is found here. But the full possibilities of this were not appreciated, and the spud in consequence was not made to contact with the tailpiece, the screw-threads being only carried to a certain point, and a space purposely left between the two ends for the insertion of a washer or gasket, assumed to be necessary. Nor was this relative arrangement of material persisted in. Being designed for use in mines and quarries, the iron nuts got broken by rough handling, and brass nuts, as more durable, were substituted, the spud being changed at the same time to iron, thus abandoning the whole resemblance. While, then, the desirability of having an iron-to-brass contact at the screw joint was no doubt appreciated and taken advantage of, in making up this coupling, so much so that when the nut was changed from one metal to the other, vice versa, the spud was also; yet the effect of having the meeting ends different, and allowing the harder metal of the one to bear upon the softer metal of the other making a tight joint at all times, was entirely lost sight of, stopping short by just so much of realizing the device in hand.

Ingersoll-Sergeant Hose Coupling.

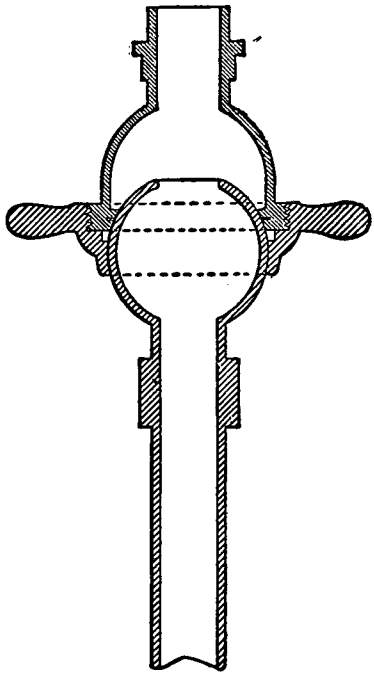


The Giffard-Sellers-Kneass steam injectors, which are also referred to, stand no differently or better than the rest. In these there is an iron arm or branch, coupled to a brass tailpiece by a brass nut, which, no doubt, gives brass to iron at the meeting faces of the coupling ends, as well as at the screw-thread connection. But, as in the case of the Nichol-Murdock hydrant-bottom, this is accomplished at the expense of a brass nut in addition to a brass tailpiece, or in other words, with

two members of brass, where one would have done, the economy of metal being material.

Nor is anything more to be made out of the several Moran devices if indeed so much, their sole relevancy consisting in showing, in some of their forms, a brass to iron contact between the members. The oil filler joint was the first of these; the whisky filler and the steam joint being developed from it. It consisted of a dome or bell, fitting down upon a hollow ball or sphere, the two being united and held together by a cap or ring fitting around and screwing over the point of union, making a flexible ball and socket joint with two extended arms. As originally constructed, all the parts were of brass, but, this being expensive, they were subsequently made of iron, after which, there being parts of each material in stock, they were put together somewhat indiscriminately, particularly when certain parts were renewed or old ones sent in for repair, with the result at times that a brass bell and an iron ball, with an iron cap or ring, would be brought together, thus realizing the arrangement of material found in the patent. But, even if the mechanical structure of this device were nearer than it is, the normal arrangement was all brass or all iron, and such a haphazard assemblage of material, varying from this, as is now relied upon, is of no practical significance here. The advantage of an iron to brass contact, which was thus secured, was not appreciated, nor was anything useful deduced from it or contributed to the art. The chance combination is simply seized upon to meet the exigencies of the present case, in the hope that it may do duty as an anticipation. Prior knowledge and use negativing novelty is not, however, to be made out in any such way. Tilghman v. Proctor, 102 U. S. 707, 26 L. Ed. 279; Ajax Metal Co. v. Brady Brass Co., 155 Fed. 409. The whisky filler and steam joint evolved from this were of a slightly different structure; the ball and socket being made to fit closely, so as to be steam and water tight; the whisky filler being all brass, except as the ring, which did not come in contact with the liquor, was sometimes for economy made of iron; and the steam joint being all of one material. But, as is evident from this description, they are neither of them of any relevancy here. And the same is true of the automatic steam drip, by the same inventor, which is apparently referred to simply to show that the advantage of an iron to brass contact to avoid rust

The Moran Flexible Oil-Filler.

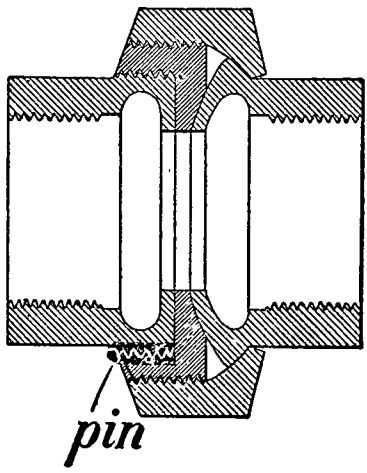


was well known, of which there is already abundant evidence in this record and which no one will deny.

From this review, therefore, it will be seen that the want of novelty which is charged has not been made out. Not only is not the precise combination of materials shown, except here and there by accident, which is of no account; but there is nothing upon which the device in suit is not a substantially inventive advance. It may be that the benefit of an iron to brass contact which is made use of, as well as the effect of iron bearing upon brass to make a tight joint, was known. But in the way that both principles are employed, at one and the same time, to accomplish beneficial results, with economy of material and of parts, the device stands unanticipated and alone, and must be sustained. It is possible that representations were made in argument before the examiner, which went beyond the real state of the art as so found, without which the patent would not have been allowed. But that is past, and its validity is to be determined, not by what the examiner may have thought of it, if otherwise informed, but by what is disclosed with regard to it here. Nor would that seem to affect the presumption in favor of the patent, if that were material, as it is not.

The question of infringement remains, in which connection it may be observed that there is nothing in the file wrapper to limit the invention as specified and claimed in the patent, and it is therefore to be taken as it is there set forth. It may have been cut down in its course through the Patent Office from its original form. Most inventions are. But nothing is put forward now which was rejected then, which is all with which we are concerned. The device sold by the defendant is manufactured under the Dart (1902) patent not the one spoken of above but a later one, which is also subsequent to the one in suit.

The Defendant's Pipe Coupling.



But, aside from the presumption of legality which this may give (Miller v. Eagle Mfg. Co., 151 U. S. 186, 208, 14 Sup. Ct. 310, 38 L. Ed. 121), it is of no consequence if infringement actually appears. The general structure of the coupling is the same as that of the complainants, and there is the same relative arrangement of materials and of parts, there being an iron nut, and an iron tailpiece, but the spud, instead of being of brass, is also of iron, an iron to brass contact at the screw joint, as well as at the pipe ends, being secured by means of a brass ring or bushing screwed onto the end of the spud, giving it a brass face, and being further held in place by means of a pin. But the splitting up or multiplication of parts in this way, without any new function or result, does not avoid infringement, if it is otherwise made out (Eck

v. Kutz [C. C.] 132 Fed. 758), and that is the case here, at least as to the third claim. It is contended that, by making this facing ring or bushing of brass, there is economy of material, even greater than in the complainants' device, upon which, if it is allowed as an element in maintaining the invention, the defendant is equally entitled to rely. But economy of material is not all, although it, of course, plays a part. the full inventive idea, as already stated, consisting in perceiving that an iron to brass contact could be secured at the screw-thread connection, as well as at the face ends, by one and the same piece of brass, economizing not only in material, but in number of parts. With regard to the first and second claims, however, the case is not so clear. Apparently for the purpose of differentiating the Paynter as well as the first Dart, in each of which a bushing is employed at the face as a distinct part, the inventor in these claims specifically declares for a second coupling member composed of a relatively softer and non-oxidizable metal, having a bearing surface formed integrally therewith. There may be a particularity of description here, which was unnecessary, to which—the invention at the best being a narrow one—the complainants should be held down. And there is not a little force in the suggestion that the later is merely a rearrangement of the earlier Dart. But, however this may be, upon a careful study of the two claims in question, and taking them as they read, it will be found that in addition to the fact that the defendant has appropriated the principle of the invention, the effect of which he should not be permitted to evade, the brass ring or bushing, making screw engagement with the coupling ring, may well stand as the second member of the combination specified, without regard to the pipe end of which it forms the face, thus fulfilling the terms of the first and second claims, as well as the third, and making out the infringement charged.

Let a decree be drawn in favor of the complainants, sustaining the patent, awarding an injunction, and directing an account, with costs.

DODGE v. FRANK WATERHOUSE & CO., Inc., et al.

(Circuit Court, W. D. Washington, N. D. May 14, 1907.)

No. 1,290.

1. TRUSTS—CONTRACTS CREATING—VIOLATION OF DUTY BY TRUSTEE.

Complainant and defendant were both creditors of a steamship company, the defendant for a part of the purchase price of a steamship which it had contracted to sell to the company. The latter had loaded the vessel at Seattle for a voyage to Nome, but defendant refused to allow her to proceed until the indebtedness was adjusted. At a meeting at which all three parties were represented, the company by its president, a written agreement was made between complainant and defendant by which the latter agreed to take a mortgage on the vessel securing both claims, acting as trustee for complainant. At the same time the president of the company executed a note in its name to defendant as trustee for the amount of complainant's claim, and also an agreement to deposit one-half the amount to defendant's credit at Nome from the earnings of the voyage, to be applied on such note. He also signed the mortgage, and the vessel was delivered into the company's possession. The other officers

of the company in New York having refused to execute the mortgage, defendant, without complainant's knowledge, entered into an arrangement with the company by which they undertook to cancel the sale, and defendant executed a release to the company of all demands and claims including the freight money which was to be deposited for complainant's benefit. The vessel was of sufficient value to pay all claims against it. *Held*, that the instruments executed at the meeting constituted a single contract to which all three were parties, and which, by virtue of the delivery of the vessel thereunder and its acceptance and use by the company, made a completed sale and rendered the mortgage and the note and collateral agreement binding obligations in favor of complainant, that by discharging and releasing the same defendant became liable to complainant for the full amount of his debt.

2. SAME—EQUITY—NECESSARY PARTIES.

To a suit in equity by complainant to recover his debt from defendant as trustee, the steamship company was not a necessary nor proper party, having been discharged by the release from any liability over to defendant.

In Equity.

Geo. H. King, for complainant.

W. H. Bogle, for respondents.

HANFORD, District Judge. I am unable to find in the pleadings and evidence in this case any legal or equitable grounds for holding the defendant Frank Waterhouse as an individual liable to the complainant, and I therefore direct that as to him the case be dismissed, with costs.

The other defendant, Frank Waterhouse & Co., Incorporated, will hereafter be referred to as the defendant, as if it were the sole defendant in the case. It was formerly the owner of the steamship Garonne, and in the year 1904 it contracted to sell said steamship to the North Alaska Steamship Company, another corporation, which appears to have been organized without any capital other than the hopes of its promoters. In the month of June, 1904, the purchaser owed the defendant $37,671.46 on account of the purchase price for the steamer, and owed the complainant $10,000 for borrowed money, and also other creditors a considerable amount for repairs and betterments made to the steamer and supplies for an intended voyage from Seattle to Nome.

On June 2, 1904, in order to arrange for the payment of the steamship company's debts to the defendant and to the complainant, and to clear the ship so she could proceed immediately on her intended voyage, the three parties, represented respectively by Frank S. Pusey, agent for the complainant, Frank Waterhouse, president of the defendant, and Charles B. Smith, president of the steamship company, held a conference at Seattle, which culminated in the execution and delivery of a memorandum agreement, a promissory note, and an assignment of freight money, which several documents are of the following tenor:

"Memorandum between Frank S. Pusey, Agent for G. M. Dodge, of New York, and Frank Waterhouse & Co., Inc., of Seattle, Washington.

"The North Alaska Steamship Company is indebted to said Waterhouse & Co., Inc., in the sum of about $37,671.46 being balance due on purchase price of the steamship Garonne, and are also indebted to said G. M. Dodge in the sum of about ten thousand dollars for borrowed money.

"It is agreed that said Waterhouse & Co., Inc., shall take a mortgage from said North Alaska Steamship Co. upon the steamship Garonne to secure both claims above mentioned. The claim of said Waterhouse & Co., Inc., shall be prior and paramount under such mortgage, and the claim of said Dodge shall be secondary. Said Waterhouse & Co., Inc., shall take a note from said North Alaska Steamship Co. payable to them as trustee, for the amount so owing to said Dodge, said note to be payable in two months from date.

"It is agreed that said Waterhouse & Co., Inc., in acting as such trustee for said Dodge in the securing of said indebtedness, assumes no liability whatever with reference thereto, except that it agrees to act in good faith.

"Frank S. Pusey,
"Agent for G. M. Dodge.
"Frank Waterhouse & Co., Inc.,
"By Frank Waterhouse, President."

"$10,000.00. Seattle, Wash., June 2nd, 1904.

"On or before two months after date we promise to pay to the order of Frank Waterhouse & Co., Inc., as trustee the sum of ten thousand and 00/100 dollars, with interest at the rate of seven per cent. per annum from date, negotiable and payable at the Seattle National Bank, Seattle, Wash. If suit is brought on this note or it becomes advisable to place the same in the hands of an attorney for collection, we agree to pay an additional sum equal to five per cent., upon the amount of this note as an attorney's fee.

"North-Alaska Steamship Co.,
"By Charles B. Smith, President."

"Seattle, Washington, June 2nd, 1904.

"I do hereby agree to hold out and deposit five thousand dollars ($5,000.00) of the freight money collected from first voyage of S. S. Garonne upon its arrival at Nome, Alaska, with the Bank of Nome to the credit of Seattle Nat'l Bank for use of Frank Waterhouse & Co., Inc., trustee.

"Charles B. Smith."

A mortgage of the steamship Garonne was also prepared and signed by Smith, as president of the steamship company, containing stipulations in conformity with the above memorandum, and upon these several documents this suit is founded.

The following quotations from the defendant's answer are proximately a true statement of the transaction and the controlling circumstances which influenced the parties:

"That on June 2, 1904, there was a balance due respondent company on said purchase price from said North Alaska Steamship Company of $37,671.46. That said steamer was loaded with cargo and passengers ready to start on her voyage to Nome, Alaska. That the representative of said North Alaska Steamship Company reported to respondent company that there were claims unpaid against said steamer for repairs and supplies amounting to approximately thirteen thousand dollars ($13,000.00). That said North Alaska Steamship Company had failed to furnish a guarantee bond guaranteeing said vessel would be kept free of liens, and they had failed to furnish the collateral security for said deferred payments according to the terms of their contract, and stated to respondent that they were unable to furnish such security; and respondent company had notified them that said vessel would not be permitted to sail under their charge until said contract was complied with in full. That on or about June 1, 1904, one Charles B. Smith, president of said North Alaska Steamship Company, arrived in Seattle from New York expecting to go to Nome, Alaska, on said steamer, and one Frank S. Pusey, representing himself as the agent of said complainant, also arrived in Seattle about the same date. That said Smith represented to respondents that his company was prepared to pay off all of the claims against said vessel incurred by repairs and supplies as soon as he could notify the New York office of the amount due therefor, and that they were prepared to pay the balance due respondent company on the purchase price within the next 20 days, and in view of said representa-

tions, and relying thereon, this respondent company consented to permit said steamer to make said voyage in charge of said North Alaska Steamship Company. That said Smith and said Pusey agreed that said North Alaska Steamship Company was indebted to said complainant, in the sum of ten thousand dollars ($10,000.00), and said Smith, on behalf of his said company, offered to take a bill of sale to said steamer and to execute a mortgage thereon for the balance due respondent company, payable in twenty (20) and forty (40) days from that date, and to give a second mortgage to said complainant to secure the ten thousand dollars ($10,000.00) due him payable in sixty (60) days from that date; said bill of sale and mortgages to be executed by said company as soon as the money was received by respondent company with which to pay the claims for labor and supplies against said steamer. That said Smith also agreed with said Pusey to assign to him, and on behalf of said North Alaska Steamship Company did assign to said Pusey, certain freight due on cargo then being shipped by said steamer to Nome, which was payable on delivery of the cargo at Nome, and said Pusey appointed said Smith as agent to collect said freights and remit them to the Seattle National Bank for the credit of said complainant. That as a matter of convenience it was agreed between the said Pusey and the said respondent company that one mortgage would be taken on said vessel securing both claims due said respondent company and due said complainant; said mortgage providing for priority in favor of the debt due respondent company. That said Pusey stated to respondents that he did not wish to remain in Seattle for the length of time necessary to get said mortgage executed by said North Alaska Steamship Company, and requested respondent company to act for him in receiving such money as might be remitted by said Smith to said Seattle National Bank for the credit of complainant, and in the acceptance and recording of said mortgage; and the respondent company as a matter of accommodation to said Pusey, consented to do so, and the memorandum set forth in the sixth paragraph of said bill of complaint was executed to evidence said arrangement.

"Respondent further shows that it was agreed that the note to said complainant should be executed by said North Alaska Steamship Company payable to this respondent company as trustee for said complainant in order that the same might be deposited in the Seattle National Bank, and any remittances received by said bank from said Smith could be credited thereon. * * *

"Respondent states that in the transactions and conversations with said Pusey leading up to said final arrangement the said Pusey was distinctly informed of the rights of this respondent and the conditions as they existed at that time between it and said North Alaska Steamship Company. * * * Respondents state that said North Alaska Steamship Company was a New York corporation, and had its main office and corporate seal in the state of New York, and that all of its officers except the said Charles B. Smith, who was president, were then in New York. That respondent company caused to be prepared a bill of sale of said steamer from respondent company to said North Alaska Steamship Company, and also caused to be prepared a mortgage from said North Alaska Steamship Company to respondent company upon said steamer with appropriate conditions and provisions to secure the debt due this respondent company, and also that due complainant in accordance with the terms agreed on. That said mortgage was submitted to said Pusey and declared by him to be satisfactory in form. That thereupon respondent company procured said Charles B. Smith, president of said North Alaska Steamship Company, to sign said mortgage for and on behalf of said company, and also to execute the notes upon behalf of said company. * * * That accordingly this respondent company on June 3, 1904, inclosed said bill of sale and said mortgage to the Chase National Bank of New York with directions to said bank to deliver said bill of sale to said North Alaska Steamship Company upon the proper execution of said mortgage by that company, and on the same day respondent company notified J. B. Leake, the secretary of said company, and also the Occidental Security Company, the financial agent of said company in New York, of the forwarding of said papers and requested prompt execution thereof. That said North Alaska Steamship Company failed and refused to execute said mortgage and refused to pay the claims incurred by it against said steamship company for repairs and supplies. * * * Re-

spondents state in answer to the allegations contained in the ninth paragraph of said bill of complaint that said steamship Garonne on June 2, 1904, was in first-class condition, and respondent believes that she was thoroughly seaworthy, and they state that the overhauling and repairs made thereon by said North Alaska Steamship Company were charged and done on the credit of this steamer."

The North Alaska Steamship Company having failed to meet its obligations for repairs, etc., the defendant corporation, disregarding the arrangement made at Seattle with the complainant's representative, served a written notice upon the officers of the North Alaska Steamship Company in New York, which reads as follows:

"New York, July 8th, 1904.

"North Alaska Steamship Company—Gentlemen: By the terms of our conditional contract of sale of the steamship Garonne to you it was provided that deferred payments should be evidenced by notes of your company and secured by a first mortgage on the steamer and by such additional collateral security as should be satisfactory to us. It was also further provided that your company should give us a guaranty company's bond, protecting us and the steamer from any lien or claims for supplies or repairs that might be incurred by you at any time before the payment of our debt in full. It was also provided in said agreement that these securities and bonds were to be furnished to us on or before the 10th day of March, 1904. None of these conditions have been complied with by you. There is now a balance due us of $37,641.00, with interest since June 2, 1904, and there are claims and demands outstanding against the steamer, incurred by you in the purchase of supplies and material and for repairs, amounting to something over $30,000.00, which are unpaid and for which the holders claim a lien against the steamer. We now notify you that unless you are prepared to and will at once complete the performance of your contract by accepting title to the steamer, executing a mortgage and notes for the deferred payments, furnish the bond from the guaranty company, indemnifying us against any claims against the steamer, and furnish the additional collateral security for preferred payments due us, that security to be to our satisfaction, we will exercise the right reserved to us under the contract of canceling your option of purchasing the said steamer and declare a forfeiture of any rights you would otherwise have in said contract, and also will retain the payments heretofore made to us thereon. We are now and have been since the tenth day of March, last, ready and prepared to execute a bill of sale to you of the steamer upon your compliance with the terms of said contract, but we are not willing to allow the matter to stand open in its present shape, and we require that you either perform the contract or submit to a forfeiture of your rights under it at once.

"Yours truly, Frank Waterhouse & Co."

The response was a notice that said steamship company was unable to comply with the terms of said demand, and that it abandoned the contract to purchase the steamship, and thereupon the president of the defendant corporation entered into the following written contract with Wm. F. King, who had been a financial backer of the steamship company:

"Memorandum of Agreement made this 9th day of July, 1904, between Wm. F. King, of New York City, Party of the First Part, and Frank Waterhouse, of Seattle, Washington, Party of the Second Part.

"For and in consideration of the mutual covenants and agreements hereinafter expressed the said parties mutually agree as follows:

"First. The said Wm. F. King acting for both parties, will at once organize a corporation under the laws of the state of New York, to be known as the Merchants' and Miners' Steamship Company of New York, with a capital stock of one hundred thousand dollars ($100,000.00), such corporation to have all the powers usual and common to transportation companies. The board of

directors shall be composed of five members and the board for the first year shall consist of the following persons: William F. King, Wm. R. Corwine and S. Cristy Mead, of the city of New York, and Frank Waterhouse and W. H. Bogle, of the city of Seattle. For the first year the president shall be Frank Waterhouse, the vice president W. H. Bogle and the secretary S. C. Mead. The said Wm. F. King is to receive fifty thousand dollars par value of the capital stock and the said Frank Waterhouse is to receive the other fifty thousand dollars par value of the capital stock.

"Second. Upon the formation of said corporation, said Waterhouse will have Frank Waterhouse & Co., Inc., execute a bill of sale conveying to said new company the steamship Garonne with her equipment, supplies and material on board and also turn into the treasury of said company, the cash in the hands of Frank Waterhouse & Co., Inc., received from the last voyage of the Garonne.

"Third. The said Wm. F. King will advance to said new company the sum of thirty thousand dollars ($30,000.00), in cash, to be applied in the payment and discharge of the claims now existing against the steamship for supplies, material, repairs, etc., said money to be deposited by said King in the Chase National Bank, New York, to the credit of Frank Waterhouse, fifteen thousand dollars ($15,000.00) thereof, on or before July 16th, 1904, and the remaining fifteen thousand dollars ($15,000.00) on or before July 23d, 1904.

"Fourth. Said new company shall execute a mortgage securing to said Wm. F. King the said sum of thirty thousand dollars ($30,000.00) and to said Frank Waterhouse & Co., Inc., the sum of thirty-seven thousand dollars, with interest on said amounts from July 15th, 1904. Said mortgage to contain the usual covenants and agreements contained in such instruments, but to provide specificaly against any personal liability or stock liability of either of the parties hereto for any part of the indebtedness expressed in said mortgage. Said indebtedness to be represented by notes given by said mortgagor company to said respective parties as above, and each of the notes to be of equal rank under the mortgage, and to be payable at such time or times as said parties hereto may hereafter agree, and to bear interest at the rate of 6 per cent. per annum.

"Fifth. Said Waterhouse shall advance to said new company such amount as may be needed for the operation of the steamer during the present season.

"Executed in duplicate the date above named.

"Wm. F. King.
"Frank Waterhouse."

The scheme outlined in this agreement was subsequently carried through to completion, and on the same day that said agreement was entered into the defendant executed a release to the North Alaska Steamship Company forever discharging it "of all and from all, and all manner of action and actions, cause and causes of actions, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, expense, executions, claims or demands whatsoever in law or in equity, which against the North Alaska Steamship Company, its successors and assigns, ever had, now has or which its successors and assigns hereafter can, shall or may have for, upon or by reason of any matter, cause or thing whatsoever from the beginning of the world to the day of the date of these presents." A similar release was given to the defendant by the steamship company, and the defendant also agreed to relinquish the freight money assigned by Smith, the president of the steamship company, to the defendant as trustee for the complainant. The exchange of releases and relinquishment are proved by the testimony of Mr. Bogle, given in behalf of the defendant, and by a copy of the release executed by

the defendant, which was introduced in connection with his testimony as defendant's "Exhibit Q3."

These transactions were carried through to completion at the city of New York without any notice being given to the complainant. In its answer and in the evidence introduced in behalf of the defendant there is an attempt to excuse its failure of duty in this regard on the ground that its officers did not know the address or whereabouts of the complainant. From the testimony of Waterhouse and Bogle it appears that the only efforts made to communicate with the complainant were confined to inquiries directed to persons connected with the steamship company, whose interests would not have been advanced by affording him a fair opportunity to see to the enforcement of his rights in connection with the adjustment made between the two corporations. This shows inexcusable negligence on the part of a trustee. The evidence proves that the complainant is, and has been for many years, a man of national reputation, and at the time of the transactions he had an office in New York City, which he visited frequently, and when absent therefrom he was but a short distance from New York City, and was in constant communication with his office. I have no doubt that any 10-year old boy of ordinary intelligence, if dispatched with a message, could have readily delivered it to the complainant in person, and that Mr. Frank Waterhouse, if he had made a bona fide effort to do so, could have communicated with the complainant by mail, telegraph, or telephone, or personally.

It is the contention of the complainant that the steamship Garonne in the year 1904 was of sufficient value to constitute ample security for the entire indebtedness of the North Alaska Steamship Company, including the unpaid purchase money, the debts contracted for repairs, improvements and supplies, and the debt due to him, and that the disposition made of the ship without collecting said debt constitutes a breach of trust rendering the defendant corporation liable to him for the entire amount of said debt. The defense appears to rest upon a theory that the North Alaska Steamship Company acquired no interest in the ship other than an option to purchase, and that the defendant corporation incurred no liability to the complainant except to hand over any amount of money which might be voluntarily paid by the steamship company under the contract of June 2, 1904. In this it is assumed that the steamship company was not a party to that contract and was not obligated to mortgage the steamship to secure the money due to the complainant. I hold, however, that the mortgage which was signed by the president of the steamship company, the promissory note for $10,000, given to the defendant as trustee for the complainant, the assignment of freight money, and the contract signed by the defendant and Pusey as agent for the complainant, constitute one contract, binding upon all three of the parties. The documentary evidence in the case proves that notice of the transaction was promptly sent to the secretary of the steamship company in New York, and that Smith's authority as president of the company was not disputed. The evidence also proves that there was more than a mere executory contract to sell the steamship to the North Alaska Steamship Company,

because the sale was consummated by complete manual delivery of the ship to the purchaser, and she was permitted to leave the port of Seattle under the control of the purchaser in consideration of said contract, and that she earned money for the purchaser. Therefore the defendant held the legal title subject to the trust created by said contract, and, except as against other creditors and bona fide purchasers, the ship was effectually and legally hypothecated for the complainant's debt.

The evidence proves that the Garonne was surrendered to the defendant in good condition, and that she was then worth more than the amount of the complainant's debt over and above all other claims against her. The defendant was then in the same situation, practically, that it would have been if the mortgage had been executed and foreclosed and the ship sold to the defendant for the amount of the debts secured by the mortgage, and the manner in which she was disposed of by the defendant without notice to the complainant was incompatible with the good faith to which the defendant, as trustee for the complainant, became pledged by its agreement with Pusey. The evidence also proves that the release given by the defendant while it was the holder of the $10,000 note included the debt evidenced by that note, and discharged the North Alaska Steamship Company from its indebtedness to the complainant, to the extent of the power of a trustee, under the circumstances, and by discharging the steamship company in that manner and disposing of the security without the complainant's consent the defendant, by the principles of equity, must be held to have assumed an obligation to pay the note.

In the argument in behalf of the defendant, it was contended that the North Alaska Steamship Company should have been joined as a necessary party to the suit, and that because of a defect of parties the court cannot render a decree, other than a decree of dismissal. If it were true that the steamship company is a necessary party, the court would be obligated to dismiss the suit, notwithstanding the failure of the defendant to set forth this ground of objection to the bill of complaint, by demurrer, plea, or answer. The defendant, however, by the introduction of the release in evidence, has proved affirmatively that the steamship company is not a necessary nor a proper party. It has no interest to be affected by the litigation, because the release is an estoppel against any reclamation by the defendant against it.

I direct that a decree be entered in favor of the complainant for the amount of the principal and interest of the promissory note, and the amount specified in the note for attorney's fee.

UNITED STATES v. LIPSETT, Sheriff of Chippewa County.

Ex parte GILLETTE.

(District Court, W. D. Michigan. September 26, 1907.)

1. HABEAS CORPUS—POWER OF FEDERAL COURTS—SOLDIER CHARGED WITH CRIME UNDER STATE LAWS.

Under Rev. St. §§ 752, 753, 761 [U. S. Comp. St. 1901, pp. 592, 594], a court or judge of the United States has power to issue a writ of habeas corpus on petition of the United States for the purpose of an inquiry into the cause of detention of a prisoner held by a state to answer to a criminal charge, where it is alleged by the petitioner that the act charged as a crime was committed by the prisoner in the performance of his duty as a soldier of the United States; and it has authority to determine summarily as a fact whether or not such allegation is true, and, if found to be true, to discharge the prisoner on the ground that the state is without jurisdiction to try him for such act.

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

2. HOMICIDE — EXERCISE OF AUTHORITY — ESCAPING PRISONER — ACCIDENTAL KILLING OF THIRD PERSON.

A soldier in the service of the United States was placed on guard over prisoners and furnished with a gun and ammunition. By the manual of guard duty, with which he was familiar, it was made his duty if a prisoner attempted to escape to command him to halt, and if he failed to do so, and there was no other possible means to prevent his escape, to fire upon him. One of the prisoners started to run away down a public street, and the guard pursued, calling on him to halt, to which no attention was paid. The guard, being lame, was unable to overtake the prisoner, and after reaching a place where the street was apparently clear fired upon him, but the bullet went over his head and struck and killed a young woman who was walking with others in the street upon higher ground and was not seen by the guard. He fired again at the prisoner, but the latter escaped temporarily. There was no claim that the killing was intentional, or that the guard acted maliciously or wantonly, or otherwise than in good faith. *Held*, that under such facts the guard in shooting was acting in the supposed performance of his duty as a soldier, and was not subject to arrest and trial for manslaughter by the state.

Habeas Corpus.

H. C. Carbaugh, Judge Advocate U. S. Army, Jno. A. Hull, Judge Advocate U. S. Army, and George G. Covell, U. S. Dist. Atty., for the United States.

George B. Holden, Pros. Atty., for respondent.

KNAPPEN, District Judge (orally). The substantial facts are these: On or about July 22, 1907, Cyrus Gillette, a private soldier in the military service of the United States, and stationed at Ft. Brady, adjacent to Sault Ste. Marie, Mich., was acting under orders of his immediate superior officer as a military sentry over two military prisoners (at least one of whom, Hodsdon, was charged with desertion), who were engaged in work near the entrance to Ft. Brady Military Reservation. While so employed, the prisoner Hodsdon attempted to escape, in such attempt running easterly in a public street. Gillette immediately called upon the prisoner to halt, and repeated his call two or three times. Hodsdon ignored the demand to halt, and continued his

flight at full speed; Gillette following him as rapidly as he could (having a lame knee, and having been recently discharged from the hospital), loading his gun as he went with the guard cartridge, in preference to the service cartridge, the former having a smaller charge of explosive and a different shaped bullet from the latter, so as not to carry the bullet to such a great distance as the service cartridge does. Gillette held his fire some distance, while running, because of some children whom he saw in the street down which he was pursuing the escaping prisoner. When from 30 to 100 feet from the reservation limits Gillette fired at Hodsdon, who was from 125 to 200 feet in advance of him, still running and trying to escape. The bullet passed over Hodsdon's head and accidentally struck and killed Miss Elizabeth Cadenhead, who, with friends, was returning from a visit to Ft. Brady, and was walking along the street on which Gillette and Hodsdon were running and in the same direction, being at the time of the shooting from 375 to 475 feet ahead of Gillette, and thus from 250 to 275 feet ahead of Hodsdon. There is no claim that Gillette saw Miss Cadenhead, or any other member of her party, either before or at the time of shooting; nor that he knew of their presence in the street. The point where Miss Cadenhead stood when the shot was fired was about five feet higher than the spot where Gillette stood; the latter spot being about two feet higher than the place occupied by Hodsdon.

After the firing, Hodsdon continued his flight, turning from the street on which he was running south about 100 feet, and then southeasterly about 130 feet, and hid in a clump of bushes and trees on a private residence lot, where he was found two hours later. After he had turned south Gillette again fired at him, but without effect. Gillette was familiar with the manual of guard duty issued by the Secretary of War, which contained the provision:

"If a prisoner attempts to escape, the sentinel will call 'halt.' If he fails to halt when the sentinel has once repeated his call, and if there be no other possible means to prevent his escape, the sentinel will fire upon him."

Which manual also contained a syllabus of the decision of the United States Circuit Court for the Eastern District of Michigan in the case of United States v. Clark, 31 Fed. 710, which contained, among other things, this statement:

"It seems that the sergeant of the guard has a right to shoot a military convict if there be no other possible means of preventing his escape."

Said manual also containing the circular of Colonel Morrill, addressed to the Assistant Adjutant General of the Department of Columbia, containing this statement:

"A sentinel is placed as guard over prisoners to prevent their escape, and for this purpose he is furnished a musket with ammunition. To prevent escape is his first and most important duty. * * * I suppose the law to be this: That a sentinel shall not use more force or violence to prevent the escape of a prisoner than is necessary to effect that object; but, if the prisoner, after being ordered to halt, continues his flight, the sentinel may maim or even kill him, and it is his duty to do so."

Immediately after the shooting, Gillette was tried before a general court-martial, at Ft. Brady, Mich., on the charge of manslaughter, in violation of the sixty-second article of war; the specification being

that he did "unlawfully, willfully and feloniously kill Miss Elizabeth Cadenhead, with a United States magazine rifle, loaded with powder and ball." He pleaded not guilty, and was acquitted; the findings and acquittal being approved by the proper officers in these words:

"In the foregoing case of Private Cyrus Gillette, Company M, Seventh Infantry, the evidence of record clearly shows that the accused, in compliance with his orders, pursued and shot at an escaping prisoner. There is nothing that shows that the accused had any cause to believe that the unfortunate accident that took place was liable to occur from his obeying the provisions of the guard manual, and as the shot was fired without either malice or recklessness on his part, in the evident belief that he was only discharging his duty to the United States government, the findings and acquittal are approved."

Gillette was accordingly restored to duty. He was afterwards arrested on a warrant issued by a state magistrate of Chippewa county, Mich., charging him with manslaughter in killing Miss Cadenhead. He waived examination and was held to trial before the circuit court of Chippewa county, being, pending trial, committed to jail in default of bail. The application for writ of habeas corpus was made by the United States through its district attorney, under the authority of the Attorney General of the United States, upon the ground that the state court has no jurisdiction to try Gillette for the offense charged, because the act alleged to constitute the offense was done by Gillette in the performance of his duty under the laws and authority of the United States; it being also contended on behalf of the government that the acquittal of Gillette by the court-martial is a bar to further prosecution in the state courts. The prisoner was produced in court in obedience to the writ, and hearing was had upon a stipulation of facts; no conflict of testimony being thus presented. No claim is made on the part of the state authorities that Gillette had any malice or ill will towards either Hodsdon or Miss Cadenhead, or that the homicide was other than accidental; and there is nothing in the evidence presented on the hearing reasonably tending to show, nor is it asserted, that Gillette, in firing the shot, did not act in good faith and in the supposed performance of his duty.

The defense to the writ, urged on behalf of the state authorities, is that upon the record there exists a question of fact whether there was any other possible means of preventing the escape of the fugitive than by firing, and whether Gillette exercised due care, under the circumstances disclosed by the record, in firing; the street being unobstructed, and it thus having been possible to discover that Miss Cadenhead and her companions were in the line of fire, and it being contended that, if it should be found that Gillette acted without the exercise of due care, his act became unlawful, and the homicide would be manslaughter, and that the state has the right to have the questions of fact referred to tried by a jury in the state court.

As to the effect of the former jeopardy: Whatever may have been the status of the authorities before the decision in the case of Grafton v. United States, 206 U. S. 333, 27 Sup. Ct. 749, 51 L. Ed. 1084, that decision leaves open the question of the effect of a trial and acquittal by a United States court-martial upon the right of trial in a state court

for the same act charged as constituting an offense of the same kind and name. There have been two decisions in the District Courts to the effect that such acquittal by court-martial is not a bar, viz., In re Clark (C. C.) 31 Fed. 710, and In re Fair (C. C.) 100 Fed. 149, both of which cases were decided previous to the recent decision of the Supreme Court in Grafton v. United States. I do not find it necessary to pass upon the question of former jeopardy, because, in my judgment, this case can be disposed of upon other grounds.

The jurisdiction of the district judge to act in this matter is undoubted. Sections 752 and 753 of the Revised Statutes [U. S. Comp. St. 1901, p. 592] expressly give the judges of the Circuit and District Courts power to grant writs of habeas corpus for the purpose of inquiring into the cause of restraint of liberty when a prisoner is in custody for an act done in pursuance of a law of the United States. This statute has been enforced in a variety of cases, and there is no question of the power of a federal judge under it to inquire whether an act of the nature of that here involved was done in the performance of a duty arising under a law of the United States; nor is there any question that such act, if done in the performance of duty as a soldier in the military service of the United States, was done in pursuance of a law of the United States, and so not within the jurisdiction of a state court to try.

In Re Neagle, 135 U. S. 1, 10 Sup. Ct. 658, 34 L. Ed. 55, the petitioner, a deputy marshal assigned to protect Justice Field against apprehended violence, killed a man claimed to be attempting a deadly assault upon the justice. He was arrested by the California state authorities, and sued out a writ of habeas corpus upon the proposition that in killing Justice Field's assailant he was in the discharge of his duty as an officer of the United States, and therefore not guilty of murder; that he was thus held in custody by the state authorities for an act done in pursuance of a law of the United States, and was entitled to his discharge, which was granted. The decision contains a citation of cases amply sustaining the authority of the court.

In Re Waite (D. C.) 81 Fed. 359, s. c. 88 Fed. 102, 31 C. C. A. 403, a United States pension examiner had been arrested under a statute of Iowa, charged with maliciously threatening to accuse a person of a crime in order to compel him to do an act against his will. The act which was alleged to constitute an offense was claimed by the prisoner to have been done while in the discharge of his duty as such examiner, in pursuance of a law of the United States, and relief was granted upon the ground that the state court had no jurisdiction to try the respondent.

In Re Lewis (D. C.) 83 Fed. 159, special employés of the Treasury Department were arrested under the laws of Washington for alleged robbery. The act was claimed by the prisoner to have been done while in the discharge of his duty in the service of the United States. It was, of course, claimed in each of the cases referred to that no crime had been in fact committed, and that the act alleged to constitute a crime was in fact lawful.

In Re Fair (C. C.) 100 Fed. 149, a guard in the military service of the United States, at Ft. Crook, Neb., was arrested by the civil authorities of that state on a charge of murder, alleged to have been commit

ted in the killing of a soldier while attempting to escape. It was held that he was acting under the authority of the United States, and that the state authorities had therefore no jurisdiction to try him. In each of the cases cited discharge was granted on habeas corpus.

Attention is called to the language used in Re Waite (D. C.) 81 Fed., at page 365, as fairly illustrative of the current of authorities, which seems, indeed, to be uninterrupted. It is there said:

"All these cases hold clearly, however, that when it is made to appear that an officer of the United States, or one acting under the authority of a law of the United States, is sought to be held in a state court for punishment under provisions of a statute, for an act done while in the performance of a duty he owed to the United States, the federal courts, either by removal, where the statute provides for that mode, or by writ of habeas corpus, must assume jurisdiction over the matter, and prevent further action in the state court, and the principle underlying the case is that the state has no jurisdiction over a person when he is acting under the authority of the United States."

It may be urged that the prisoner has a remedy by way of review by the Supreme Court of the United States, in case of his conviction in the state court, and so should not be given the remedy by habeas corpus. In Re Waite, supra, the Circuit Court of Appeals thus replied to this proposition (88 Fed., at page 107, 31 C. C. A. 403):

"This contention we think is without merit. While it is true that the relief prayed for by the petitioner could have been obtained in the usual way, by a writ of error, yet, in our judgment, the case at bar does not belong to the class of cases in which a person in custody under the warrant of a state court should be compelled to seek relief by appeal or writ of error rather than by a writ of habeas corpus. * * * The arrest of federal officers or other persons for acts lawfully done in discharge of their duties under federal laws impairs to a certain extent the authority and efficiency of the general government; and for that reason no court, so far as we are aware, has ever hesitated in that class of cases to discharge a petitioner from custody by writ of habeas corpus, when it appeared on a hearing of the case that the petitioner was entitled to be released from imprisonment."

So while a federal court or judge will not, in a habeas corpus proceeding, examine the evidence for the purpose of determining whether the prisoner should be found guilty or innocent, yet it is the duty of such court or judge to examine the evidence for the purpose of determining whether the act alleged to be criminal was done in the performance of duty in the service of the United States.

Attention is particularly called to the language used in the decision in the Lewis Case, 83 Fed., at page 160:

"It is true that this court could never adjudicate that question (respondents' guilt) finally, so as to convict and punish these men for robbery if they were robbers; but in a proceeding of this kind it is absolutely necessary for the court to consider the question so far as to determine whether the officers acted wantonly and with criminal intent, or whether, in so far as their acts may be regarded as wrongful, they were mere errors of judgment. Take, for instance, the Neagle Case, 135 U. S. 1, 10 Sup. Ct. 658, 34 L. Ed. 55. It is not to be conceived that, if Neagle had actually committed a murder, the federal court would have shielded him from punishment. Suppose that Judge Terry had made no assault upon Judge Field, and there were no such appearances as to give reasonable ground to a person in the situation that Neagle was in to suppose that it was necessary to use a deadly weapon in defense of Judge Field, and that while acting as a protector for Judge Field, in accordance with instructions from the Attorney General of the United States, he had

wantonly shot and killed Judge Terry, or some other man, so that his act would have been actual murder. Certainly Judge Sawyer and the Supreme Court of the United States would not have justified the use of the writ of habeas corpus to shield him from punishment."

Language of similar purport is found in several of the cases to which I have called attention. This does not mean that a soldier is immune from punishment under state laws from the mere fact that he is in the service of the United States. The distinction is well expressed in Re Waite (D. C.) 81 Fed., at page 363, where the court, after holding that the state court had no jurisdiction to try a federal officer for an act done in the discharge of his duty, said:

"By this it is not meant to assert that because a person is an officer or agent of the federal government he is thereby excepted out from the jurisdiction of the state or the binding force of its laws. The mere fact that when the acts done by him were done he was an officer of the United States, charged with certain duties to that government, will not afford him immunity from prosecution under the laws of the state. Nor will the mere fact that he claims that the acts done were within the line of his official duty afford him protection, if the acts are such as to show that the claimed immunity is a mere subterfuge, and that under no fair consideration of his official duty could he have assumed that he was acting in his official capacity when the acts complained of were done by him."

The federal statute confers express power upon a federal judge in habeas corpus proceedings of this nature to pass upon questions of fact. Rev. St. § 761 [U. S. Comp. St. 1901, p. 594], provides:

"The court, or justice, or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the matter as law and justice require."

In the Neagle, Lewis, Waite, and Fair Cases inquiry was had upon the question of fact involved.

As to the suggestion that a jury trial is necessary: Attention has already been called to the fact that in each of the cases referred to an inquiry has been entered upon by the court or judge hearing the habeas corpus matter, and that the questions of fact were actually decided by the court or judge. Perhaps the most conspicuous case was that of Neagle, in which there were tried out vexed questions of fact as to whether the United States marshal was justified in killing Judge Terry, the assailant of Justice Field. In that case, where the question was raised before the United States Supreme Court on appeal from the decision of the judge who heard the case below, it was said by the Supreme Court (In re Neagle, 135 U. S., at page 75, 10 Sup. Ct. 672, 34 L. Ed. 55):

"To the objection made in the argument that the prisoner is discharged by this writ from the power of the state court to try him for the whole offense, the reply is that if the prisoner is held in the state court to answer for an act which he is authorized to do by a law of the United States, which it was his duty to do as marshal of the United States, and if in doing that act he did no more than was proper and necessary for him to do, he cannot be guilty of a crime under the laws of the state of California. * * * The Circuit Court of the United States was as competent to ascertain these facts as any other tribunal, and it was not at all necessary that a jury should be impaneled to render a verdict on them."

These cases are not in conflict with the case of Drury v. Lewis, 200 U. S., at page 1, 26 Sup. Ct. 229, 50 L. Ed. 343, from the fact that in

the case here presented there is no conflict of testimony as to whether or not the act complained of was wanton.

Coming to the question of whether the prisoner was in fact acting, in firing the shot, in the supposed performance of his duty: It is well settled that if a homicide be committed by a military guard without malice, and in the performance of his supposed duty as a soldier, such homicide is excusable, unless the order or authority relied upon was such that a man of ordinary sense and understanding would know that it was illegal. This proposition is affirmed in Re Clark, supra, and in Re Fair, supra. As pointed out in Re Clark, it is the duty of the guard pursuing a deserter to call "halt," and to repeat the call, and if there is no other reasonable means to prevent escape to shoot. A guard failing to do so would be guilty of a most serious military offense, and liable to severe punishment therefor. The manual of guard duty, with which the prisoner was familiar, contains an express ruling of the military authorities that if a prisoner, after being ordered to halt, continues his flight, it is the duty of the guard to shoot, even maiming or killing. By reference to that ruling it is not intended to hold that it was the duty of the guard to shoot in any event, without exercising his discretion as to whether it was really necessary to do so in order to prevent escape. It should go without saying that the order and rulings contained in the guard manual were properly relied upon by the guard, because such order and rulings were not in fact illegal, but, on the contrary, were legal. If, therefore, the guard, in shooting as he did, was acting in the supposed exercise of his duty, without malice or criminal intent—and as already said, there is no claim of such—he is not liable to prosecution in the state court from the fact that from misinformation or lack of good judgment he transcended his authority, even though he might be liable to a civil action at the suit of the injured party. This proposition is sustained by the decisions in the cases of Fair, Lewis, and Waite, above cited.

Does it satisfactorily appear that it seemed to respondent reasonably necessary to shoot at the prisoner so attempting to escape? It is my duty, sitting as a judge in this proceeding, to determine this fact. If a reasonable question existed, under a conflict of testimony, whether the guard was acting wantonly, rather than in the supposed performance of his duty, or otherwise stated, whether it was believed by him at the time to be reasonably necessary to shoot, I should perhaps exercise the discretion which rests in me in favor of submitting the question to a jury in the state court; but there is no conflict of testimony, and the suggestion that different minds might draw different inferences from undisputed facts furnishes no reason why I should abdicate my responsibility to decide in this proceeding whether the guard, in shooting at the fleeing deserter, acted in the supposed discharge of his duty. That he did so act is clear. There is no room for reasonable inference to the contrary. It is conceded that he acted without malice or ill will. His good faith is not impugned. That he was not criminally reckless of the result of the shooting is shown by his holding his fire until those seen by him in the line of fire were out of the way. The fact that in the excitement of pursuit, with his attention upon the fugitive, then on lower ground, he failed to see the pedestrians 400 feet ahead, and

on higher ground, does not, under the agreed facts, show recklessness. That it seemed to the guard reasonably necessary to shoot is clear. The guard was lame and lately discharged from the hospital; the deserter was apparently gaining upon him, disregarding the order to halt, determined to escape, and continuing to flee even after the shot in question and still another shot was fired, and actually evading discovery for two hours longer. Even though it might have been more prudent for the guard to have exercised still greater care in the prevention of this deplorable accident, such fact would not convert this accident into a crime, for he was not engaged in an unlawful act. A homicide by misadventure, under such circumstances, is not criminal. United States v. Meagher (C. C.) 37 Fed. 875. The case presented is, to my mind, such that if I were sitting with a jury on a trial of the case I should deem it my duty to instruct the jury to acquit the respondent.

That the United States may protect itself by bringing this proceeding through its judicial department is established by authority. It is only necessary to cite the matter of Fair, before referred to. Indeed, in view of the breadth of the statute, it should scarcely be necessary to cite authorities upon that proposition. In my opinion, the state authorities have acted prudently in bringing the matter to the attention of the civil tribunals, and thus affording this opportunity for a judicial determination of the prisoner's liability to prosecution.

Finding, as I do, upon this question of fact, that in firing the shot in question the prisoner was acting in the discharge of his duty as a soldier in the military service of the United States, and that accordingly the state authorities have no jurisdiction to try him for the homicide in question, it becomes my duty to order his release.

It is accordingly ordered that he be released from confinement, and that he be restored to the military service of the United States, according to the terms of his enlistment.

A. R. BARNES & CO. et al. v. BERRY et al.

(Circuit Court, S. D. Ohio, W. D. October 21, 1907.)

No. 6,295.

1. COURTS—FEDERAL COURTS—JURISDICTION—DIVERSE CITIZENSHIP.

Where a bill for an injunction in the federal court was sustainable only on the ground of diverse citizenship, and it failed to show that all the parties on one side of the controversy were entitled because of diverse citizenship to sue all the parties on the other side, it did not present a case of federal jurisdiction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 855.]

2. SAME—DISPENSABLE PARTIES—DISMISSAL.

Where a bill maintainable in the federal court only because of diverse citizenship did not show that all the parties on one side of the controversy were entitled by diverse citizenship to sue all the parties on the other side, but could be made sustainable if certain defendants of the same citizenship as some of the complainants were dismissed, and it did not appear that they were necessary parties, they not having entered their

appearance, the court was authorized by equity rule 47 to dismiss the case as to them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 863.]

3. PARTIES—REPRESENTATION.

Where a voluntary association of business concerns engaged in printing, known as the "Typothetæ," executed a contract with the representatives of the International Printing Pressmen and Assistants' Union, also a voluntary association, a suit to enforce such contract might be maintained, as provided by equity rule 48, by a few of the members of the Typothetæ in behalf of all the others against the executive officers of the union, or such members as fairly represented its interests.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Parties, §§ 12, 30.]

4. MONOPOLIES—LABOR CONDITIONS—"CLOSED SHOP."

A demand by laborers for a "closed shop," or that no person, not a member of their union, should be employed therein, was contrary to public policy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Monopolies, § 10.]

5. INJUNCTION—STRIKES.

Where the service of members of a trade union was neither special, extraordinary, nor unique, in the sense that it could not otherwise be supplied, and that its loss would cause irreparable injury, an injunction could not be granted to restrain the individual laborers from striking.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, §§ 117, 118.]

6. SAME—CONTRACT WITH TRADE UNIONS—ENFORCEMENT.

The officers of the International Printing Pressmen and Assistants' Union, desiring to obtain a closed shop and an eight-hour day, presented to the Typothetæ of America, a voluntary association of employing printers, a contract to this effect, which was rejected, and on January 8, 1907, a contract between the parties was ratified, which was a mere renewal of a previous contract and did not provide for a closed shop, but declared that within a reasonable time, to wit, after January 1, 1909, an eight-hour day should be granted. This contract, having been affirmed by both parties, was carried out for but a short time, when, owing to a change of officers of the union, a demand was made that the contract be modified so as to provide for an immediate eight-hour day and a closed shop, and to enforce this demand, which was denied, the officers incited the members of their various local unions to strike against their employers, who were various members of the Typothetæ. *Held*, to justify an injunction restraining the officers of the union from demanding a modification of the existing contract, from calling, instituting, or inciting strikes because of the refusal of the members of the Typothetæ to institute an eight-hour day and a closed shop, from arranging for a referendum vote of the employés on the subject of instituting strikes, and from paying strike benefits.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, §§ 117, 118.]

On Motion for an Injunction.

Charles B. Wilby, Henry Spalding, and Dudley Taylor, for complainants.

Kinkead, Rogers & Ellis, for defendants.

THOMPSON, District Judge (orally). This suit is brought to prevent the violation of a contract between two voluntary associations, the United Typothetæ of America and the International Printing Pressmen and Assistants' Union of North America. The complainants are

members and officers of the Typothetæ, suing "in their own behalf and as representatives of and in behalf of all other members" of the Typothetæ, against Berry, the president, William L. Murphy, John G. Warrington, and Peter J. Breen, the vice presidents, and Patrick J. McMullen, secretary and treasurer of the union, "and all other officers and agents" of the Union, "and of the local and subordinate branches and unions thereof." The members and officers of the Typothetæ, named, are citizens of states other than Ohio, and the president and the secretary and treasurer of the Union are citizens of Ohio, and the vice presidents are citizens of Montana, Missouri, and New York; but it is not shown by the bill who the other members, officers, and agents of the Union are, or of what state or states they are citizens. It is shown, however, that the complainants Theodore L. De Vinne & Co., Publishers' Printing Company, I. H. Blanchard & Co., William Green, and John Macintyre are citizens of New York, and that the complainant the Franklin Hudson Publishing Company is a citizen of Missouri. The bill therefore fails to show that all the parties on one side of the controversy have a right by diverse citizenship to sue all the parties on the other side, and thereby fails to bring the controversy within the jurisdiction of the court. But the complainants now move the court to dismiss the defendants Murphy, Warrington, and Green, upon the ground that they are not indispensable parties, and that it proceed in the cause without them, in conformity with the provisions of equity rules 47 and 48, and the question presented is whether these rules are applicable to this controversy.

In the opinion of the court these rules are applicable. The jurisdiction of the court depends upon the citizenship of the parties before the court, and not of those whom they may represent under rules 47 and 48. In Great Southern Fireproof Hotel Company v. Jones, 177 U. S. 449, 20 Sup. Ct. 690, 44 L. Ed. 482, the suit was brought by Benjamin F. Jones and George M. Laughlins, Henry A. Laughlins, Jr., and Benjamin F. Jones, Jr., as "members of a limited partnership association, doing business under the firm name and style of Jones & Laughlins, Limited, * * * which association is a citizen of the state of Pennsylvania." The citizenship of the members composing the partnership was not set forth in the bill. The court held that the partnership could not be a citizen, and that, as the citizenship of the partners was not shown, dismissed the bill, saying:

"We therefore adjudge that, as the bill does not make a case arising under the Constitution and laws of the United States, it was necessary to set out the citizenship of the individual members of the partnership association of Jones & Laughlins, Limited, which brought this suit."

Here the suit was not brought by the Typothetæ, but by a few of the members thereof, on behalf of themselves and the others, and their citizenship was set forth in the bill. The Typothetæ is composed of persons, partnerships, and corporations, and the Union of subordinate unions, and under rule 48 a few of the members of the Typothetæ may sue in behalf of all the others against such members of the Union as may fairly represent its interests. Its interests are fairly represented by its executive officers, the president and the secretary and treasurer,

and the only remaining question is whether, under rule 47, the three vice presidents, as parties, should be dismissed from the case. They are not within the jurisdiction of the court, they have not entered their appearance, they are not indispensable parties, and their voluntary appearance, if permitted, would oust the jurisdiction of the court, and the motion, therefore, to dismiss them from the case, will be sustained.

That brings us to the main question. The real parties in interest are the employers and the employés. They are the constituents of the two organizations. In their associated capacity they act through officers and agents selected by them. The contract in question was made by the constituent members of these associations, acting through their officers and agents. The employers now seek to enforce practically the specific performance of the contract by enjoining the officers and agents of the employés from: (1) Violating the contract by demanding a modification thereof whereby the "eight-hour day" and the "closed shop" may be instituted; (2) calling, instituting, or inciting strikes or otherwise hindering, interfering with, obstructing, or stopping the business of the employers because of their refusal to institute the "eight-hour day" and the "closed shop"; (3) arranging for a referendum vote of employés upon the subject of instituting strikes; (4) paying strike benefits.

The purpose of the contract or agreement is set forth in the first paragraph thereof, as follows:

"For the purpose of establishing between the employing printers of the United States and their pressmen and feeders uniform shop practices and fair scales of wages, settlement of all questions arising between them, and the abolition of strikes, sympathetic or otherwise, lockouts and boycotts."

It is charged in the bill that at a convention of the Union held at Pittsburg, in June, 1906, the board of directors of the Union were authorized and instructed to meet a committee of the Typothetæ and secure a renewal of the contract expiring May 1, 1907, which action of the directors should be final without ratification by the Union, and that the agreement of January 8, 1907 (Exhibit No. 2) so made by them is binding upon the Union and its constituents, without their ratification, although ratification thereof by the convention of the Typothetæ was necessary to make it effective. On the other hand, Berry, the president of the Union, by affidavit, sets forth a copy of the report of the "committee on officers' reports," based upon the recommendation by the president of the Union, and which was adopted by the convention, in which it is stated that:

"The committee are pleased to coincide with the recommendations of the board of directors, inasmuch as they are of such a nature that the committee have seen fit to indorse the plan of assessment as formulated by the board, and that we recommend that this convention declare in favor of the eight-hour day immediately after the expiration of the agreement now existing between the U. T. A. and the I. P. T. and A. U., provided it is not within the scope of possibilities of having same arranged amicably and equitably between the U. P. A. and I. P. T. and A. U., within a reasonable time after the expiration of the agreement now existing between these two respective organizations."

If there was a prospect that an arrangement could be made for the adoption of the "eight-hour day" within a reasonable time, they would

wait; otherwise, if there was no such reasonable prospect, then demand should be made for the immediate adoption of the "eight-hour day." The suggestion is that it was not the understanding of the parties that the time should be fixed as set forth in the agreement, but that a reasonable time was to be agreed upon, and that it was open for further consideration; that is, the suggestion conveyed by what I have just read, but in that connection I will read from the affidavit of Macintyre. He says:

"I have also examined 'The American Pressman' (volume 16, No. 10), issued at St. Louis, September, 1906, which purports to set forth the official proceedings of the 18th annual convention of the International Printing Pressmen and Assistants' Union, held at Pittsburgh, Pennsylvania, June 18–23, 1906. * * * I have also examined the same publication (volume 17, No. 10), issued September 20, 1907. * * * Said issue of September 20, 1907, of said publication, purports to cover the official proceedings of the 19th annual convention of the International Printing Pressmen and Assistants' Union of North America, held at Brighton Beach, N. Y., June 17–23, 1907. That on page 28 of said number there is set out under the heading 'Exhibit II' a form of agreement purporting to be an agreement between the said Union and said Typothetæ, which said agreement contained a provision for an eight-hour day beginning July 1, 1908. That at the end of said Exhibit II, on page 29 of said publication, the following note appears: 'The above agreement was gone over carefully by the Typothetæ committee, and after considerable discussion over its merits, as well as the eight-hour day, they flat-footedly refused to consider it. We then presented the old agreement of the past five years as the only solution of the matter, and after several hours of conference it was finally agreed to and adopted, as follows, marked as "Exhibit III" '—which follows said note on said page 29, and have compared it with complainants' Exhibit No. 2, attached to the bill for injunction, in support of which bill this affidavit is made, and I find that said agreements are identical; that is to say, the 'Exhibit III' is the same agreement as set forth in complainants' Exhibit No. 2, and is the same agreement referred to in said note in which it is said that 'It was finally agreed to and adopted.' That on the same page, and referring to the same agreement referred to as complainants' Exhibit No. 2, the following paragraphs appear:

'The above agreement is practically the old agreement of the past five years; the changes in it being in hours after January 1, 1909, with a method of forming a record as to complaints against either side should occasion warrant it.

'As stated in the first of this article, the board of directors had decided that they had by vote of the convention full power to renew the agreement. This goes without question, as the signatures of all five members of the board are attached to the Newspaper Publishers' Agreement; First Vice President Murphy refusing to sign the Typothetæ agreement for reasons of his own unknown to the writer, until the final agreement was drawn up and about to be signed, although he voted with the board as a unit in their Chicago meeting in presenting the old agreement to the Typothetæ as good enough for another five years. Seeing that the convention made no changes in it *other than eight hours within a reasonable time, he agreed to January 1, 1909, as a reasonable time.*' "

The italics are mine.

Now, it seems to have been a discussion as to what would be a reasonable time within which the "eight-hour day" should be adopted. The Union, of course, sought to have it established at once, and the Typothetæ would not agree to that. As a result of the conference—and it seems to have been earnestly urged—they finally agreed upon the provision that is contained in the contract of January, 1907 (Ex-

hibit No. 2 to this bill). So far as we are advised, the contract was duly made by the two associations, and its validity has not been questioned; but since its execution President Higgins, Vice President Gordon, and Secretary and Treasurer Webb have been succeeded by Berry as president, by Breen as vice president, and by McMullen as secretary and treasurer, and the new officers and directors have demanded that the contract be modified in the respect already mentioned, and, to enforce the demand, have, as alleged in the bill, incited strikes against members of the Typothetæ who have refused to accede to the modifications, and have threatened to pursue the same policy against all other members thereof who so refuse.,

The "closed shop" is contrary to public policy, and the demand for the immediate adoption of the "eight-hour day" is violative of the contract. Now, this is the situation as I see it. This contract was made. The old officers were succeeded by new ones, who were dissatisfied with it. They insisted upon a modification of it which would recognize the "closed shop" and adopt at once the "eight-hour day." The Typothetæ stood upon its contract rights and refused to make this concession, refused to change and modify the contract made, and it is alleged in the bill that in consequence thereof strikes have been declared against certain members of the Typothetæ in different parts of the country, and that strikes are threatened as against all members of the Typothetæ who may refuse to accede or consent to the modification of the contract as demanded. Practically the Union is insisting upon a new contract.

The service of the employés, members of the Union, is neither special, extraordinary, nor unique, in the sense that it could not otherwise be supplied, and that its loss would cause irreparable injury, and it is not sought to restrain them from quitting the service of their employers, but only that their officers, agents, and representatives be restrained from inciting them to strike, unless the contract be so modified as to make provision for the "eight-hour day" and "closed shop," and to make it effective at once. It is not a question, therefore, of whether the men who work shall be enjoined from striking, but it is a question whether the officers, agents, and representatives of these men, who represent the organization and control it, shall be permitted to incite the men to strike, to induce them to strike, and thereby repudiate the contract which was made by them through their agents at the January convention of 1907. The bill charges that the executive officers and directors have conspired to force the making of a new contract which will embody these two demands, and, in the event of the refusal of the Typothetæ to agree thereto, then to enforce these demands by strikes, and that they are using their position, power, and authority to control and induce the men to strike. That, in substance, is the allegation of the bill.

The court is not asked to make an order enjoining the men from striking, and, if it were asked, would refuse to grant it, because, as already stated, no case is made, nor can be made, in which the court would compel the men to labor. They cannot be made slaves. They cannot be compelled to work, and it is not sought by this bill to compel

them to work; but it is sought to prevent the officers of the organization from using their power and influence to induce the men to strike in violation of their contract.

It is plain that these officers have great influence and power with the body of men composing this association, and if they exercise it unlawfully—exercise it for the purpose of repudiating the contract—they may be restrained from exercising such power and influence, although the men themselves cannot be restrained from striking, or from walking out, at any time, and refusing to work. In a word, the proposition dealt with is this: May the officers of this organization, in violation of this contract, induce, influence, incite, or coerce the men into resorting to a strike to compel a modification of the contract? Shall they be permitted to do that?

Now, after having carefully read these pleadings, the affidavits, and the different exhibits, it seems to me plain that in January, 1907, a contract was completed between these two associations, after a contest over these very questions that are now raised, and it was believed by those representing the Union at that time that the best thing they could do would be to accept the proposition to make the "eight-hour day" operative in 1909. They felt compelled to accept that as a reasonable time. It was a question as to what would be a reasonable time, and from their point of view a reasonable time was at once. The other side sought to postpone it as long as possible, and finally a compromise was reached fixing 1909 as the time. When the new officers came in, they were dissatisfied with the action of the old board of directors and of the officers and with the convention. They thought that those men should have made a stronger fight. They felt that the Union had not been fairly treated; that if they had stood out as they should have done they could have shortened the time. They felt aggrieved. Then they made the demand that this contract, which had been made by the old board and officers, should be modified to meet their wishes, or that they would not abide by it.

I am compelled to dispose of this case upon what appears in the bill and the accompanying affidavits. There is no answer, and no affidavits on behalf of the defendants, except the ones I have read. I am now disposing of the application practically upon what is shown by this bill. It is shown by the bill that, being advised of this contract, they advised the men to repudiate it, to demand that the "eight-hour day" be made operative at once, and also the "closed shop," and to enforce the demand they threatened strikes, and it is alleged that strikes have been entered upon in Chicago, and other places throughout the country, and that a strike will be instituted against every member of the Typothetæ unless it consents to this modification of the contract.

Now, so far as the men are concerned, if they take it into their own hands, they may walk out, but this court is asked to stay the hands of the officers who manage and control this organization, who have power to influence, to incite, to put on foot these strikes, who have all the machinery in their hands, and who seek to use it to induce and incite these men to violate a contract that was fairly made.

I am of the opinion, therefore, that a case is made requiring that

these officers, named, be enjoined, in the respects prayed in the bill, from exercising their power, their control, and their influence to induce strikes for that purpose.

SABRE v. UNITED TRACTION & ELECTRIC CO. et al.

(Circuit Court, D. Rhode Island. September 10, 1907.)

No. 2,694.

1. CORPORATIONS—ACTIONS BY STOCKHOLDER AGAINST CORPORATION—PARTIES.
   To a suit by a stockholder of a holding corporation which holds all of the stock of certain street railway companies against such holding company for relief against its action in leasing the property of the street railway companies, and in taking other action alleged to have been without authority, and to have deprived complainant of his right to share ratably with other stockholders the entire net earnings of the street railway companies, the latter companies are not necessary parties; no question of their internal management being involved.

   [Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 719.]

2. SAME—SUIT BY STOCKHOLDER—JURISDICTION.
   Such a suit is not one relating to the internal management of the defendant corporation which can only be brought in the state of its incorporation, but is one to protect the individual rights of complainant, and may be maintained in any court having jurisdiction over the defendant.

3. EQUITY—PLEADING—DEFENSE OF LACHES.
   Where a suit in equity is brought within the time fixed by the analogous statute of limitations, the bill is not demurrable for laches because of delay alone, but such defense, if not apparent on the face of the bill from other circumstances than such delay, must be made by answer setting up other facts which make the doctrine of laches applicable.

   [Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 498.]

4. SAME—RIGHT OF ACTION—FORM OF RELIEF.
   A complainant is not debarred from all relief in equity against a voidable transaction by which others besides himself are affected, and in which they have acquiesced because he does not seek to have such transaction avoided as to them, but asks only equitable compensation for the injury resulting to himself.

In Equity. On demurrer to bill.

Gardner, Pirce & Thornley, Rathbone Gardner, and Lewis A. Waterman, for complainant.

Edwards & Angell and Walter F. Angell, for defendants.

BROWN, District Judge. The bill alleges that the complainant is a stockholder of the United Traction & Electric Company, a New Jersey corporation, which owned and held all the shares of capital stock of the following street railway corporations of Rhode Island: Union Railroad Company, Pawtucket Street Railway Company, and Providence Cable Tramway Company, and of other similar corporations—that said United Traction & Electric Company up to June 24, 1902, was entitled to receive and did receive all the earnings and profits of each and all of said corporations over and above the expense of op-

erating and maintaining the same, by way of dividends upon the capital stock of said corporation; and that moneys so received were applicable to the payment of dividends upon the capital stock of the United Traction & Electric Company. On the defendants' brief, this company is described as a mere holding company, having no property in the state of Rhode Island and deriving no powers from the Legislature of this state.

On or about April 3, 1902, the General Assembly of Rhode Island incorporated the Rhode Island Company, which was given authority to acquire, by lease, purchase, or otherwise, the property of any gas companies, electric lighting companies, and street railway companies incorporated under the laws of Rhode Island. On or about June 24, 1902, the United Traction & Electric Company, as the owner and holder of all the capital stock of the various street railway companies, voted that each of said street railway corporations should lease to the Rhode Island Company for a period of not less than 99 years all its property, rights, and franchises, upon the terms that the Rhode Island Company as lessee should pay a sum sufficient to enable the United Traction & Electric Company to pay to its stockholders dividends at the rate of 5 per cent. per annum, and should guarantee the payment of dividends at said rate to stockholders of said United Traction & Electric Company.

The bill avers, upon information and belief, that the action of the United Traction & Electric Company, in voting to make said lease, "was either without authority, or was solely by the pretended author ity of the board of directors of said United Traction & Electric Company, and that the stockholders of said United Tractior & Electric Company were not notified of said proposed action, and had no opportunity to vote upon the same"; that the Rhode Island Company as lessee has since received all the net profits and earnings of said Rhode Island street railway corporations over and above the amount of rental reserved by such lease. It further alleges: The incorporation under the laws of the state of New Jersey on or about May 21, 1902, of a corporation by the name of the Rhode Island Securities Company, authorized by its charter to acquire, hold, and dispose of any or all of the capital stock of other corporations. That said Rhode Island Securities Company has acquired and holds all the shares of capital stock of the Rhode Island Company—

"and, as the holder of such stock, claims the right to receive and does receive all the net earnings of said Rhode Island Company, and that said Rhode Island Securities Company has and owns no other assets whatever."

"That either by virtue of said lease or leases or by the action of the respective boards of directors of the said United Traction & Electric Company and said Rhode Island Securities Company, each stockholder in said United Traction & Electric Company was offered one share of the capital stock of the Rhode Island Securities Company for every four shares of the capital stock of the United Traction & Electric Company held by such stockholder, * * * that all the stockholders of the United Traction & Electric Company, other than himself, have accepted the shares of said Rhode Island Securities Company allotted to them as in this paragraph set out."

For the purposes of the demurrer, we may assume that all the stockholders of the United Traction & Electric Company other than the

complainant have assented to the arrangement which the complainant contends is an infringement of his right as a stockholder of the United Traction & Electric Company.

The complainant avers that as a stockholder of the United Traction & Electric Company he is justly entitled to his proportionate share of the entire net earnings of the Rhode Island street railway corporations whose stock is held by said United Traction & Electric Company, and that by the lease of the properties of the Rhode Island corporations to the Rhode Island Company he is limited practically for all time to an annual dividend of 5 per cent. upon the par value of his said stock, and that the value of his stock has been thereby greatly diminished.

The bill differs from the ordinary stockholder's bill, in that it contains no specific allegations of fraud or conspiracy. It is apparently based upon the theory that the transfer to the Rhode Island Company was unlawful and unauthorized, and that he is entitled to equitable relief in consequence of the depreciation of the value of his stock by acts which were without authority, and legally null and void. He prays for discovery as to the terms and details of the transactions between the United Traction & Electric Company and the Rhode Island Company, and that the defendants "may account to the plaintiff for the value of his said stock in the United Traction & Electric Company, and, upon an accounting, may be decreed to pay to the plaintiff the full and fair value of his said four hundred shares of said stock as shown by such accounting, or, in lieu thereof, to issue to the plaintiff the same proportional part of all the stock of said Rhode Island Securities Company that your orator holds in the stock of the United Traction & Electric Company," and for further relief.

The bill contains other material allegations, but the nature of the principal questions may, perhaps, be understood from the foregoing statement. While it is true that the bill is in some respects indefinite, it seems sufficient to apprise the defendants of the nature of the claim when read with a fair degree of liberality. See Swift & Co. v. United States, 196 U. S. 375, 395, 25 Sup. Ct. 276, 49 L. Ed. 518.

The first and second assigned causes of demurrer raise the question whether the Union Railroad Company, the Pawtucket Street Railway Company, the Providence Cable Tramway Company, and the Rhode Island Company, all Rhode Island corporations, are indispensable parties. If so, and if any of said Rhode Island corporations should be joined as parties defendant, it is contended that this court would be without jurisdiction, since citizens of the state of Rhode Island would be complainant and defendants.

It is conceded by the defendants that both of the defendant corporations are mere holding companies. Their shares represent rights to the earnings of the various Rhode Island corporations and to control of the corporate action of those corporations. That these Rhode Island street railway corporations, all of whose shares are held or voted by holding companies, and whose corporate action is merely in obedience to the action of holding companies, have such independent existence as to render them indispensable parties, is doubtful. Viewing

the bill as relating principally to transactions between holding companies, it does not at present seem essential that these Rhode Island corporations be made active parties in this litigation. The present controversy apparently does not in substance relate to the internal management of the street railway corporations, but rather to the disposition of their earnings, and to the right of holding companies to exercise an external control. Unless the theory upon which these holding companies have proceeded should be regarded as unsound, we may dispense with parties whose independent rights may not be substantially affected by this litigation.

The third cause of demurrer is that the bill relates solely to the management of the internal affairs of foreign corporations, and to the relations of the complainant with said corporations as a stockholder therein. This does not seem to me to be well grounded. The complainant is proceeding solely for the protection of his individual rights. The bill shows that he is the only nonassenting stockholder of the United Traction & Electric Company, and, in substance, alleges that the securities company has gained possession of assets which legally and equitably belong to him. His rights against the securities company could not be worked out through an appeal by him, a stockholder in the United Traction & Electric Company, to the Rhode Island Securities Company, in which he is not a stockholder, since he has refused to accept stock of the latter company; and, in face of the assent of all other stockholders of the United Traction & Electric Company, he could hardly obtain relief by an appeal to them or to officers elected by them.

The fourth cause of demurrer is for laches. The bill was filed on May 14, 1906. The transactions complained of were on or about June 24, 1902. There are no allegations of ignorance or excuses for delay. The period of time which has elapsed is nearly 3 years and 11 months. This period is within the statute of limitations; and, when this is the fact, it is held by good authority that the bill is not demurrable in the absence of other circumstances than mere delay, but the defense of laches must be set up in the answer.

In Kelley et al. v. Boettcher et al., 85 Fed. 55, 62, 29 C. C. A. 14, 21, it was said by the Circuit Court of Appeals for the Eighth Circuit:

"When a suit is brought within the time fixed by the analogous statute, the burden is on the defendant to show, either from the face of the bill or by his answer, that extraordinary circumstances exist which require the application of the doctrine of laches; and, when such a suit is brought after the statutory time has elapsed, the burden is on the complainant to show, by suitable averments in his bill, that it would be inequitable to apply it to his case."

See, also, Boynton v. Haggart, 120 Fed. 819, 57 C. C. A. 301.

While it is true that "courts of equity often treat a lapse of time, less than that prescribed by the statute of limitations, as a presumptive bar, on the ground 'of discouraging stale claims, or gross laches, or unexplained acquiescence in the assertion of an adverse right'" (see Hayward v. National Bank, 96 U. S. 611, 617, 24 L. Ed. 855; Harwood v. Railroad Company, 17 Wall. 79, 21 L. Ed. 558), I am of the opinion that it is not clear, upon the face of the bill, that the com-

plainant's delay disentitles him to any form of relief, and the question of laches may be reserved for answer.

The fifth cause of demurrer is for lack of equity. The questions of law which arise upon the allegations of the bill are numerous, and I am of the opinion that this is a proper case for overruling the fifth cause of demurrer, with liberty to the defendants to insist upon the same defense by answer. See Kansas v. Colorado, 185 U. S. 125, 144, 22 Sup. Ct. 552, 46 L. Ed. 838. The question of the right of this complainant to set aside entirely the various transactions as null and void, and of his right to obtain for himself some form of compensation with the least possible disturbance of existing arrangements, are quite distinct. The complainant's failure to attempt to set aside completely transactions to which so many have agreed is not necessarily a reason for denying all relief. A court of equity does not feel itself bound to a rigid application of a rule that an invalid conveyance must be altogether set aside in order to give proper relief to one who has suffered thereby. Equitable relief may at times be worked out more efficiently by allowing a voidable transaction to stand, upon condition that equitable compensation be made, than by avoiding it absolutely. Jones v. Missouri-Edison Electric Co., 144 Fed. 765, 75 C. C. A. 631; Southern Pacific v. United States (No. 1) 200 U. S. 341, 26 Sup. Ct. 296, 50 L. Ed. 507.

Demurrer overruled.

In re TOLEDO PORTLAND CEMENT CO.

(District Court, E. D. Michigan, S. D. March 8, 1907.)

No. 1,127.

1. BANKRUPTCY—CORPORATIONS SUBJECT TO ADJUDICATION—"ENGAGED IN MANUFACTURING."

In the phrase "engaged in manufacturing," as used in Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423], the word "engaged" means occupied, employed, busy, and the word "manufacturing" means the making of an article, either by hand or machinery, into a new form capable of being used in ordinary life, or the fashioning of raw materials into a change of form for use; and a corporation which, although authorized to manufacture an article of commerce, has not the means for such manufacture, and has taken no step in the process of manufacturing, is not engaged in any proper sense in the manufacturing of such article, and is not subject to adjudication as an involuntary bankrupt under said section.

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

2. SAME.

A corporation incorporated for the sole purpose of making and selling cement, which has not completed its buildings nor its railroad from them to the marl beds from which it was to obtain its materials, nor in fact acquired all of the right of way therefor, and which has taken no step in the process of manufacture, is not subject to involuntary proceedings in bankruptcy, under Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423], as a corporation engaged in manufacturing.

In Bankruptcy. On exceptions to findings of referee.

H. E. Bodman, George D. Welles, H. A. Conlin, and King & Tracy, for petitioners.

A. F. & F. M. Freeman and A. J. Waters, for respondent.

SWAN, District Judge. An involuntary petition was filed in the above-entitled cause against respondent, a Michigan corporation, praying that an adjudication of bankruptcy be entered against it for the matters charged in the petition. The referee has returned his findings of fact and law, which need not be here repeated at length. The referee held, upon the authority of In re White Mountain Paper Company, 127 Fed. 180, 11 Am. Bankr. Rep. 491, and White Mountain Paper Co. v. Morse, 11 Am. Bankr. Rep. 633, 127 Fed. 643, 62 C. C. A. 369, that the respondent was engaged in manufacturing, and therefore amenable to the bankrupt act.

Upon the facts found by him and recited in his report I cannot agree with his conclusion of law that the corporation came within the provisions of Bankr. Act July 1, 1898, c. 541, § 4, subd. "b," 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423]. The opinion in the case first cited, notably that in the Circuit Court of Appeals in the Second Circuit, is by Judge Putnam, and is expressly predicated upon the facts of that case, in which the corporation proceeded against had taken the first step in the business of manufacturing and was proceeding in that business with a view to the ulterior steps necessary to complete the product which it was its purpose to manufacture; in other words, it had stepped into the domain of manufacturing. In this case the referee finds expressly that the buildings are uncompleted, right of way was not all obtained, no manufacturing has ever been done, the railroad was never completed from the factory to the marl beds, and, in fact, a portion of the right of way was never acquired. The case at bar differs widely in its facts from that upon which the referee relied. In the latter case the company's defense to the petition for bankruptcy was that, inasmuch as it had not commenced in its mill the production of either pulp or paper or any other article named in its charter, it was not, at the time the petition was filed against it, engaged at all in manufacturing. This proposition was overruled by the court, which found that the getting out of the required lengths of lumber for use in the manufacture of pulp, with a design to manufacturing them, was manufacturing, though in its earlier stage. The court, protesting that this proposition "was a narrow aspect, to which we are not limited," says:

> "The question is a question purely of fact, * * * so that we are bound to hold that on any fair construction of the statute, and in every application of the facts as applied thereto, the corporation was not principally, but wholly, engaged in manufacturing, although in the earlier stages of it. * * * We may well further state that the circumstances of the proceeding before us, as applied to the statute we are considering, are so very peculiar that no precedent cited fits properly into it, or can be expected to do so. The view we take of this proceeding resolves it mainly into questions of fact. * * *"

This question of fact is not in this case, and is negatived expressly by the referee in his finding of fact. The respondent here was incorporated to make and sell but one product—cement. The power to manufacture implies of necessity the power to sell, or there would be

no object for incorporating it for the production of cement. Upon this record it is clear that it was not engaged in mercantile pursuits, for it never produced cement, nor ever sold any. While it was organized to make and sell that product, it had never become industrially or commercially active. Financial embarrassment arrested the progress of the works necessary to enable it to exercise its corporate franchise for the manufacture and sale of cement, and the enterprise has ever since remained dormant. Nearly two years after respondent came into this condition this petition in bankruptcy was filed, which alleges that the respondent is engaged in manufacturing pursuits. The truth of this allegation is the hinge of jurisdiction of the court of bankruptcy. Can it be said, upon these facts, which are not controverted, that respondent is within the letter or spirit of the bankrupt act?

As held in United States Hotel Company v. Niles, 134 Fed. 225, 67 C. C. A. 153, 68 L. R. A. 588, 13 Am. Bankr. Rep. 403, and In re Surety, Guaranty & Trust Company, 121 Fed. 73, 56 C. C. A. 654, 9 Am. Bankr. Rep. 129, the present bankruptcy act is more restrictive than that of 1867, which applied to all moneyed interests or commercial corporations. The language of the present act descriptive of the corporations amenable to involuntary proceedings is specific. It means that the corporation's business must not only be that of one or more of the classes designated, but it must be "engaged in" such business, or, if carrying on more than one business, it must be "principally engaged" in one at least of the commercial or industrial pursuits designated in section 4b. Can a corporation having the authority, but not the means, to manufacture an article of commerce, which has taken no step in the process of manufacturing, be properly said to be engaged in "manufacturing" that article? "Engaged" means, in that connection:

"Occupied, employed, busy. * * *" Webster.

"(1) To busy oneself; (2) to be occupied or devoted; (3) to take part, as to engage in trade; (4) employ the time of. * * *" Standard Dictionary.

See State ex rel. Dawson, 39 Ala. 383; In re Ralph's Trade-Mark, 25 Ch. Div. 194.

A corporation in that stage of its existence cannot be truthfully said to have a manufacturing business, pursuit, or employment. The erection of buildings necessary to the exercise of its authorized powers is neither a manufacturing, trading, printing, publishing, mining, or mercantile pursuit. "In the more modern idea attached to the word [manufacture], it is making an article either by hand or machinery into a new form, capable of being used and designed to be used in ordinary life." Lawrence v. Allen, 7 How. 794, 12 L. Ed. 914. In Kidd v. Pearson, 128 U. S. 20, 9 Sup. Ct. 10, 32 L. Ed. 346, it is said:

"Manufacture is transformation; the fashioning of raw materials into a change of form for use."

The internal revenue law abounds with provisions fixing the tax to be paid by those who carry on business as dealers of liquor, tobacco, cigars, or manufacture and deal in oleomargarine and other commodities, and imposing penalties for nonpayment of the tax. The language of these statutes defining the persons taxable is equivalent to that here under discussion, and the taxes and penalties for their nonpayment are

predicated expressly on activity in the particular industry, manufacture, or business upon which the tax is imposed.

The argument for petitioners is practically that the word "engaged" is used as a synonyn for organized or incorporated. This ignores the rules of statutory construction. The ordinary and natural meaning of words in a statute is to be adopted, unless the context indicates or it otherwise appears that they are to have a technical meaning, or that another construction is required to avoid injustice or absurdity. The cardinal rule of interpretation is that, when the language of the statute is clear, it is not open to construction, and that effect must be given to every word of the statute if it can be done without violating the intention of the Legislature. Market Company v. Hoffman, 101 U. S. 115–119, 25 L. Ed. 782.

In Columbia Iron Works v. National Lead Co., 127 Fed. 99, 62 C. C. A. 99, 64 L. R. A. 645, respondent denied that it was a corporation engaged principally in manufacturing. Discussing this contention, Judge Severens said (page 101 of 127 Fed., 62 C. C. A. 99, 64 L. R. A. 645):

"No doubt the question is to be determined upon the consideration of what the corporation actually does, rather than what it is authorized by its charter to do."

In United States Hotel Company v. Niles, 134 Fed. 228, 67 C. C. A. 153, 68 L. R. A. 588, Judge Lurton says:

"The Congress has not seen fit to define the occupations which are meant to be included under the description of corporations 'engaged principally in trading.' That its principal business shall be trading is required; for if trading be a minor object, wholly incidental to some greater purpose, it is not then embraced among the corporations subject to the law."

As it is undisputed that the respondent never made or sold a pound of cement, how can it be said to be or to have been at any time subject to be proceeded against in bankruptcy?

In Re New York & W. Water Company (D. C.) 98 Fed. 711–714, District Judge Brown said:

"No doubt the powers of a corporation are to be determined by its charter and by the statutes applicable to it. The amendment of the charter of this corporation authorized it to buy, sell, use, and deal in water for power, manufacturing, and hydraulic purposes. As above stated, however, the evidence is that it did not furnish water for these purposes; and under the bankrupt act the question is, not how extensive the company's powers may be, but in what pursuits the corporation is in fact principally engaged, and whether these pursuits are principally trading or mercantile."

With like reason it may be well said that a company may be organized for manufacturing and selling certain products, but neither its organization nor powers make it subject to proceedings in bankruptcy unless it can be truly said, under the construction of this statute, that the word "engaged" has no significance whatever, but that the decisive fact in determining the liability of such a corporation to involuntary bankruptcy is the purpose for which it was incorporated. If the business in which it was proposed to engage in was authorized by its charter, it would follow from this reasoning that any of the corporations designated as amenable to bankruptcy proceedings might be proceed-

ed against upon its organization, and is engaged in manufacturing business when it purchases land preparatory to the construction of its works. It seems clear that if Congress meant to make corporations incorporated for the conduct of any of the lines of business mentioned in section 4 of the act subject to adjudication as involuntary bankrupts, before they began the business for which they were created, the most natural expression of that intent would have been the phrase "incorporated for," or "organized for manufacturing or mercantile pursuits." Either would have demonstrated an unmistakable purpose to bring them within the scope of the act immediately upon incorporation or organization. It is said in Murphy v. Utter, 186 U. S. 111, 22 Sup. Ct. 782, 46 L. Ed. 1070:

"Every word or clause used in a statute is presumed to have a meaning of its own independent of other clauses. * * *"

If the contention of the petitioners can be maintained under the first clause of section 4, one who has bought or leased a farm with the ulterior purpose of farming, but who is not engaged either personally or by his employés in that vocation, is a person "engaged" chiefly in farming or tillage of the soil. The contrary is held in Re Matson (D. C.) 123 Fed. 743.

In Tiffany v. La Plume Condensed Milk Co. (D. C.) 141 Fed. 448, Judge Archbald held that:

"The liability of a person, whether natural or artificial, to bankruptcy, is to be judged by the character of the pursuit in which such person was engaged at the time the debts due the petitioning creditors were incurred, with respect to which it may be conceded that as to a corporation its actual business is to be considered, and not that which it might have possibly undertaken by virtue of any authorized power."

It is evident that a contrary construction would subject a corporation of either of the classes mentioned in section 4 to bankruptcy proceedings, although it had not yet commenced the building of its plant, but had borrowed money for that purpose.

In Warren v. Shook, 91 U. S., 711, 23 L. Ed. 421, the court, construing section 90 of the internal revenue act of 1864, as amended (13 Stat. 252, c. 173), which imposed a tax on "all brokers and bankers doing business as brokers," held that it was intended to compass the entire class of persons engaged in the business of buying and selling stocks and coin and (top page 711 of 91 U. S. [23 L. Ed. 421]):

"It is only when making sales and purchases in his business, his trade, his profession, his means of getting his living or of making his fortune, that he becomes a broker within the meaning of the statute."

By a parity of reasoning it would seem that until a corporation of the classes described has become a factor in the activities of the commercial or industrial world for the purpose of its organization, it is not engaged in manufacturing, trading, or other pursuits. For these reasons I am constrained to overrule the finding of fact and law of the referee which sustains the jurisdiction of the court of bankruptcy over the respondent in this case.

The finding of the referee (17 Am. Bankr. Rep. 375) is reversed, and the petition is dismissed, with costs against petitioners.

TWEEDIE TRADING CO. v. PITCH PINE LUMBER CO.

(District Court, S. D. New York. October 1, 1907.)

1. SHIPPING—CONTRACT OF AFFREIGHTMENT—COMMENCEMENT OF LAY DAYS FOR DISCHARGING—"ARRIVAL" OF VESSEL.

Under a clause in a bill of lading which entitles the ship to "commence discharging immediately upon arrival," her "arrival" dates from the time she actually reaches a berth where she can unload, provided there has been no delay on the part of the consignee in providing such berth, and the lay days for discharging commence to run from that time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, § 592.]

2. SAME—DISCHARGING "CONTINUOUSLY"—"WORKING DAYS" DEFINED.

In a provision of a bill of lading which entitles the ship to discharge "continuously," the word must be construed to mean continuously during working days, and "working days" exclude Sundays and holidays usually observed, and include only the usual working hours of days on which usual work is only prevented by weather.

In Admiralty. On exceptions by both parties to commissioner's report on reference pursuant to decision reported in 146 Fed. 612.

Mr. Haight, for libelant.

Mr. Burlingham, for respondent.

HOUGH, District Judge. Of some of the arguments at bar, it is enough to say that the interlocutory decree entitles libelant to some demurrage, assessable against respondent as for a breach by it of the contract of carriage and of section 9 of the bill of lading (both set forth at length in the decision on the merits).

The exceptions filed, and the language of the instruments referred to, require consideration of two legal queries: (1) When does the laying time begin of a ship entitled "to commence discharging immediately upon arrival"? And (2) how is the laying time to be computed if the ship be entitled to "discharge continuously * * * any custom of the port to the contrary notwithstanding," and if the consignee is bound to receive cargo "as fast as steamer can deliver * * * working all hatches at once"?

The conduct of parties to a contract, contemporary with the execution or breach thereof, frequently waives some strict legal right or furnishes a rule of construction of the parties' own creation, and as binding upon them as any part of the contract itself. Perhaps this result occurs more frequently in contracts relating to shipping than in any other department of the law. But the testimony in this case is so fragmentary and unsatisfactory that in my opinion it offers no assistance in the construction of a somewhat unusual agreement.

1. "Arrival" must mean arrival at a place where discharge is possible. A loaded ship has not arrived at her destination in respect of the discharge of her cargo until she is where the work of unloading may be actually begun. Charterers and consignees frequently incur liability before that time, by neglecting or refusing to give the ship an opportunity to unload; but ordinarily the ship must first give formal notice of her readiness to proceed to an appropriate unloading place, and must actually go there when duly assigned, before her laying time

begins. And the burden of proving compliance with these requirements is on the ship. There is here no proof at all regarding notice by ship to consignee; but, as the vessel did go to a berth selected by consignees, it is inferable that before so doing notice was either given and acted upon or waived. The evidence warrants no more definite finding. Nor is there any evidence of delay caused by consignees in getting to a discharging berth, and it therefore results that September 5, 1905, at 8 a. m. (that being the day and hour when the Sangstad got to her berth), marks the moment after which she was entitled to discharge in compliance with the contracts first above referred to.

2. I know of no litigation arising out of an unloading clause providing for continuous discharge except Maclay v. Spillers, 6 Com. Cases, 217. The discussion there reported is not serviceable here; but the facts seem to me to show that it occurred neither to court nor counsel that "continuously" meant every hour of the 24 and every day of the week. Yet to that extent must the argument go if the word is to be taken literally. In my opinion the phrase must be interpreted with a reasonable regard for human weakness and human habits of alternating rest and work. This method of construction was adopted in Forest Steamship Co. v. Iberian Iron Ore Co., 5 Com. Cas. 83, regarding the singular phrase "working day of twenty-four hours." In like manner, the phrase "running days" was denied the meaning of consecutive days in Nielsen v. Wait, 16 Q. B. D. 77, while "forthwith" has been held to mean no more than without unreasonable delay. Hudson v. Hill, 43 L. J. C. P. 273. (Cf. Forest Oak Steam Shipping Co. v. Richard, 5 Com. Cases, 100, as to the meaning of the charter party words "proceed immediately.") I do not think there is any tenable ground between the literal (and impossible) meaning of the contract and holding that this vessel was entitled to discharge "continuously" during working days, and I therefore so hold. Clearly "working days" exclude Sundays, and holidays usually observed, and include days on which usual work is only prevented by weather (Sorensen v. Keyser, 52 Fed. 163, 2 C. C. A. 650; Holman v. Peruvian Nitrate Co., 5 Sess. Cas. [4th Ser.] 657); and a holiday is one created by general acceptance and observance, to which dignity it may arrive without the aid of statute law, e. g., the Welsh Eisteddfod (Deniston & Co. v. Zimmerman, 11 L. T. R. 113).

Before these legal rules can be applied to the case at bar, the question of fact must be settled: How much lumber was the Sangstad entitled to discharge per working day with the work proceeding "as fast as she could deliver * * * working all hatches at once"? To this point the evidence submitted has been directed, and in my opinion it is nearly all guesswork. The estimates range from 200,000 feet per diem to more than twice that amount, and the direct evidence regarding one extreme is as untrustworthy as that regarding the other. I think the matter is controlled by a few facts concerning which there is no contradiction. It is admitted that there was delay at Buenos Ayres in unloading this cargo; the fact of that delay was observed and reported by the libelant's agents in that port; it is to be presumed that they were quite as well informed regarding the steamship's rights and possibilities as the court can be at the distance of so many months

and miles; and these agents fixed the rate of desired discharge at 200,000 feet per Buenos Ayres working day.

The action of these agents is, of course, not conclusive upon the libelant, but all the testimony does not disturb the presumption of fact that these men, interested to get as much demurrage as they could, were right in fixing that amount. I accordingly hold that the Sangstad was entitled to discharge at the rate of not less than 200,000 feet per working day of eight hours, and that the only permissible interruptions were Sundays and holidays, and not rainy days.

There will be filed with this opinion a computation based upon it. Unless error therein is discovered, a final decree will be entered in accordance therewith, and the commissioner's report modified accordingly.

STEVENS v. OSCAR HOLWAY CO.

SAME v. DOTEN GRAIN CO.

(District Court, D. Maine. September 7, 1907.)

Nos. 53, 54.

BANKRUPTCY—VOIDABLE PREFERENCES—PAYMENTS TO CREDITORS.

Evidence considered, and *held* to show that a bankrupt at the time he made payments to two creditors within four months prior to his bankruptcy knew himself to be hopelessly insolvent and intended such payments as preferences; that, when the first of such payments was made, the creditor receiving it did not have knowledge of the insolvency, nor reasonable cause to believe that a preference was intended, so as to render it voidable under Bankr. Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], as amended February 5, 1903 (32 Stat. 799, c. 487 [U. S. Comp. St. Supp. 1905, p. 689]), but that as to all subsequent payments which were made after the debtor had repeatedly made defaults and given checks, which were protested, both creditors were put upon inquiry, which, if made, would have disclosed the insolvency, and had reasonable cause to believe that preferences were intended.

In Equity. Suits by trustee in bankruptcy to recover preferences.

Robert T. Whitehouse, for Stevens, trustee.

Geo. C. Wing, for Oscar Holway Co.

Foster & Foster and Chas. A. Strout, for Doten Grain Co.

HALE, District Judge. Each of the above causes in equity is heard upon bill, answer, replication, and proofs. By agreement of counsel, the two cases are tried and argued together. In both cases the trustee seeks to recover, for the benefit of creditors, certain payments made by the bankrupt to the several respondents, within four months next preceding the filing of a petition in bankruptcy against him, on the ground that the payments were voidable preferences. The answers of the respondents admit the bankruptcy of the debtor and the receipt of the various payments on the dates alleged; but deny the insolvency of the debtor at the dates of the several payments, his knowledge of his insolvency, his intent to prefer, and that the respondents had any knowledge of the bankrupt's insolvency, or had reasonable cause to believe that he intended a preference by the payments.

Sections 60a and 60b of the bankruptcy act of July 1, 1898 (30 Stat. 562, c. 541 [U. S. Comp. St. 1901, p. 3445]), as amended February

5, 1903 (32 Stat. 799, c. 487 [U. S. Comp. St. Supp. 1905, p. 689]), provide that:

(a) "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, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. 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. And, for the purpose of such recovery, any court of bankruptcy, as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

The payments in question were as follows: A payment of $688.19, made to the Doten Grain Company on February 20, 1906, and $330 paid to the same respondent company on May 5, 1906; and the following payments made to the respondent, the Oscar Holway Company: $176 on April 12, 1906, $150 on April 13th, $135.02 on April 14th, and $43.02 on April 25th. It is admitted that all these payments were made within four months before the filing of the petition in bankruptcy.

1. The testimony shows that, at the time when all of the above payments were made, the debtor, William W. Blanchard, was insolvent, within the meaning of section 1, par. 15, of the bankruptcy act, which provides that:

"A person shall be deemed insolvent within the provisions of this 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."

The testimony of the trustee establishes the fact that on February 20, 1906, the liabilities of the debtor were about $11,333, and that his assets amounted to $3,491, exclusive of the mill, which was mortgaged to its full value, and that there was therefore an excess of $8,844 of liabilities over assets, that on April 12th the total liabilities of the debtor were $13,385, and that his assets were about $3,000, showing a total excess of more than $10,000 liabilities over assets. On May 5, 1906, the liabilities, shown by the claims proven, were $12,220; and this sum is exclusive of $250 of unproved claims listed by the debtor as justly due. On May 9th a voluntary assignment was made at common law, and the inventory of the common-law assignee shows that the assets were about $3,000, leaving an excess of over $9,000 of liabilities at that time.

2. The testimony in the record shows that the effect of the enforcement of the several payments or transfers would be to enable the respondent creditors to obtain a greater percentage of their debts than any other of the creditors of the same class.

3. Did the debtor, knowing that he was insolvent, intend a preference by the said several payments?

In his testimony the bankrupt testified that he was insolvent, and that he knew he was insolvent, during the period of time covered by said payments. But the respondents contend that there is not sufficient evidence to prove that when he made the said several payments, or any of them, the bankrupt intended to create a preference to either of the several creditors.

Before discussing the several payments in detail, it is necessary to consider the law with reference to a bankrupt's intention to make a preference. In the Andrews Case, 144 Fed. 922, 75 C. C. A. 562, it was held by the Circuit Court of Appeals in this circuit that the intention to prefer must be an actual intent, and not an attributed one, and that it cannot be presumed from the fact alone that the debtor knew he was insolvent when he made the payment of a pre-existing debt. In speaking for the Court of Appeals, Judge Putnam said:

"It is true that the ordinary rule that a person who does an act is supposed to contemplate what results therefrom applies to cases of this class, but only as an element, and it cannot apply even as an element, unless the party who does the act has a knowledge of the essential facts which tend to produce the resulting consequences, or at least has a reasonable cause to believe them, or purposely shuts his eyes."

In the case at bar the testimony convinces me that, at the time when all the several payments were made, the bankrupt knew he was insolvent; that he knew the great excess of his liabilities over his assets; that his property was fully mortgaged; that his paper was long overdue; and that his creditors were "declining to wait any longer." The testimony is not so clear with reference to his intention to prefer when he made the payment of February 20, 1906, as when he made the subsequent payments; but, even when he made the earliest payment, I must conclude that he knew he was "hopelessly insolvent," and that he did, as a matter of fact, intend a preference in making such payment. And, in respect to the latter payments, the testimony does not leave room for the slightest question upon this point. I have no hesitation, then, in coming to the conclusion that, at the time when he made each one of the several payments, he, in the language of Judge Putnam, "had knowledge of the essential facts which tend to produce the resulting consequences."

I conclude in respect to each one of the several payments that the debtor, knowing he was insolvent, intended a preference.

4. It now becomes my duty to inquire, in respect to the several payments, whether or not each one of them was made by the debtor with the knowledge on the part of the creditor, or with a reasonable cause to believe, that it was intended thereby to give a preference.

Each payment presents a question of fact for the court to pass upon. The law is clear and undisputed. In the case of each payment, in order to sustain the complainant's allegation upon this point, he must show that, at the time the payment was made, the creditor had reasonable cause to believe the debtor to be insolvent. If facts in respect to the debtor's financial condition are brought home to the creditor, or such information is brought home to him as would put an ordinarily

prudent man upon his inquiry, then the creditor is chargeable with knowledge of the facts which such inquiry would reasonably be expected to disclose. Upon this point, the Andrews Case, supra, is controlling, especially when taken in connection with the decisions cited therein. Since that case, I do not find that the Supreme Court has given any decisions which throw any light upon the question; but, in the several circuits, there have been important decisions to the same effect.

In Hussey v. Richardson-Roberts Dry Goods Co., 148 Fed. 598, 78 C. C. A. 370, the Circuit Court of Appeals for the Eighth Circuit passed upon a case where a mercantile creditor had sold bankrupt goods only a few months prior to bankruptcy. The debtor was slow in making payments. The creditor learned that the debtor had placed a mortgage on his stock, and sent an attorney to look after the claim. The bankrupt stated to the attorney that he did not have sufficient capital to meet his bills promptly, but was doing a profitable business, and was entirely solvent; that he had an offer for his stock in cash and land amounting in value to a sum largely in excess of his indebtedness, which he could accept at once. The attorney advised its acceptance, and meantime took a chattel mortgage on the stock for the amount of his claim. The debtor was, in fact, insolvent and became a bankrupt within four months thereafter. The court held that such facts supported the finding of the District Court that, when the mortgage was taken, the creditor did not have a reasonable cause to believe a preference was intended, and that, hence, it was not voidable under section 60b of the bankruptcy act. It points out that while the giving of a preference by an insolvent, as defined by section 60a, affords sufficient ground for adjudication of bankruptcy against him, it may not be sufficient to make a transfer void under section 60b; but that, to accomplish the latter purpose, the additional fact must be shown that the one receiving the transfer had reasonable cause to believe it to be a preference. In that case the court held that the circumstances did not charge the creditors with sufficient knowledge to hold them with having accepted a preference. The same is true of the leading case, In re Eggert, 102 Fed. 735, 43 C. C. A. 1, which contains a valuable statement of the law and of the decisions up to June, 1900.

In Pittsburg Plate Glass Co. v. Edwards, 148 Fed. 377, 78 C. C. A. 191, the Circuit Court of Appeals for the Eighth Circuit passed upon a state of facts where the intention of the bankrupt to make a preference was inferred as a necessary consequence of his act in giving a mortgage while in financial embarrassment, and where an examination of the record impressed the court with the belief that the attorney was so well satisfied of the bankrupt's insolvency and its effect upon the mortgage he was about to take that he purposely "traveled as close to the edge of actual knowledge as he could without obtaining it."

In the case before me, the following facts appear in reference to the first payment, namely, that of February 20, 1906: Before October, 1905, the Doten Grain Company had no considerable amount of trouble with the debtor, Blanchard, in the matter of payments, although he had occasionally failed to meet his notes at maturity. There is testimony tending to show that checks of Blanchard were charged back

and protested in October and December, 1905; that a note fell due in December, 1905, which was unpaid until some weeks later; that in January, 1906, the creditor wrote to Blanchard, demanding payment by return mail of the balance of the note which had matured some weeks before; that the creditor wrote somewhat sharply, "We cannot allow these notes to get behind in this way." I will not detail all the evidence touching this payment. It is enough to say that the evidence tended to show that the debtor was under greater financial embarrassment than he had ever been before; that he was becoming slower in his payments. I have already found that, at the time of this payment, the debtor knew that he was hopelessly insolvent, and that he actually intended the payment as a preference; but the testimony does not fully show the knowledge of the bankrupt's condition on the part of the creditor which the bankrupt himself possessed. It is my duty to give the bankrupt the benefit of the doubt which arises in my mind as to whether the transaction of February 20, 1906, does not come within that class of cases where mere slowness of payment is held insufficient to put a creditor upon his inquiry as to the financial affairs of the debtor. I conclude that there is not sufficient evidence to hold the payment of February 20, 1906, to the Doten Grain Company to be a voidable preference; and I so decide.

5. On May 5, 1906, the debtor paid to the Doten Grain Company $330. The following facts appear in regard to this payment: That the last car of grain sold by the Doten Grain Company was on January 11, 1906; that in payment for this a note was given for $368.68 payable February 20th; that this note was not paid at maturity, but remained overdue and unpaid for over a month, during which time the creditors wrote late in February and late in March demanding payment; that on April 11th the creditors wrote again, threatening to take other measures unless the amount was paid; that on April 17th a check was sent by Blanchard for the amount; that the check was dated ahead to April 23d, and was protested for nonpayment on April 28th; that at that date the creditors again wrote to the debtor, stating that they were very much surprised, after the long time they had waited on the old note, to have the check protested for nonpayment; that the creditors further demanded that the debtor should immediately send them bills or a certified check for the amount, saying that they did not want the debtor to send them another check dated ahead, and that they would not wait any longer, but would take further steps; that, receiving no reply to this, on April 11th the president of the respondent company, by telephone, demanded payment of the debtor, and the debtor promised to send in the amount within a very few days; that, without giving the debtor an opportunity to fulfill his promise, the respondent sent its treasurer, Foster, to Canton. There is testimony on the part of the respondent that Foster was sent for the purpose of conferring with the debtor as to his habit of buying on sight drafts, and for the further purpose of inducing him to buy more goods. The whole testimony, however, convinces me that Foster was sent in order to obtain a payment. The testimony tends to show that the debtor told Foster that he was in good financial condition, and that he offered his books and invoices for examination; but

that, while Foster made inquiries of other persons as to the financial condition of the debtor, he did not examine the books and invoices which were tendered for his examination. Foster himself admits that his experience with Blanchard would ordinarily lead him to apprehend insolvency; and he details no facts which should be held to distinguish the case from the ordinary one. The testimony leads me to believe that, if he had examined the books and invoices which were tendered for his examination, he would have found the property fully mortgaged; that a recent mortgage had been put upon it; that cars had been obliged to stand on the track for 30 days before the debtor could obtain the money to pay his sight drafts; and that his creditors were generally demanding payment. In fact, he would have found a condition of affairs which resulted within four days in a voluntary assignment by the debtor.

The whole testimony in regard to this payment induces the belief in my mind that there were sufficient facts brought to the attention of the agent of the respondent corporation to put a reasonable man upon his inquiry; and that, if due inquiry had been made, facts would have been shown which would have made it apparent to the creditor that the payment was intended as a preference.

I hold, then, that the payment of May 5, 1906, to the Doten Grain Company, was a voidable preference.

6. Payments were made to the Oscar Holway Company on April 12, April 13, April 14, and April 25, 1906. The total amount of these payments is $504.04. The testimony tends to show that the Oscar Holway Company began to sell goods to Blanchard when he first started in business; that, up to the last part of 1905, all notes and checks were paid; that on November 15, 1905, he gave four notes of $500 each to apply to his account, which left a balance on open account of $332.22; that two of these notes were paid when they matured, and the others were not so paid; that the date of the last sale of goods to Blanchard by this respondent was August 25, 1905; that from this time the respondent company refused to do business with him. Mr. Martin, the treasurer, says the reason they ceased to do business with him was "because his payments were not satisfactory"; that his salesman, Mr. Webster, reported that the man was an expensive liver; and that as early as June, 1905, he had instructed his agents to cut down Blanchard's credit. In March, 1906, the debtor wrote, sending check in payment for the last of the four notes, and asking the creditors to hold same until the Monday following. This check was protested for nonpayment. Blanchard then wrote a letter, asking the creditors to send back the check to the Rumford Falls National Bank, so that it would be paid as his deposits went in. The company did as requested; but the check remained in the bank up to April 12th, and no deposits were made on it. The testimony shows that Martin knew that Blanchard had arranged to secure an additional loan upon his mill property from the Auburn Building & Loan Association, and that the property was then fully mortgaged. He knew also that creditors were pressing Blanchard everywhere, and, as he puts it, "other creditors were having great difficulty in collecting their debts from him." In this condition of affairs, Martin, the treasurer, sent Webster to

the debtor "to see what could be done about collecting the money." Webster testifies in regard to his attempts to obtain the payments. From his testimony it appears that he knew his corporation had stopped selling goods to Blanchard on account of his overdue bills; that the debtor was getting more and more behind in his accounts; that no attempts had been made to sell the debtor anything on credit after the fall of 1905; that he did not meet his notes when they became due; that he was an expensive liver; that all these facts had been reported to Martin, the treasurer, and that Martin had requested that no more goods be sold Blanchard on credit. Being asked, "When did you lose confidence in his ability to pay his debts in full?" Webster replied: "When he failed to meet his notes." With all this knowledge, Webster was sent by Martin to Canton with particular instructions to collect the money to pay the check which had been protested and which was lying in the bank waiting for deposits to take it up. He was sent a few days after the additional mortgage on the mill property was placed with the Auburn Building & Loan Association. The testimony convinces me that Webster was sent to collect the balance, or so much of it as he could. When he arrived, he told Blanchard that the payment must be made. Blanchard promised to pay him some at that time, but failed to do so. He then promised to pay him something the next day, but did not, as he says, "meet it at all." The next day, April 12th, he paid him $76. Webster then went home and came back the next day, called on Blanchard at least three times in succession that week, and obtained three payments, namely, on April 12th, 13th, and 14th. He finally went away leaving a balance unpaid, which he says he was unable to get; and he says further that he had lost confidence in Blanchard's ability to pay his debts. The testimony, then, tends to show that Blanchard's position was regarded as so hopeless that it was useless to attempt to obtain payment of any balance, and that two agents of this respondent corporation knew that the debtor's mill property was mortgaged to its full value, that he was unable to meet his protested check, and that he was being pressed everywhere.

In the case of the Mayo Contracting Company, in the Massachusetts District, in an opinion as yet unpublished, Judge Dodge holds that the same circumstances, which establish an intent to prefer on the debtor's part, also establish, on the part of the creditor, reasonable cause to believe that the debtor intended a preference. In the case at bar, with reference to the payments to this respondent, the same evidence which leads me to believe that the bankrupt intended to make a preference induces the belief, also, that this respondent had reasonable cause to believe such to be the debtor's intent. The whole evidence, taken together, leads me to the conclusion that an authorized agent of the respondent corporation had reasonable grounds to believe that the debtor was insolvent, and that, in making the payments to this respondent, he intended a preference. The payments to the Oscar Holway Company are held to have been voidable preferences.

A decree may be drawn in accordance with this opinion, with costs for complainant in each case.

UNITED STATES v. CHARLES H. WYMAN & CO.

(Circuit Court of Appeals, Eighth Circuit. July 22, 1907.)

Nos. 1,798, 2,580.

1. CUSTOMS DUTIES—PROTEST—PERIOD FOR FILING.

Customs Administrative Act June 10, 1890, c. 407, § 14, 26 Stat. 137 [U. S. Comp. St. 1901, p. 1933], permitting protests against decisions of collectors of customs to be filed "within ten days after but not before" liquidation of the entries, fixes definitely the time within which a protest must be filed; and, if not filed within this period, a protest is invalid.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Customs Duties, § 198.]

2. SAME—EXTENSION OF TIME—CUSTOMHOUSE ERROR.

By a customhouse error the date of liquidation was stated in an entry as being later than it was in fact, and a representative of the importer was thereby misled; but the correct date was given in both a notice sent to the importer and the liquidation bulletin posted for inspection by importers. *Held*, that the error did not have the effect of extending the period for filing protests, prescribed by Customs Administrative Act June 10, 1890, c. 407, § 14, 26 Stat. 137 [U. S. Comp. St. 1901, p. 1933].

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Customs Duties, § 198.]

3. SAME—LIQUIDATION—DISCREPANCY IN DATE.

For the purpose of ascertaining the date for filing protests, importers are bound to take notice of the dates given in the liquidation bulletin publicly posted as prescribed by the customs regulations; and, in case of conflict between the bulletin and notations on the entry, they should be governed by the former.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Customs Duties, § 198.]

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

Edward P. Johnson, Asst. U. S. Atty. (Henry W. Blodgett, U. S. Atty., on the brief), for the United States.

Clinton Rowell and Joseph H. Zumbalen, for importers.

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

RINER, District Judge. This is an appeal from an order of the Circuit Court for the Eastern district of Missouri, reversing the action of the Board of United States General Appraisers in overruling the protest of Charles H. Wyman & Co., a corporation, importer, and further ordering that the surveyor of customs at the port of St. Louis reliquidate the entry in controversy according to certain findings made by the court.

It appears from the record that Wyman & Co. imported on the steamer Wilhelm der Grosse from Bremen two cases, numbered 521 and 525, containing millinery, buckles, and ornaments valued at $135. The importation was entered on the 3d day of July, 1900, at the port of St. Louis as No. 17. The duty thereon was fixed at 60 per cent. ad valorem, under paragraph 434 of the tariff act of 1897. Act July 24, 1897, 30 Stat. 151, c. 11 [U. S. Comp. St. 1901, p. 1676]. The en-

try was liquidated July 6, 1900. The liquidating clerk, by mistake, made the date of liquidation July 7, instead of July 6, 1900, the figure "7" being in red ink. He then passed the entry back to the entry clerk, who discovered the error in the date and corrected it by drawing a line through the figure "7" and writing over it in black ink the figure "6." It was admitted by the importer that the change was not made with the intent to injure or benefit any one. The record of the liquidation of this entry, No. 17, in the entry clerk's office, shows that it was liquidated July 6, 1900. The evidence shows that the entry was placed upon the bulletin of liquidations, which is posted for the inspection of importers; and it is stipulated between the parties that the bulletin sheet of July 6, 1900, shows this entry to have been posted as liquidated July 6, 1900. The importer also received notice dated July 6, 1900, from the entry clerk, advising it of the liquidation of this entry; and the memorandum on the back of this notice setting forth the data from which to prepare a protest was admitted to be in the handwriting of Mr. Hollman, acting for and on behalf of the importer. The protest was presented to the surveyor of customs on the 17th of July, 1900, who declined to receive it on the ground that it was not presented in time. It was then presented to the Board of United States General Appraisers, who, after hearing, on the 17th of October, 1905, sustained the decision of the surveyor. An application was then made, within the time allowed by law, to the Circuit Court for the Eastern district of Missouri, for a review of the questions of law and fact involved in the decision; and upon consideration of the evidence taken by the Board of General Appraisers, together with some additional evidence taken pursuant to an order of court, the Circuit Court entered the order here complained of.

Two questions are presented by this record: First, was the protest presented in time; and, second, if so, was the merchandise properly assessed at 60 per cent. ad valorem, as jewelry, under paragraph 434 of the act of 1897?

Section 14 of an act of Congress (Act June 10, 1890, 26 Stat. 137, c. 407 [U. S. Comp. St. 1901, p. 1933]), entitled "An act to simplify the laws in relation to the collection of revenue," approved June 10, 1890), so far as it becomes necessary for the determination of the question first suggested, is as follows:

"That the decision of the collector as to the rate and amount of duties chargeable upon imported merchandise, including all dutiable costs and charges, and as to all fees and exactions of whatever character (except duties on tonnage), shall be final and conclusive against all persons interested therein unless the owner, importer, consignee, or agent of such merchandise, or the person paying such fees, charges, and exactions other than duties, shall, within ten days after 'but not before' such ascertainment and liquidation of duties, as well in cases of merchandise entered in bond as for consumption, or within ten days after the payment of such fees, charges, and exactions, if dissatisfied with such decision give notice in writing to the collector, setting forth therein distinctly and specifically, and in respect to each entry or payment, the reasons for his objections thereto, and if the merchandise is entered for consumption shall pay the full amount of the duties and charges ascertained to be due thereon."

We think the provision of the statute above quoted fixes definitely the time within which the protest must be filed, and that the 10 days

begins to run from the date of final liquidation. Prior to this act of 1890, a protest could be filed at any time after entry and duties estimated thereon; the final liquidation being regarded only as fixing the limit beyond which notice could not be given. Davies v. Miller, 130 U. S. 284, 9 Sup. Ct. 560, 32 L. Ed. 932. The case of Davies v. Miller was decided in 1889, and the statute in force at that time provided that the decision of the collector should be final unless the owner, importer, agent, or consignee of the merchandise—"shall within ten days after the ascertainment and liquidation of duties * * * give notice in writing to the collector on each entry, if dissatisfied with his decision, setting forth therein distinctly and specifically the grounds of his objection thereto." This provision, as already suggested, the Supreme Court held, only fixed the limit beyond which notice could not be given; and it was doubtless for the very purpose of avoiding the inconvenience arising from this practice that in the act of 1890 the words "but not before" were inserted in section 14, thus confining the time of the protest to within 10 days from final liquidation and to prevent it from being filed either before the final ascertainment or after the expiration of the 10 days from such final ascertainment. In re Guggenheim Smelting Company, 112 Fed. 517, 50 C. C. A. 374; In re Bailey et al., 112 Fed. (C. C.) 413.

It is admitted that this entry, No. 17, was as a matter of fact liquidated on the 6th of July, 1900, but it is insisted that, because the liquidating clerk by inadvertence indorsed upon the entry in red ink the words "liquidated July 7th, 1900," the time for filing the protest began to run from that date. While it is true that Mr. Hollman, representing the appellee, stated in his affidavit that he obtained possession of entry No. 17 in order to get the details of the assessment for the purpose of filing protest if necessary, and that he did not observe any date other than the date of July 7, 1900, as indicating the date of liquidation; yet in our judgment the fact, if it was a fact, that the correction of the date on the entry had not been made until after Mr. Hollman's examination, which he states in his affidavit was made July 7, 1900, would not have the effect to extend the time, for the importer was not bound to take notice of the notations made by the liquidating clerk on the entry, but was bound to take notice of the liquidation bulletin sheet posted for inspection by importers and the notice sent to the importer by the entry clerk. Article 1417 and article 1460, Customs Regulations 1899. It is admitted that both the notice sent to the importer and the liquidation bulletin sheet in relation to this entry were dated July 6, 1900, and that the liquidation bulletin sheet shows the entry in question to have been posted as liquidated on July 6, 1900. We think, too, that the record clearly shows that the correction of the date on the entry itself was made on July 6, 1900, the date of liquidation, and the fact that Mr. Hollman did not see it was due to some oversight on his part. Mr. Johnson, the entry clerk, testified that entries were recorded the day they were received in a record book called "Record of Liquidations," and that this entry, No. 17, appeared upon that book as liquidated July 6, 1900, and that no change or correction in relation to this entry was made upon the record. Hence the correction of the date upon the entry, it is reasonable to presume, was

made before the entry was recorded. It follows from what has been said that the decision of the Board of General Appraisers was right, and should have been affirmed.

The conclusion reached upon the first question presented by the record renders it unnecessary to consider the second question.

The order of the Circuit Court is reversed, with directions to affirm the decision of the Board of United States General Appraisers.

STAIR v. KANE.

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

No. 1,656.

1. NEGLIGENCE—ACTION FOR NEGLIGENCE—QUESTION FOR JURY.

The petition, in an action against the lessee of a theater for a personal injury, alleged that among the appliances of the theater of which defendant had control was a fire extinguisher, which was kept on the sill of an open window at the side of the stairway leading to the gallery of the theater, that it was unsecured, and was in a place where men and boys in crowding down the stairway, as was usual at the close of a performance, were likely to knock it out of the window, as they in fact did, and that it fell and injured plaintiff, who was on the walk below. There was evidence tending to support such allegations. *Held*, that the petition and evidence made a case of negligence which was properly submitted to the jury.

2. SAME—EVIDENCE TO ESTABLISH.

The accident itself in such case may be regarded, in the absence of explanation, as proof of the negligence charged.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 218, 271.]

3. EVIDENCE—RELEVANCY—SIMILAR TRANSACTIONS.

In such action, evidence was admissible to show that the descending crowd had several times previously dislodged the fire extinguisher from its place in the window, and that such fact was known to defendant, as material in determining whether or not the fire extinguisher was in an unsafe and dangerous place, and whether defendant was negligent in placing and permitting it to remain there on the occasion in issue.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 406-413.]

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

Wm. B. Beebe and A. W. Lamson, for plaintiff in error.

R. B. Newcomb, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. This was a suit brought by a minor, through his mother, for personal injuries against the lessee of the Cleveland Theater, in Cleveland, Ohio. The young man, Kane, had attended a night performance, and as he was leaving the theater he was struck on the sidewalk in front by a fire extinguisher, which, during the performance, and for some time before, had been standing in the window on the third or gallery floor, next the stairs down which

the occupants of the gallery passed to reach the street. The case went to the jury, and there was a verdict for the plaintiff.

It was the contention of the plaintiff that the defendant owned and controlled the fire extinguisher, that he negligently and carelessly placed it in the window unfastened and unsecured, and as a result it fell from the building and injured the plaintiff. In other words, the contention was that the fire extinguisher was unfastened and unsecured, and occupied a dangerous position, and that, although no one saw it fall, the jury had a right, under the circumstances, to infer that it fell because of the negligence of the defendant in permitting it to remain where it was, when he might reasonably anticipate that the crowding and jostling of the young men and boys, just out from an entertainment and eager to reach the street, would, in their hurry, push it from the window onto the fire escape and permit it to fall down upon the people leaving the theater below.

There are really but two questions presented: First, whether the petition stated a case of negligence which was supported by sufficient evidence to sustain the verdict; and, second, whether the court did right in permitting the introduction of evidence tending to show that the fire extinguisher was so placed in the window, unfastened and unsecured, and next the stairs which descended from the gallery towards the street, that on several occasions it was struck by the jostling crowd and fell over in the direction of the fire escape, being caught and held by an employé then on duty. There are some other questions relating to charges given or refused, but they all really depend upon the disposition of those that we have indicated.

1. As to the petition and the evidence in its support, we entertain no doubt that a case of negligence was stated by the plaintiff, and that the evidence was sufficient to warrant the court in leaving to the jury the determination whether the defendant was or was not guilty as charged. The petition states that the defendant had charge and control of the fire extinguisher which fell and injured the plaintiff; that the defendant negligently placed it in a window next the stairs which descended from the gallery, not safely or properly fastened or secured, and as a result it fell from the window over the fire escape and down on to the street, where it struck and injured the plaintiff, who was just leaving the theater. We think this states a case in favor of the young man against the lessee of the theater. The latter was compelled by law to provide a fire extinguisher, but it was his duty to put it in a secure place, where it would not be liable to fall out the theater and injure a patron or passer-by. This obligation accompanied the duty. The petition charges the violation of the obligation to place the fire extinguisher in a secure place. He was negligent in placing it where the ordinary movement of a gallery crowd (of which he was advised) might jostle it loose and let it fall on to the sidewalk. The accident itself might be regarded, in the absence of explanation, as proof of the negligence charged. Scott v. London Dock Co., 3 H. & C., 596; Cinti., etc., Ry. Co. v. South Fork Coal Co., 139 Fed. 528, 71 C. C. A. 316, 1 L. R. A. (N. S.) 533; Traction Co. v. Holzenkamp, 74 Ohio St., 379, 78 N. E. 529.

2. The ruling on the introduction of certain evidence arose during the testimony of Gross and Grussey, employés of the defendant not a great while before the accident. Gross was a special police officer and watchman in charge of the gallery from October 1, 1904, until February, 1905. He noticed the fire extinguisher standing in the window next the stairway where the crowd descended from the gallery. Asked to state what he noticed, if anything, with reference to the fire extinguisher when the crowd would be going down stairs, he said, after objection:

"The crowd would rush for the stairs. They would jam up against the window, and, when the window was open, there was twice that the fire extinguisher fell out, and I grabbed it."

At another place, Gross, in answering as to how the crowd came to knock the fire extinguisher out of the window, said:

"It started to fall, and I grabbed it as it went out, because the crowd came rushing like a lot of cattle. The small boys especially would fall into the sill of the window as they went down those stairs."

Grussey was ticket taker in the gallery and night watchman until August, 1905. Answering the question: "I wish you would state what you noticed when the crowd was rushing out with reference to the fire extinguisher in the window," Grussey said: "I have noticed the crowd bumped up against it and throwed it down several times." Grussey testified that he reported the knocking of the fire extinguisher out of the window to the manager of the theater, and wanted to put up some slats there to keep the crowd from brushing up against the window. Cookson, the manager, said this could not be done; no slats could be put up there.

As stated, the testimony of Gross and Grussey was admitted subject to exception, and its use was carefully limited in the charge; the court saying:

"I am requested, gentlemen, to charge that it is only the negligence of the defendant on the night in question which is to be considered by you as determining its liability in this case, and not its negligence at some other time. Evidence of what had occurred with respect to this fire extinguisher prior to the night when the accident occurred was only admitted in evidence for the purpose of showing that the fire extinguisher would fall over, and that the defendant was notified of the fact that it would so fall over or out as claimed by the plaintiff. Only for that purpose are you to consider the testimony of anything that happened in respect to the falling over of the fire extinguisher prior to that night."

In other words, the evidence was not used to show negligence on the part of the lessee on former occasions, but tended to show the usual conduct of the crowd in descending or "piling down" from the gallery; and, in view of such anticipated conduct, the fire extinguisher, in being placed unfastened in the window next to the descending crowd, was being left in an unsecure, dangerous, and negligent position. The fact that the descending crowd had several times dislodged it from its place in the window, and this was known to the lessee, was material in determining whether the fire extinguisher was or was not in an unsafe and dangerous place, and the lessee negligent in placing and leav-

ing it there. We think the testimony was properly admitted, and we find no error in the action of the court below which would warrant a reversal.

The judgment is affirmed.

In re SUNSERI.

(District Court, W. D. Pennsylvania. February, 1907.)

BANKRUPTCY—JURISDICTION OF COURT—SUMMARY SEIZURE OF PROPERTY.

While a court of bankruptcy possesses the power to summarily seize property in the possession of third persons, but alleged to belong to the estate of a bankrupt, when necessary for the preservation of the estate, such power should be exercised only upon a petition by creditors definitely setting forth all the facts which show the bankrupt's ownership and the necessity for such action, and on the giving of a bond to protect the rights of the person in possession; and when such person sets up an adverse claim to the property which is not merely colorable the bankruptcy court is without jurisdiction to adjudicate the same over his objection, but must leave it to be determined in a plenary suit.

In Bankruptcy. On petition by receiver and answer thereto.

Eichenauer & Ache, for receiver.
E. L. Mattern, for Billante & Co.
Breck & Vaill, for bankrupt.

EWING, District Judge. On January 18, 1907, a creditors' petition praying for the adjudication of A. Sunseri as a bankrupt was filed, and on the same day a petition of various creditors praying for the appointment of a receiver was presented, whereupon Charles P. O'Connor was appointed receiver, with authority to take charge of, preserve, and dispose of the assets of said bankrupt, subject to the approval of the court. On January 31st the said receiver presented his petition, setting forth the foregoing facts, and alleging that the said Sunseri had entered into a conspiracy with P. Billante & Co., of Huntingdon, Pa., to defraud the creditors of said Sunseri, and that in pursuance of said conspiracy large quantities of goods were shipped by Sunseri to P. Billante & Co., at Punxsutawney, Pa., where they had a store, and that some of the said goods were transferred and shipped by Billante from there to their store at Huntingdon, and that some goods purchased by Sunseri he had shipped direct to Billante & Co., and that these goods so disposed of by Sunseri to Billante & Co., constituted a large portion of his assets, and that the conduct of these parties was for the purpose of hindering, delaying, and defrauding the creditors of said Sunseri, and praying for an order to seize said goods in the hands of P. Billante & Co., in order that they might be preserved to the bankrupt's estate. Said petition further alleged that P. Billante & Co., were financially irresponsible, and that the identity of the members of the firm had not been established and was unknown in their locality. On the same day the prayer of that petition was granted, and the said O'Connor directed to take into custody, and hold subject to the further order of this court, the merchandise transferred

to P. Billante & Co., at Punxsutawney and at Huntingdon, and the said P. Billante & Co., were directed to propound their claim within 10 days after service of said order. Pursuant to said order the receiver took charge of the stores of the said Billante & Co., at Huntingdon and Punxsutawney.

On February 5th Billante & Co., by Philip Billante, one of the partners, filed an answer to the receiver's petition in the nature of a counter petition, setting forth that they had no knowledge whatever of the financial condition of Sunseri, and never entered into any conspiracy with him, but that the goods so shipped by Sunseri to them were purchased by them in the ordinary course of business, for the purpose of conducting their stores at Huntingdon and Punxsutawney, the former of which they opened about the 1st of April, 1906, and the latter apparently some time subsequent, and that for all of said merchandise the prices paid were full and adequate; that all of said merchandise had been paid for, except one bill for a shipment in January, 1907, amounting to about $40.75, against which they have a good defense for shortage and damaged goods; and that said bill, together with a bill of January 7, 1907, of $140, had been placed by Sunseri in the hands of an attorney for collection from them, payment of which they refused, as to the $40 for the reason aforesaid, and as to the $140 for the reason it was paid for in cash and they hold a receipt therefor, which is attached to their said answer. And the said respondents allege that the order of this court was without authority for the seizure of their property without notice, process, or suit; that it was beyond the jurisdiction of this court to seize any goods outside its territorial limits (the said town of Huntingdon being in the Middle district of Pennsylvania); and that for the reasons above stated, as to their claiming this property adversely and with more than colorable title, this court is without jurisdiction to determine the title to it in this summary manner.

Upon this petition and answer the case was argued by counsel, without any testimony having been taken, and upon the facts as set forth in said petition and answer. It will be noted the answer does not deny the transfer of the goods from the alleged bankrupt to Billante & Co., but does deny explicitly any knowledge of Sunseri's insolvency at the time, any conspiracy with Sunseri, any object in the purchase of said goods other than for the proper and ordinary conduct of their business, and even any indebtedness therefor to said Sunseri beyond the controverted claims aforesaid. The petition of the receiver upon which this order was granted gives no facts for the allegation of conspiracy and intent to hinder, delay, and defraud creditors, beyond the shipments to Billante & Co. from time to time during the few months preceding the filing of the petition in bankruptcy, and facts in regard to the extent of the purchases and sales made by Sunseri during the same period, as shown by his books now in the hands of the receiver. As the case now stands, it does not seem necessary to dispose of the question of extraterritorial jurisdiction, or the question of the authority of the court to summarily seize property alleged to belong to the bankrupt in the hands of third persons. When necessary

for the preservation of the estate of the bankrupt and the security of the creditors, the latter authority can hardly be questioned, under the various provisions of the bankrupt act having that object in view; but the manner and practice regarding such seizures, as pursued in this case, may very well be called into question. I do not think the court should authorize such seizure in any case, except upon a petition very clearly and definitely setting forth all the facts, not merely suspicions, and after exacting proper security to protect the rights of the third parties in whose hands the goods are alleged to be. Such petition should be presented by the creditors, rather than by any temporary receiver, and they should be required to give the bond aforesaid before such seizure should be authorized.

When property alleged to have been disposed of by the bankrupt in fraud of his creditors is in the hands of third parties, and a seizure thereof properly made under authority of the court, if such third parties set up an adverse claim to said property, which is more than merely colorable, and said parties are not merely the agent or representative of the bankrupt, the court can proceed no further than the ascertainment of these facts, but must relegate the parties to some proper plenary action. It will be seen, from the statements contained in the petition and answer, that the claim of Billante & Co. to the goods in question is more than merely colorable, and that they are claiming in their own right, and are not in any respect holding said property as agents or representatives of Sunseri. It therefore follows that this court has no authority to proceed further in the matter, or summarily dispose of the question of title, no matter how fraudulent the transaction between Sunseri and Billante & Co. may eventually prove to have been, but that said Billante & Co. are entitled to have their title to said goods determined in an appropriate plenary action. In re Teschmacher & Mrazay (D. C.) 11 Am. Bankr. Rep. 547, 127 Fed. 728; In re Davis, Taylor & Co. (D. C.) 16 Am. Bankr. Rep. 486, 144 Fed. 285; Louisville Trust Co. v. Comingor, 184 U. S. 18, 7 Am. Bankr. Rep. 421, 22 Sup. Ct. 293, 46 L. Ed. 413.

Moreover, it appears that the receiver exceeded his authority when he took possession of all the goods of Billante & Co. in their respective stores, regardless of the sources from which they obtained them. It may be added that in all such proceedings, unless the property is of an exceedingly perishable nature, or the circumstances of the case particularly urgent, it would be better, before any order for seizure were granted, to give the party in whose hands the property is alleged to be prior notice and an opportunity to be heard on a rule to show cause.

The claim of the receiver in his petition that the disposition of this property was in violation of the provisions of the act of assembly of Pennsylvania of March 28, 1905, was abandoned on the argument.

Should the creditors of Sunseri, after further examination, be satisfied that they are able to show such a transaction between Sunseri and Billante & Co. regarding these goods as to make the custody of Billante & Co. merely that of agents of Sunseri, or to show in them nothing more than a merely colorable title, they can present their pe-

tition to court for another order, and for that purpose, and for the reasons above given, the order of January 31st last will be vacated, without prejudice. But the creditors must understand that in any event they would be required, before the grant of any order by the court, to give adequate bond to protect the rights of said Billante & Co., in case it should be found that the proceeding was not well founded.

Therefore it is ordered and directed that the order of seizure of January 31, 1907, be vacated, and the custody of the property in question restored to P. Billante & Co., but without prejudice.

MANNING v. EVANS.

(District Court, D. New Jersey. August 8, 1907.)

No. 116.

1. BANKRUPTCY—VOIDABLE PREFERENCE—DATE OF FILING PETITION.

Where a petition in involuntary bankruptcy was insufficient on its face to authorize the court to make an adjudication, because it showed less than the required number of legally qualified petitioners, but other creditors afterward joined therein, the four months' period within which transfers of property may be avoided as preferential, under Bankr. Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], or as fraudulent, under section 67e as amended by Act Feb. 5, 1903, c. 487, § 16, 32 Stat. 800 [U. S. Comp. St. Supp. 1905, p. 690], runs back from the time when such joinder made the petition sufficient, which for such purpose must be considered as the date of filing.

2. SAME.

Under the law of New Jersey, it is not unlawful for an insolvent debtor to prefer a creditor by a transfer of property, if made in good faith and for an adequate consideration, and the trustee of a bankrupt cannot set aside such a transfer made by him under Bankr. Act July 1, 1898, c. 541, § 70, 30 Stat. 566 [U. S. Comp. St. 1901, p. 345], which gives the trustee the right to avoid any transfer which might have been avoided by creditors.

In Equity. On final hearing.

John S. Applegate & Son, for complainant.
Wesley B. Stout and Charles Harvey, for defendant.

LANNING, District Judge. The complainant is trustee of the estate of William F. Patterson, bankrupt. By his bill of complaint he seeks a decree setting aside certain conveyances of lands by Patterson to the defendant, George W. Evans. The pleadings and proofs establish these facts:

On December 28, 1904, Patterson was indebted to the defendant in the sum of $1,130.08 for cash loaned, and the sum of $2,600 on promissory notes, making in all the sum of $3,730.08. On these sums interest had accrued to the amount of $347. Patterson was also indebted to the defendant in the sum of $800, secured by mortgage on a parcel of real estate in Monmouth county, N. J., on which interest had accrued to the amount of $140. For some months the defendant had been endeavoring, without success, to get a settlement by Patterson. On the

date above mentioned, Patterson proposed to convey to the defendant the parcel of land covered by the mortgage of $800 at a valuation of $1,800, which, after deducting the mortgage debt of $800, the interest of $140 accrued thereon, and taxes amounting to $34, left the valuation of the equity at $826. On December 30, 1904, Patterson proposed to convey to the defendant four other parcels of incumbered real estate, the equities in which were respectively valued at the sums of $21.05, $1,256, $1,065, and $100. The aggregate valuations of the equities in the five parcels was therefore $3,268.05, or $462.03 less than Patterson's principal indebtedness to the defendant on the promissory notes and for cash loaned. There is no dispute concerning the amount of Patterson's indebtedness, and none concerning the fairness of the valuations of the equities in the real estate. The defendant accepted from Patterson deeds of conveyance for the five parcels and had them duly recorded on December 29 and 31, 1904. At the time of these conveyances, Patterson was also indebted to the Second National Bank of Red Bank, N. J., on eight promissory notes.

A petition to have Patterson adjudged an involuntary bankrupt was filed against him on March 31, 1905, by the Second National Bank of Red Bank, George K. Hopping, and David C. Bennett. The claims of these petitioners were based by their petition solely upon the eight promissory notes above referred to. The petition showed that Hopping was liable as indorser on five, and that Bennett was so liable on one, of the eight notes, and that the Second National Bank had recovered judgments on all the notes not only against Patterson as maker, but against all the indorsers, including Hopping and Bennett. There was no averment that Hopping or Bennett had paid to the Second National Bank any part of the judgments thus recovered against them, or that they had in any way whatever become creditors of Patterson, or that the bankrupt's creditors were less than 12 in number. On April 15, 1905, Patterson filed a general demurrer to the petition, alleging it to be insufficient. On June 9th, the demurrer was withdrawn, and a plea interposed alleging that Patterson's creditors were more than 12 in number, and that the petition had in fact been filed by but one creditor. On June 27th, the petitioners filed a replication to the plea. On July 3d, before any hearing upon the plea, two other creditors entered appearance and joined in the original petition. On July 10th Patterson consented that he be adjudicated a bankrupt, and adjudication was that day made. On August 11th, the bankrupt filed a schedule of his assets and liabilities showing that his creditors were more than 12 in number, and on August 15th the complainant was appointed trustee.

This statement shows that, as the pleadings stood up to July 3, 1905, this court was without power to adjudge Patterson a bankrupt. Hopping and Bennett were not shown by the petition filed on March 31st to be creditors of Patterson. They were simply contingently liable upon notes which they had indorsed for Patterson. The petition therefore had been filed by but one creditor. More than three months were allowed to intervene before any other creditor availed himself of the privilege contained in section 59f of the bankruptcy act to enter his appearance and join in the original petition. Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]. Until at least three

creditors having provable claims amounting in the aggregate in excess of the value of securities held by them to $500 or more had joined in a petition to have Patterson adjudged a bankrupt, the court was without authority so to adjudge him. The contention of the defendant in the present case therefore is that the bankruptcy proceedings must be considered as having been commenced on July 3, 1905, more than four months after the date of recording the conveyances to him, and too late to effect the preferences he thus received.

In the Romanow Case (D. C.) 92 Fed. 510, Judge Lowell said:

"The respondents further object that Breitstein's appearance was entered more than four months after the act of bankruptcy complained of, but this seems immaterial. Section 3b provides that the petition may be filed within four months of the act of bankruptcy. The petition was filed January 29th, and that remains the date of its filing, though some petitioners have joined in it subsequently thereto. For instance, the date of bankruptcy is defined by section 1, subd. 10, to be the date when the petition was filed. If an adjudication is made in this case, the date of bankruptcy will be January 29th, though the adjudication be made upon the petition of one or more creditors who joined therein in the month of February."

In the Stein Case, 105 Fed. 749, 45 C. C. A. 29, Judge Wallace, speaking for the Circuit Court of Appeals of the Second Circuit, after referring to section 59f of the bankruptcy act, which authorizes creditors other than original petitioners "at any time" to enter their appearance and join in the petition, said:

"It is urged that to permit other creditors to procure an adjudication who have not sought to do so until after four months have elapsed since the act of bankruptcy would enable them to overhaul conveyances and sales as fraudulent or preferential which could not be done otherwise, and might work injustice to those whose titles had by lapse of time become safe. Nothing in the bankrupt act indicates a solicitude for the protection of fraudulent vendees, and, if creditors whose preferences may be disturbed have any equities to urge against an adjudication, they are authorized by section 59 to intervene and present them. And, even if imaginable cases of hardship may arise, the plain language of the act, authorizing creditors 'at any time' to join in the original petition, cannot be disregarded."

In each of the above cases, however, the petition appeared, on its face, to be free from defects.

In the Bedingfield Case (D. C.) 96 Fed. 190, Judge Newman said:

"It would be necessary in every case, of course, that a petition in involuntary bankruptcy should, on the face of it, show that creditors participated to the amount of $500, before a petition could be filed, or a rule obtained; and these, of course, would have to be participating in good faith. Then, if afterwards, and before adjudication, it should appear that for some reason one or more of the petitioning creditors did not have debts, or their debts were not provable, and other creditors came in sufficient to make the amount necessary, they could be allowed, and the proceedings stand. The court would never entertain a mere sham petition prepared originally with a view to doing this, but it would be only where a petition was brought in good faith, and some such contingency as has been referred to occurred."

In the Mackey Case (D. C.) 110 Fed. 355, the petition was correct in form. It was shown, however, that the petitioning creditors did not have provable claims amounting to $500, although in their petition they had averred that they had. Other creditors were thereupon allowed

to join in the original petition after the expiration of four months from the date of the act of bankruptcy.

In the Haff Case, 136 Fed. 78, 68 C. C. A. 646, it appears that the original petition against Haff was filed by a single creditor, who averred that the number of creditors was less than 12. Haff filed an answer alleging that they were more than 12 in number. Thereafter two other creditors intervened in the proceedings under the original petition. Later still, Edward Ridgely filed a petition which the Circuit Court of Appeals for the Second Circuit held to be an original petition, but defective because it did not allege that the creditors were less than 12 in number. It was allowed to stand, however, for the reason that that defense was not properly presented on the hearing by the bankrupt.

In the present case, the petition in bankruptcy was defective on its face. There was no averment that the creditors were less than 12 in number, and they were in fact more than 12. While there were three petitioners, the facts averred showed that only one of them was a creditor. In law, therefore, there was but one petitioner. If other creditors desired to put themselves in a position where they might, through a trustee, obtain a decree vacating the preferences set forth in the petition as acts of bankruptcy, they should have entered their appearances and joined in the petition within four months after the preferences were given. The filing of a petition in bankruptcy is notice to all the world. If, on its face, it appears to be in proper form, creditors who do not join in it are entitled to rely upon it as a good petition. In every such case, if it subsequently appear that some of the petitioners are not creditors, or if some other defect be made to appear, a reasonable construction of the bankruptcy act permits such defect to be cured by allowing other creditors to appear and join in the petition even after the expiration of the four months' period. But to extend that rule to a case in which the petition shows on its face that the requisite number of creditors have not joined in it—a defect which every creditor is bound to observe—is equivalent to adjudging a petition valid in which the acts of bankruptcy charged were committed more than four months before the filing of the petition.

I think that a proper construction of the bankruptcy act requires me to hold, in this case, that the petition in bankruptcy was not filed until July 3, 1905. As the conveyances to the defendant, Evans, were made more than five months previous to this date, it follows that they cannot be set aside under the provisions of section 67e of the bankruptcy act. See Little v. Holley-Brooks Hardware Company, 133 Fed. 874, 67 C. C. A. 46.

Nor can they be set aside under the provisions of section 60b, which is 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."

A "preference," within the meaning of this section, is such an one as is described in section 60a, where it is said:

"A person shall be deemed to have given a preference if being insolvent, he has, within four months before the filing of the petition * * * made a transfer of any of his property, and the effect of the enforcement of such * * * transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

In 1903 the clause respecting the four months' limitation was transferred to section 60a from section 60b. The effect of this transfer was to make the four months' limitation an element of the preference referred to in both of the sections. Section 60b therefore does not authorize a recovery by a trustee where the preference was made more than four months before the filing of the petition.

The remaining question is whether the complainant is entitled to redress under the provisions of section 70e, which is as follows:

"The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred unless he was a bona fide holder for value prior to the date of the adjudication. Such property may be recovered, or its value collected, from whoever may have received it except the bona fide holder for value. For the purpose of such recovery any court of bankruptcy hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

It will be observed that in this section there is no four months' limitation as in the other sections above referred to. Its effect is to subrogate the trustee to the rights of creditors. Its distinguishing feature is that it authorizes a trustee in bankruptcy to invoke the relief furnished by state laws to creditors for annulling transfers of property by their debtors. See In re William H. Gray (Sup.) 3 Am. Bankr. Rep. 647, 62 N. Y. Supp. 618; Skillen v. Endelman (Sup.) 11 Am. Bankr. Rep. 766, 79 N. Y. Supp. 413; Collier on Bankruptcy (6th Ed.) 613; Loveland on Bankruptcy (3d Ed.) § 158; Bush v. Export Storage Company (C. C.) 136 Fed. 918. The question therefore is: Are the facts such that a court of the state of New Jersey would adjudge the conveyances of December 28 and 30, 1904, invalid as against creditors?

As already stated, Patterson's indebtedness to the defendant was in excess of the fair value of the equities in the lands conveyed to the defendant. The considerations agreed on were credited against that indebtedness. The conveyances were made for valuable considerations, and also, I am satisfied, in good faith. It is a well-settled principle of law in New Jersey that an insolvent debtor may prefer any of his creditors, either by giving a mortgage upon his property to secure an antecedent indebtedness, or by conveying property to his creditor in satisfaction of such indebtedness, provided it be done in good faith and for an adequate consideration. See Garr v. Hill, 9 N. J. Eq. 210; Livermore v. McNair, 34 N. J. Eq. 478; Low v. Wortman, 44 N. J. Eq. 193, 7 Atl. 654, 14 Atl. 586.

I am unable to discover any theory upon which I can sustain the bill of complaint, and there must be a decree dismissing it, with costs.

MANNING v. PATTERSON.

(District Court, D. New Jersey. August 8, 1907.)

No. 115.

In Equity. On final hearing on bill, answer, replication, and proofs.

John S. Applegate & Son, for complainant.

Wesley B. Stout and Charles Harvey, for defendant.

LANNING, District Judge. This is a proceeding in equity to set aside, as fraudulent against creditors, a mortgage on real estate for $2,000 given by the defendant as an individual to himself as guardian of John F. Patterson, a lunatic, on December 31, 1904, and recorded on January 3, 1905. The mortgage was given as a substitute for two other mortgages, one for $1,200, and the other for $800, covering other lands owned by the defendant. On giving the mortgage for $2,000, the other two mortgages were canceled. It is not contended that the mortgages for $1,200 and $800, which were given about 1892, were in any respect invalid. As was stated in the opinion in Louis Y. Manning, Trustee, v. George W. Evans (just filed) 156 Fed. 106, an effective petition to have Patterson adjudged an involuntary bankrupt was filed against him on July 3, 1905, just six months after the new mortgage had been recorded.

For the reasons given in that opinion, the mortgage cannot be set aside either under the provisions of section 67e or those of section 60b of the Bankruptcy Act. Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]. The contention that it is invalid under the provisions of section 70e seems to me equally untenable. Patterson owed to the estate of the lunatic for whom he was guardian the sum of $2,000. If on December 31, 1904, when the new mortgage was given, that debt had been wholly unsecured, and if he then knew he was insolvent, he nevertheless had the legal right, subject to the provisions of the bankruptcy act, to prefer his lunatic creditor. If an effective petition in bankruptcy had been filed against him within four months after January 3, 1905, when the new mortgage was recorded, a different question concerning the validity of the mortgage would have been presented. The transaction here complained of not only took place six months before the filing of an effective petition in bankruptcy, but it was wholly free from any attempt to do more than prefer one of the insolvent's many creditors. It was not intended, in any legal sense, to hinder, delay, or defraud any creditor whomsoever.

The bill of complaint must therefore be dismissed, with costs.

BOARD OF TRUSTEES OF WHITMAN COLLEGE v. BERRYMAN et al.

(Circuit Court, E. D. Washington, S. D. June 4, 1907.)

No. 250.

1. COURTS—JURISDICTION OF FEDERAL COURTS—AMOUNT IN DISPUTE.

In a suit by an educational corporation to restrain public officers from levying and collecting taxes upon its property under an alleged exemption in its charter, the value of the matter in dispute for the purpose of determining the jurisdiction of a federal court is not limited to the amount of the particular tax which has been or is threatened to be levied, but is the value of the right to the exemption claimed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, §§ 890, 891.

Jurisdiction of circuit courts as dependent on amount in controversy, see notes to Auer v. Lombard, 19 C. C. A. 75; Tennent-Stribling Shoe Co. v. Roper, 36 C. C. A. 459.]

2. SAME—FEDERAL QUESTION.

Such a suit is one arising under that provision of the Constitution of the United States prohibiting the impairment of contracts by a state, and is within the jurisdiction of a federal court, without regard to the citizenship of the parties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 82.]

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. Co.'s Mining Co., 35 C. C. A. 7.]

3. TAXATION—STATUTORY EXEMPTION—CONSTRUCTION.

A provision of a charter of an educational corporation granted by legislative act, that "the property of said board of trustees of Whitman College, including all income and proceeds shall be used exclusively for the purposes of education and in consideration of said use, said property, income and proceeds, shall not be subject to taxation," includes within the exemption all property of the corporation, whether used directly for college purposes or as a source of income.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 398.]

4. TERRITORIES—LEGISLATIVE POWER—CORPORATE CHARTERS.

Act March 2, 1867, c. 150, 14 Stat. 426, which provides that "the legislative assemblies of the several territories of the United States shall not, after the passage of this act, grant private charters or especial privileges, but they may by general incorporation acts permit persons to associate themselves together as bodies corporate for mining, manufacturing, and other industrial pursuits," did not deprive a territorial Legislature of power in amending an existing charter of an educational corporation to provide that its property shall be exempted from taxation.

5. SAME.

Under Rev. St. § 1850, providing that legislative acts of territories "shall be submitted to Congress, and if disapproved shall be null and of no effect," where such an act has been on the statute books for many years without any expression of disapproval by Congress, the implication is warranted that it was approved.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 18.]

6. TAXATION—TAX SALE CERTIFICATE—ACTION TO SET ASIDE—NATURE OF REMEDY—ADEQUACY OF REMEDY AT LAW.

Under the revenue laws of Washington, which provide for the issuance of certificates of delinquency for unpaid taxes which bear 15 per cent. interest and are liens on the property, such a certificate is a cloud upon the title to real estate, and an owner of a number of parcels against which

taxes have separately been wrongfully imposed is without adequate remedy at law and may maintain a suit in equity to remove such cloud.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, §§ 1583, 1584.]

In Equity. On demurrer to bill.

George Turner, Thomas Burke, W. T. Dovell, and Allen H. Reynolds, for complainant.

Lester S. Wilson and Otto B. Rupp, for defendants.

WHITSON, District Judge. Elkanah Walker, Cushing Eells, and others, on the 20th day of December, 1859, secured a charter from the Legislature of Washington Territory for the establishment of an educational institution to be devoted to the instruction of persons of both sexes in science and literature. The persons therein named and their successors were declared to be a body politic and corporate, in law, by the name and style of the "President and Trustees of Whitman Semipary." It was provided that the corporation should have perpetual succession, with power to acquire, possess, and hold property, real, personal, and mixed, and to sell, grant, convey, rent, or otherwise dispose of the same at pleasure; with power to sue and be sued, plead and be impleaded, in all courts of justice, both at law and in equity. Sess. Laws Wash. T. 1859–60, p. 422.

The persons named in the act of the Legislature accepted the conditions of the grant, and established said seminary at Walla Walla in pursuance of its purposes, and in accordance with the provisions therein contained. It was maintained as Whitman Seminary until the 20th day of November, 1883, when the act was amended by the territorial Legislature. The name was changed to Whitman College, and it was amended in other respects, but in so far as vital to the matter now at issue, reference need only be made to section 6, relating to taxation, which reads as follows:

"That the property of said board of trustees of Whitman College, including all income and proceeds shall be used exclusively for the purposes of education, and in consideration of said use, said property, income and proceeds, shall not be subject to taxation." Sess. Laws Wash. T. 1883, p. 400.

The amendment was accepted; and, being thus empowered, Whitman College became the successor of Whitman Seminary and received by appropriate conveyances its property and assets, and thereafter continued to be, and is now, maintained as an educational institution for the purposes expressed and in accordance with the original act and the amendments thereof.

Thus may be briefly summarized the allegations of the bill in so far as it relates to the history of the subject-matter which leads up to the controversy in this case. That controversy arises out of the attempt of the defendants, who are alleged to be, respectively, the assessor, treasurer, auditor, and board of county commissioners of Walla Walla county, to assess for taxation, and levy taxes upon, certain real property belonging to the complainant, which it is contended is in violation of the amendatory act of 1883, and it has taken the form of a

demurrer to the bill of complaint, which challenges both the jurisdiction of the court and the equity of the bill.

First, as to Jurisdiction.

(a) It is objected that an amount sufficient to sustain jurisdiction is not disclosed, the tax sought to be collected being $946.32; that the amount of the tax, and not the value of the property taxed, furnishes the criterion by which jurisdiction should be determined, and that future taxation is so speculative and involved in so much uncertainty as not to be the subject of inquiry; that complainant may not be the owner of the property, and if so future taxes may not be assessed. As to the extent of this rule, we must now inquire.

In Citizens' Bank v. Cannon, 164 U. S. 319, 322, 17 Sup. Ct. 89, 41 L. Ed. 451, the Supreme Court, in discussing the question, said:

"The purpose of the bill is to restrain certain tax assessors and tax collectors from collecting taxes for specific years, and, if the amount of such taxes does not confer jurisdiction, it is, from the nature of things, impossible for a court to foresee what, if any, taxes may be assessed in the future."

So it was thus stated in Holt v. Indiana Mfg. Co., 176 U. S. 72, 20 Sup. Ct. 272, 44 L. Ed. 374:

"And the effect on future taxation of a decision that the particular taxation is invalid cannot be availed of to add to the sum or value of the matter in dispute."

That the rule is well settled the following authorities will attest: Fishback v. Western Union Tel. Co., 161 U. S. 96, 16 Sup. Ct. 506, 40 L. Ed. 630; Washington, etc., R. v. District of Columbia, 146 U. S. 231, 13 Sup. Ct. 64, 36 L. Ed. 951; New England Mortgage Security Co. v. Gay, 145 U. S. 123–130, 12 Sup. Ct. 815, 36 L. Ed. 646; Northern Pacific Railroad Co. v. Walker, 148 U. S. 392, 13 Sup. Ct. 650, 37 L. Ed. 494; Walter v. Northeastern Railroad, 147 U. S. 370, 13 Sup. Ct. 348, 37 L. Ed. 206; Clay Center v. Farmers' Loan & Trust Co., 145 U. S. 224, 12 Sup. Ct. 817, 36 L. Ed. 685; Mayor, etc., of Baltimore v. Postal Tel. Cable Co. (C. C.) 62 Fed. 500; Linehan Railway Transfer Co. v. Pendergrass, 70 Fed. 1, 16 C. C. A. 585; Woodman v. Ely (C. C.) 2 Fed. 839; Murphy v. East Portland (C. C.) 42 Fed. 308.

Nor can the contingent loss which may be sustained by either of the parties through the probative effect of the judgment, however certain it may be that such loss will occur, be considered for the purpose of sustaining jurisdiction. New England Mortgage Co. v. Gay, 145 U. S. 123, 12 Sup. Ct. 815, 36 L. Ed. 646; Rude v. Westcott, 130 U. S. 152, 9 Sup. Ct. 463, 32 L. Ed. 888; Elgin v. Marshall, 106 U. S. 578, 1 Sup. Ct. 484, 27 L. Ed. 249; Gibson v. Shufeldt, 122 U. S. 27, 7 Sup. Ct. 1066, 30 L. Ed. 1083; Bruce and Another v. Manchester & Keene Rd., 117 U. S. 514, 6 Sup. Ct. 849, 29 L. Ed. 990.

In the latter case it was held:

"The matter in dispute, on which the jurisdiction of this court depends, is the matter which is directly in dispute in the particular cause in which the judgment or decree sought to be reviewed has been rendered; and the court is not permitted, for the purpose of determining its sum or value, to estimate its collateral effect in a subsequent suit between the same or other parties."

These authorities would at first blush appear to deny the jurisdiction of the court in this case. Such was my firm conviction at the conclusion of the oral arguments. The correct solution of the question turns upon what is in dispute here; whether it is the taxes now assessed, and which may in the future be assessed, or whether it is the right to be exempt from taxation pursuant to the terms of the statute. That the Supreme Court had in mind a distinction in this regard is disclosed by reference to Citizens' Bank v. Cannon, supra, where this language was used:

"It is further argued that jurisdiction may be seen in the averment of the bill that the value of the exemption of the bank's property during the continuance of its charter exceeds $2,000 for each parish. But the answer to this is that this is not a suit to exempt property from taxation permanently. The purpose of the bill is to restrain certain tax assessors and tax collectors from collecting taxes for specific years, and, if the amount of such taxes does not confer jurisdiction, it is, from the nature of things, impossible for a court to foresee what, if any, taxes may be assessed in the future."

Complainant was seeking in this case to enforce an exemption granted by the laws of the state of Louisiana, but the object sought was to be exempt from the payment of taxes already assessed, asserted, it is true, by reason of the act of exemption and in reliance upon it; but the purpose of the suit related wholly to particular taxes less than the jurisdictional amount, together with those anticipated for succeeding years.

In Scott v. Donald, 165 U. S. 58, 17 Sup. Ct. 265, 41 L. Ed. 632, interference with the right to import liquors into South Carolina was the ground upon which an injunction was sustained. It is true in that case it was stipulated between the parties that the right to import liquors in the manner in which the complainant had been importing them, and intended in the future to import them, was of the value of $2,000 and upwards; but the stipulation related purely to a question of fact, and the jurisdiction could only have been sustained upon the principle that complainant's right to import liquors was the matter in dispute, for the tax complained of was an insignificant amount.

Lanning v. Osborne et al. (C. C.) 79 Fed. 657, involved water rates for irrigation which had been fixed at $3.50 per acre; the purpose of the suit being to establish the right to collect $7 per acre. In referring to the argument of counsel against jurisdiction, Judge Ross, in sustaining it, said:

"I am unable to see the least ground for their contention. But for the high character of the counsel, and for the earnestness with which they press the point, I should be disposed to think it little less than absurd to say that the subject-matter of the controversy between the complainant and the respective defendants is the sum of $3.50—the mere difference between the annual rate contended for by the defendants and that to which the complainant asserts a right. The real subject of the controversy is the asserted right on the part of the land and town company to establish the rates at which it will furnish water to the defendants for the purpose of irrigation, in the absence of any action on the part of the board of supervisors of the county. The establishment of that right, denied by the defendants, is the principal object of the bill, and it is the value of that right which constitutes the amount in controversy. Railway Co. v. Kuteman, 4 C. C. A. 503, 54 Fed. 547; Fost. Fed. Prac. § 16; Stinson v. Dousman, 20 How. (U. S.) 461, 15 L. Ed. 966; Railroad

Co. v. Ward, 2 Black (U. S.) 485, 17 L. Ed. 311. The bill shows the value of that right to be more than $2,000."

Nashville, C. & St. L. Ry. Co. v. McConnell et al. (C. C.) 82 Fed. 65, was a suit to restrain "scalpers" from buying and reselling tickets to the Tennessee Centennial Exposition. It was held, upon application for an injunction, that the amount in dispute was not determined by the amount which the complainant might recover from the defendant in an action at law for the acts complained of, but by the value of the right to be protected, or the extent of the injury to be prevented by the injunction. So in a suit for injunction to prevent unlawful interference with the complainants' business, it has been held in this circuit that the value of the right to carry on such business is the matter in dispute. Evenson et al. v. Spaulding et al. (C. C. A.) 150 Fed. 517.

The value of the property described is alleged to be $10,000. The grounds relied upon for relief are as follows:

"That if taxes are levied upon the property of the said Board of Trustees of Whitman College, as aforesaid, and collection thereof enforced, as it is hereinbefore set forth, collection thereof will be attempted to be enforced by said defendants unless restrained by order of this court, the said Board of Trustees of Whitman College will be compelled to pay as taxes upon its property aforesaid, annually, a large sum, to wit, a sum in excess of $2,500."

It is also alleged:

"And this complainant asserts, and by this action seeks to enforce, a right perpetual to the exemption from taxation of all the property, real and personal, of said complainant."

"That the matter in dispute herein exceeds, exclusive of interest and costs, the sum or value of $2,000."

And complainant prays, among other things, "to be perpetually exempt from taxation under the laws of the state of Washigton."

Accepting these averments as they must be considered for the purposes of the present inquiry, it would be premature to say that, if donations have been made upon the strength of the assurance that taxes would not be levied upon the property of complainant as alleged in the bill, its right to be so exempt may not be of greater value than the amount essential to retain the cause in this court, for it may well be supposed that the withdrawal of that favor would deter others from making like donations, and the effect of the change upon the status of its property, and upon the efficiency of the institution itself, might be such as to depreciate its charter to an extent sufficient to bring it within the power of the Circuit Court to entertain the contention which the complainant makes. If the right which the complainant seeks to enforce is of such a value, then a very different question is presented from that of a tax less in amount than that which the court is authorized to consider, even though such relief be sought under a valid statute which gives exemption. The scope of the bill is clearly one beyond mere relief against the tax which is mentioned. The value of the right to be exempt from taxation must be found before it can be held that the complainant is remediless here.

It is true the validity of a tax less than $2,000 is incidentally involved, but that cannot be construed as a limitation upon the broader purpose

in view. The value of the matter in dispute is the test by which jurisdiction is determined. Smith v. Adams, 130 U. S. 167, 9 Sup. Ct. 566, 32 L. Ed. 895; Stinson v. Dousman, 20 How. (U. S.) 461–467, 15 L. Ed. 966; American Fertilizer Company v. Board of Agriculture of North Carolina, 43 Fed. 609, 11 L. R. A. 179; Simon et al. v. House et al., 46 Fed. 317; Humes v. City of Ft. Smith, Ark. (C. C.) 93 Fed. 857; Delaware, L. & W. Co. v. Frank (C. C.) 110 Fed. 694; Southern Express Co. v. Mayor, etc., of Ensley (C. C.) 116 Fed. 756; City of Hutchinson v. Beckham, 118 Fed. 401, 55 C. C. A. 333; Pennsylvania Company v. Bay (C. C.) 138 Fed. 203.

(b) The parties, complainant and defendants, are citizens and residents of this district. Complainant relies upon section 10, art. 1, of the Constitution of the United States, which prohibits the impairment of contracts, and upon the act of Congress which vests in the Circuit Courts power to hear controversies arising under the federal Constitution and laws. 25 Stat. 434, c. 866.

The power to hear the cause by reason of the amount involved appearing to be sufficient, the position of complainant's counsel has the sanction of authorities which need only be cited to illustrate their controlling force upon this phase of the case. Given v. Wright, 117 U. S. 648–655, 6 Sup. Ct. 907, 29 L. Ed. 1021; Yazoo, etc., R. R. Co. v. Thomas, 132 U. S. 174, 10 Sup. Ct. 68, 33 L. Ed. 302; Wilmington & Weldon R. R. Co. v. Alsbrook, 146 U. S. 279, 13 Sup. Ct. 72, 36 L. Ed. 972; Illinois Central R. R. Co. v. Adams, 180 U. S. 28, 21 Sup. Ct. 251, 45 L. Ed. 410; Starin v. New York, 115 U. S. 257, 6 Sup. Ct. 28, 29 L. Ed. 388; Walla Walla v. Walla Walla Water Co., 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341; Vicksburg Water Power Co. v. Vicksburg, 185 U. S. 65, 22 Sup. Ct. 585, 46 L. Ed. 808; Nashville Ry. Co. v. Taylor (C. C.) 86 Fed. 168. Notwithstanding the fact that Trustees of Dartmouth College v. Woodward, 4 Wheat. 519, 4 L. Ed. 629, has been many times before the courts, often distinguished, and variously applied, yet the principle there announced that a charter constitutes a contract has never been overturned, and it has been expressly applied to legislative grants exempting from taxation. Asylum v. New Orleans, 105 U. S. 369, 26 L. Ed. 1128; Washington University v. Rouse, 8 Wall. (U. S.) 439, 19 L. Ed. 498; Dodge v. Woolsey, 18 How. (U. S.) 331, 15 L. Ed. 401; State Bank of Ohio v. Knoop, 16 How. (U. S.) 369, 14 L. Ed. 977; Farrington v. Tennessee, 95 U. S. 679, 24 L. Ed. 558.

Assuming now, because is so appears by the allegations of the bill, that the amendatory act was based upon a sufficient consideration, we are led to inquire as to the validity of the plaintiff's contract, and whether it would be impaired by the levy and collection of taxes upon its property. Thus we are brought to the most important question to be considered.

The suggestion made in argument that those properties not devoted to the actual use of the college—that is, occupancy for educational purposes—do not fall within the language of the act, may be dismissed with the remark that such a construction is not consistent with the manifest intent of the Legislature, namely, to establish an educational institu-

tion, and to provide assistance for it by exempting its property from the burdens imposed for governmental purposes. The contention is neither justified by the letter nor the spirit of section 6. The provision "that the property of said Board of Trustees of Whitman College, including all income and proceeds, shall be used exclusively for the purposes of education," and shall be exempt from taxation, must be construed in view of the well-known ways by which such institutions are endowed. The privilege granted would be of but slight consequence if it could only apply to the buildings and grounds occupied for the uses of the college as such. The word "income," taken in connection with the context, clearly indicates an intent to exempt property available for the maintenance of the college. Home of the Friendless v. Rouse, 8 Wall. (U. S.) 437, 19 L. Ed. 495.

It is difficult to conceive how more apt words could have been used to express that intent than those which so concisely and yet comprehensively imply that all the property, whether income producing or otherwise, should be exempt from taxation. In the nature of things, there can be no income from the college buildings. To hold with the contention that words of such clear import were only intended to apply to a part of the property, and to that part from which no income or proceeds could in any way be derived, would be to misinterpret plain language, to override the well-expressed intention, and to overlook that which it must be conclusively presumed was in the minds of legislators when dealing with the subject, namely, that institutions of this character are almost invariably maintained by income derived from investments, and those generally secured by donation.

Passing to the more serious suggestion, which is that it was beyond the power of the territorial Legislature to enact the amendment under which the complainant claims exemption from taxation, and treating this phase of the case as relating to jurisdiction, rather than as discretion in its exercise, it may be remarked, and indeed it is not seriously disputed, that prior to 1867 there was no congressional or other inhibition which would have prevented the enactment of such a statute. The difficulty arises on account of an amendment to the Organic Act of the territory, approved March 2, 1867, which reads as follows:

"That the legislative assemblies of the several territories of the United States shall not, after the passage of this act, grant private charters or especial privileges, but they may by general incorporation acts permit persons to associate themselves together as bodies corporate, for mining, manufacturing, and other industrial pursuits." 14 Stat. 426, c. 150.

It will be noted that the original act incorporating Whitman Seminary was at a time prior to the adoption of this amendment, and that the amendment to that act was adopted subsequently. This involves the necessity of inquiry into what was meant by "especial privileges."

As preliminary, it is proper to observe, as counsel have so well argued, that the subject of education has ever been uppermost in the minds of those who have established the outposts of civilization. The log schoolhouse has always accompanied the earlier efforts of pioneer life. It has been understood from the beginning that the means of education, as a rule, should not be called upon to contribute to the public expenses. Experience has shown that attempts of this character

have always been made at the sacrifice of the persons engaged in educational work. The assumption being that no ignorant people could be civilized, it was foreseen that the best available means for moral and material development was by the dissemination of knowledge; and as the work was of a charitable nature, as usual with small reward to those engaged in it, it was thought proper as contributing to the growth of the country to aid by exempting the accumulations received at the hands of charitably disposed persons from the ravages of the tax collector.

These thoughts become peculiarly pertinent to this case when it is recalled that this association of pioneers, as early as 1859, were struggling to carry on what at that time was an undertaking which displayed much public spirit and was of great hardship and self-denial; one which it is well known was of extreme difficulty, considering the early days, the sparsity of settlement, the want of facilities, the absence of wealth, the remoteness from centers of population, and the dangers attending communication with the more highly developed and well-established communities of the country. And, no doubt, in consideration of their efforts, which had in a measure been successful, and for the encouragement of education in the territory, the Legislature deemed it wise to render further assistance, and to give assurance of its approval of their strenuous endeavors by holding out the inducement to them and to their successors, and to those who might look with favor upon their early struggles, that upon any property thus brought together for the public benefit the people of the territory could well afford to forego the mere pittance which might from time to time be thus collected by the levy of taxes. The appreciation of the fact that education and refinement are more likely to go hand in hand with virtue than are illiteracy and ignorance, that they best lead to good citizenship and the good order of the community, constitutes the consideration —the public benefit—which justifies the exemption from taxation which the Legislature saw fit to give. It was fitting that such prescience should have induced so commendable an effort to commemorate, in the beautiful valley where he met his tragic death, the heroic deeds of one who contributed so much to the assertion of our title to the Oregon country since fully assured through his material aid, and which has become so vast an empire of wealth and civilized life.

There was no contemporaneous grudging of favors, whether asked of the public or bestowed by the munificence of individuals, and I cannot refrain from mentioning with lively recollection the wonderment expressed by counsel at the bar that an institution of so much merit should meet with so technical a contention in the house of its friends. Not being organized for profit, and promoters of such institutions being able to receive no reward except that which goes with good works, it is hardly to be supposed that the evils which Congress intended to remedy, when it laid its prohibitory hand upon the power delegated to the Legislatures of the territories, related to matters of the character under review, but rather that it was intended to prevent, as the words so clearly imply, the granting of corporate charters by legislative action, and the giving of exclusive rights, such as the building of public highways, toll roads, ferry and bridge franchises, and the like, which

had come to be an abuse, at least in the territory of Washington, as an examination of the session laws will abundantly disclose. Sess. Laws 1857–58, pp. 45, 46, 48; Sess. Laws 1859–60, pp. 415, 417, 418, 428, 430, 439, 440, 442, 443, 445, 447, 449, 450, 453, 459, 460, 463, 464, 465, 467, 472, 473; Sess. Laws 1860–61, pp. 72, 74, 75, 79, 82, 84, 86, 88, 97, 105, 107, 110, 112, 115, 116, 123, 128; Sess. Laws 1861–62, pp. 63, 65, 69, 75, 80, 81, 83, 89, 90, 91, 92, 99, 102, 105, 108, 114, 115, 117, 119, 124, 128, 130, 131, 132, 133, 135; Sess. Laws 1862–63, pp. 57, 61, 63, 65, 66, 67, 70, 73, 75, 76, 77, 78, 84, 86, 88, 89, 90, 91, 93, 95, 96, 100, 101, 102, 103, 104, 105, 107, 108, 109, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132; Sess. Laws 1864–65, pp. 90, 91, 93, 94, 95, 97, 98, 99, 100, 102, 103, 105, 107, 108, 114, 120, 124, 144, 148; Sess. Laws 1865–66, pp. 169, 172, 178, 180, 186, 188, 189, 193, 196, 200, 204, 207, 210; Sess. Laws 1866–67, pp. 207, 211, 213, 216, 218.

These numerous acts have been referred to as showing to what alarming extent the forming of private corporations by legislative action and the granting of monopolies had gone. It is fair to assume that it was in this respect, and with this departure from ordinary legislative methods in view, that the words "especial privileges," coupled as they were with private charters, were intended to relate. Such enactments are notably absent from the session laws after the congressional act of 1867, and from this it may be fairly deduced by the cotemporaneous understanding that Congress intended to check this tendency, which had so distinctly manifested itself in the industrial development of the people. Thus we must conclude, contrary to that which superficially appears, that it was not intended in the early days of western development to prevent the struggling pioneers from aiding those who were seeking to build up schools and colleges; that nothing was further from the intent of Congress than to hinder, harass, or annoy such efforts, or to deprive the people from giving such encouragement as has from the earliest settlements been so often and so freely accorded.

If this be the correct view, it disposes of this branch of the case. We are not without authority giving the construction upon which complainant relies. Immunity from taxation conferred on a corporation by legislation is not a franchise; nor does such immunity pass under a decree providing that the purchaser shall succeed to all franchises, rights and privileges. Chesapeake & Ohio Railway Co. v. Miller, 114 U. S. 176, 5 Sup. Ct. 813, 29 L. Ed. 121. In the sale of a franchise transferring all "rights, privileges, and immunities" of one insurance company to another, the right to be exempt from taxation granted to the first company did not pass by the use of those words. Phœnix Ins. Co. v. Tennessee, 161 U. S. 174, 16 Sup. Ct. 471, 40 L. Ed. 660. "The term 'especial privileges' refers to the granting of monopolies such as ferries, trade-marks, the exclusive right to manufacture certain articles, or to carry on certain business in a particular locality to the exclusion of others." Elk Point v. Vaughn, 46 N. W. 577, 1 Dak. 113. The constitutional provision that the Legislature shall not pass "a private or local bill * * * granting to any private corporation * * * any exclusive privilege" does not prohibit the enactment of a statute providing for payment of percentage upon gross premiums

in lieu of other taxes. Trustees of Exempt Firemen's Fund v. Roome, 93 N. Y. 313, 45 Am. Rep. 217. The term "privileges" does not include immunity from taxation, unless the other provisions of the act give such meaning to it. Pickard v. Tennessee, etc., Railroad Co., 130 U. S. 642, 9 Sup. Ct. 640, 32 L. Ed. 1051. A grant of lands to a railroad corporation, to be used as passenger and depot grounds and other public purposes, was not a grant of a special or exclusive privilege in violation of the Constitution of Illinois. State of Illinois v. Illinois Cent. R. R. Co. (C. C.) 33 Fed. 730.

There is another view which cannot pass unnoticed. Undoubtedly, Congress could have enacted the statute in question. By section 1851, Rev. St., the legislative power of the territories was extended to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States. One of the provisions of the Organic Act (section 1850, Rev. St.), reads as follows:

"All laws passed by the legislative assembly and governor of any territory except in any territories of Colorado, Dakota, Idaho, Montana and Wyoming shall be submitted to Congress, and, if disapproved, shall be null and of no effect."

It cannot be said that a law passed by a territorial legislature will become effective as against a previous inhibition contained in the organic act of such territory. On the other hand, the case of Mormon Church v. United States, 136 U. S. 1, 10 Sup. Ct. 792, 34 L. Ed. 481, would seem to hold to the contrary. Yet it is settled that where the act passed involves the construction of a statute, rather than the violation of an act of Congress, it will be assumed, in the absence of express disapproval, that the act was considered as extending to a rightful subject of legislation not inconsistent with the Constitution or laws of the United States. Such in effect was the holding in Miners' Bank v. State of Iowa, 12 How. (U. S.) 1-7, 13 L. Ed. 867, where it is said:

"Congress, in creating the territorial governments, and in conferring upon them powers of general legislation, did not, from obvious principles of policy and necessity, ordain a suspension of all acts proceeding from those powers, until expressly sanctioned by themselves, whilst for considerations equally strong they reserved the power of disapproving or annulling such acts of territorial legislation as might be deemed detrimental. A different system of procedure would have been fatal to all practical improvement in those territories, however urgently called for; nay, might have disarmed them of the very power of self-preservation. The argument would render also the acts of the territorial government, even the most wholesome and necessary, and though indispensably carried to the extreme of authority, obnoxious to the charge of usurpation or criminality. The reverse of this argument, whilst it is accordant with the investiture of general legislative power in the territorial governments, places them in the position of usefulness and advantage towards those they were bound to foster, and subjects them at the same time to proper restraints from their superior."

The inference is warranted that an act duly passed has been submitted for approval, and, where it has been suffered to remain without disapproval for many years, that it was approved. So it has been held:

"In the first place, we observe that the law has received the implied sanction of Congress. It was adopted in 1859. It has been upon the statute book for more than 12 years. It must have been transmitted to Congress soon after it was enacted, for it was the duty of the Secretary of the Territory to

transmit to that body copies of all laws, on or before the 1st of the next December in each year. The simple disapproval by Congress at any time would have annulled it. It is no unreasonable inference, therefore, that it was approved by that body." Clinton v. Englebrecht, 80 U. S. 446, 20 L. Ed. 659; Baca v. Perez, 42 Pac. 162, 8 N. M. 187.

Equities of the Bill.

The defendant has invoked a rule, often announced by the Supreme Court, a succinct statement of which is found in Pittsburgh Railway v. Board of Public Works, 172 U. S. 37, 19 Sup. Ct. 90, 43 L. Ed. 354, in this language:

"The collection of taxes assessed upon the authority of a state is not to be restrained by writ of injunction from a court of the United States, unless it clearly appears, not only that the tax is illegal, but that the owner of the property taxed has no adequate remedy by the ordinary processes of the law, and that there are special circumstances bringing the case under some recognized head of equity jurisdiction."

Under the revenue laws of the state, after a tax becomes delinquent, certificates of delinquency are issued and sold, which draw interest at the rate of 15 per cent. per annum. By section 1750 of Ballinger's Ann. Codes and Statutes, it is provided that such certificates of delinquency shall be prima facie evidence that:

"(1) The property described was subject to taxation at the time the same was assessed.

"(2) The property was assessed as required by law.

"(3) The taxes or assessments were not paid at any time before the issuance of the certificate.

"(4) Such certificate shall have the same force and effect as a judgment execution and sale of and against the premises included therein."

It is manifest that such a certificate outstanding, coupled with the provision that all taxes are liens upon the property assessed, would constitute a cloud. That an illegal tax upon real estate is a cloud upon the title, and that a suit in equity may be maintained to remove such cloud, is the settled doctrine in this state. Andrews v. King County, 1 Wash. 46, 23 Pac. 409, 22 Am. St. Rep. 136; Benn v. Chehalis County, 11 Wash. 134, 39 Pac. 365; Phelan v. Smith, 22 Wash. 397, 61 Pac. 31; Kinsman et al. v. Spokane, 20 Wash. 118, 54 Pac. 934, 72 Am. St. Rep. 24; Lewiston Water Co. v. Asotin County, 24 Wash. 371, 64 Pac. 544; Northwestern Lumber Co. v. Chehalis County, 24 Wash. 626, 64 Pac. 787. And the owner has no adequate remedy by the ordinary processes of the law. The complainant would be compelled to resort to a multiplicity of suits, for the statute requires that each parcel be assessed separately, and that separate certificates issue thereon. Such certificates may pass into the hands of different persons, or the county may become the purchaser. The exorbitant rate of interest imposed to insure prompt payment is a serious detriment to one who is in a state of uncertainty as to the validity of a tax upon his property. Remedies at law have expressly been held inadequate. Benn v. Chehalis County, supra; Phelan v. Smith, supra; Northwestern Lumber Co. v. Chehalis County, supra.

It it should be assumed that this suit has no broader scope than to enjoin the collection of a tax, and giving it the most narrow construc-

tion possible, it is not in any way violative of the rule laid down by the Supreme Court that federal courts should entertain suits of this character with reluctance.

For these reasons, the demurrer will be overruled.

UNITED STATES v. CONRAD INV. CO.

(Circuit Court, D. Montana. August 5, 1907.)

No. 720.

1. INDIANS—RESERVATIONS—WATER COURSES—FLOW OF WATER—APPROPRIATION.

An Indian reservation on public lands is property of the United States within the rule that the government, as the owner of lands bordering on a public stream, is of right entitled to the continued flow of the waters of such stream so far at least as may be necessary for the beneficial use of the property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indians, § 28.]

2. WATERS AND WATER COURSES—PUBLIC LANDS—APPROPRIATION OF WATER.

Under Rev. St. § 2339 [U. S. Comp. St. 1901, p. 1437], as long as land belongs to the United States as a part of the public domain, the water flowing over the same in nonnavigable streams is subject to appropriation for the purposes recognized and acknowledged by the local laws, customs, or decisions of the courts, and the mere fact that a stream traversing such public lands may border at some point or for some space on a specific territory reserved by the government for some particular governmental use or purpose will not of itself destroy the public character of its waters, which remain subject to appropriation the same as though the reserve had not been created, unless by the creation thereof there was a consequent reservation of the waters also for use in connection therewith.

3. INDIANS—INDIAN RESERVATION—WATERS.

The creation by the government of an Indian reservation on the public lands bordering on a nonnavigable stream operates as a reservation of so much of the waters of such stream as may be required by the proper needs of the government for use on the reservation for the benefit of the Indians thereon; but any surplus remains subject to appropriation by others in accordance with the local laws and customs, and such right includes the right to erect necessary dams, although they may rest in part on the land of the reservation.

4. SAME—BLACKFEET RESERVATION IN MONTANA—WATER RIGHTS.

The Blackfeet Indian reservation was created by a convention with the Indians, as shown by Act May 1, 1888, c. 213, 25 Stat. 113–129, by which the land was assigned to them for their exclusive use and occupancy that they might be assured of permanent homes, and with the design that they should ultimately take allotments in severalty. The reservation is in part bounded by the center line of Birch creek, a considerable stream, and while a considerable part of the land is capable of being used for farming, it is arid, and requires irrigation. *Held*, that the creation of the reservation operated as a reservation of so much of the waters of the creek as might at any time in the future be required and could be utilized in carrying out the purposes of the treaty; that, so long as the government was administering the affairs of the Indians, it had the right to determine as an administrative question the quantity of water required and to take the same when and where it deemed necessary, the rights of any others to appropriate water being subject to such paramount right.

5. WATERS AND WATER COURSES—WATER RIGHTS OF UNITED STATES—ESTOPPEL.

The action of the Secretary of the Interior or other departmental officer of the government in approving the maps of location of irrigation canals or ditches over public lands or reservations, as provided for by Act March 3, 1891, c. 561, §§ 18, 19, 26 Stat. 1101, 1102 [U. S. Comp. St. 1901, pp. 1570, 1571], cannot give the companies constructing the same any right to appropriate the waters of a stream, nor estop the United States to assert a priority of right thereto, where it exists, against either such companies or users who may be supplied by them.

6. SAME—SUIT BY UNITED STATES—PARTIES.

Any invasion of the prior right of the United States to the waters of a stream is a trespass, and the government may maintain a suit in equity to protect its right against any one or all of such trespassers.

In Equity.

Carl Rasch, U. S. Atty.

T. J. Walsh and George H. Stanton, for defendant.

WOLVERTON, District Judge. The facts relevant and material to an understanding of the issues involved by the present controversy are, in brief, as follows: The Blackfeet Indian reservation, by its present boundaries, was established by a convention with the Indians, as shown by Act Cong. May 1, 1888, c. 213, 25 Stat. 113, 129. Birch creek forms its southern and southeasternmost boundary; the line of separation being in the center of the stream. This creek has its source by several branches in the Rocky Mountains, and traverses public lands of the United States before it touches the reserve, and empties into the Marias river at the easternmost limit of the reserve. The Conrad Investment Company is a Montana corporation. In 1898 it began the construction of an extensive irrigation system for the reclamation and irrigation of lands in the county of Teton, in the state of Montana. The project contemplated the taking of water from Birch and Dupuyer creeks, to be carried away for storage and distribution as the demands might require. The company claims to have succeeded to an appropriation of 19,350 inches of water from Birch creek, initiated in 1897 by Thomas McGovern and his associates, and in right thereof, as well as by its own initiation, to have appropriated 20,000 inches of such water. At the time of the commencement of this suit it had constructed about 90 miles of the main channel and some 200 miles of laterals, together with a reservoir of dimensions of 5½ miles in length by a mile in width, with a depth of 35 feet, and storage capacity of 60,000 acre feet, adequate for the irrigation of 40,000 acres; the entire system being sufficient for the irrigation of 60,000 acres of land. The expense and outlay attending the enterprise was upwards of $100,000. As a means of diversion from Birch creek, the company constructed a dam across the stream, tying it to the bank upon the reservation side. The dam was first constructed of brush, bound together in bundles, laid in the stream extending with the current, and filled in with gravel and rock. Later, however, it was reconstructed, of the same kind of material, with two tiers of piling driven across the stream so as to hold the dam in place and render the structure more substantial and durable. This later improvement was completed about

the 1st of August, 1904, and increased the height of the dam from 12 to 18 inches. By means of this structure the investment company was enabled to divert practically all the water in the stream except during the flood seasons. During the months of May and June, 1898, the government constructed a ditch out of Birch creek, on the reservation side. A little later the intake was carried further up stream, and so contrived that the water from the creek, when there was any therein, would flow into it without the necessity of a dam. The length of the ditch is about 5½ miles, and it discharges into what is known as Long Coulee; thence the water is carried into Blacktail creek, which latter stream intersects Birch creek some 12 miles below the head of the ditch. The flowing capacity of the ditch is estimated by Jenkins, the engineer who constructed it, at about 800 inches. Mr. Robinson, another witness for the government, says that in its present condition, it having become out of repair, its capacity is from 700 to 800 inches, but that under ordinary conditions it would carry 1,500 inches; that being the maximum. The defendant's witnesses differ widely from this estimate, and place the capacity of the ditch at approximately 250 inches; one witness extending it to 330. It is probable, from a survey of the entire testimony, that 800 inches is the nearer correct. It is in evidence that this ditch, with an extension that is practicable to be made across and beyond Blacktail creek, and suitable laterals, will cover from 9,000 to 10,000 acres of land upon the reservation susceptible of irrigation. The defendant's evidence tends to show that there are but 2,700 or 2,800 acres fit for irrigation under the ditch. This as it respects the conduit as now constructed. Such evidence shows, further, however, that there are from 8,000 to 10,000 acres of land upon the reservation susceptible to irrigation from Birch creek. This includes land lying above the head of the government ditch on the creek, as well as below the same as now extended. Six laterals have been taken out of the ditch, and used more or less by persons whose lands lie under it, for irrigating grasses, grains, and vegetables; grasses being in by far the larger proportion. These laterals have not been kept up uniformly, and not so much water is now being used through them for irrigation as formerly. They consist of the Cayton lateral, used at one time to irrigate some 30 acres; Cayton's place, consisting of 160 acres; the Teasdale or Ingram lateral, of size about 3½ feet in the clear at the base; the ranch in connection with which it is used, containing 200 acres. The Tatsey laterals, two of them, have been used for the irrigation of 100 acres, and are susceptible of distribution upon 400 or more. Tatsey is the owner of 160 acres, but in the occupancy of 640. Besides these, there are the Frank Pias and Mrs. John Hall laterals, one each to these persons. In addition to the government ditch with its laterals, four other ditches have been taken out of Birch creek upon the reservation, namely, the White Dog-Weatherwax, McKnight, Fisher, and Lon White ditches. These have a carrying capacity in the aggregate of 1,740 inches, and are presently so disposed as to irrigate more than 500 acres of land. There are inhabitants on the reservation side of the creek other than these mentioned, making an aggregate of 11 persons with their families. This by brief generalization of the testimony. The defendant's testimony will vary the

generalization somewhat. But let the amount of water diverted be more or less, or the amount of land susceptible of irrigation from such diversion be smaller or larger in area, we have a fairly definite idea of what can or might be done as it respects the irrigation from Birch creek of lands upon the reservation.

Much testimony has been directed to the dam at the head of the investment company's canal, for the purpose of indicating what amount of water was permitted to pass it and flow down the creek for use by persons desiring to irrigate their lands below. Some of the witnesses affirm that there was a considerable seepage from the dam, amounting to from 100 to 250 inches of water; while others testify that a large amount of water was allowed to run over the dam and continue its course down the stream. I think it is proven, however, by a survey of all the testimony, that the dam as constructed was sufficient to turn practically all the water in the stream at its ordinary stage. In the flood season, which occurs annually and lasts from two to four weeks, the dam overflows by a large volume, and the overflow continues down the course of the creek; but otherwise the water was mainly diverted by the canal. Seepage from the dam amounted to but little, and whatever there was of it was taken up by ditches upon the south side of the stream, of which there are several, so that the people upon the reservation secured but small, if any, benefit from it. The investment company could, by the regulation of its headgates, so raise the water in the stream as to allow it to flow over the dam in considerable quantities; but this was a regulation of which the company had complete control, and it assumed to divert the water or let it go down the stream as it pleased. By reason of its regulation, there was at times insufficient water running down the stream for use by the people upon the government side even for stock purposes, to say nothing of the irrigation that might have been carried on.

It is argued that there were some springs upon the government side that afforded abundant water for all stock and domestic purposes, and even for a limited irrigation. But in the last two years those springs, some, if not all of them, went dry, and the people were left without sufficient for their use. It is true that the last two years have been unusually dry, and there has been a dearth of water, as compared with former years. However, there has been at all times a large quantity of water flowing in Birch creek, abundant, if allowed to go down the stream, to have supplied all the wants and present needs of the people living upon the government side of the stream; but, as I have shown, it was cut off from them by the investment company's dam. Birch creek, at its lowest stages, carries about 2,500 inches of water; at its highest, a very large volume, amounting to 150,000 inches.

The primary question involved here, in my opinion, has been settled by the decision of the Circuit Court of Appeals for the Ninth Circuit, in the case of Winters v. United States, 143 Fed. 740, 74 C. C. A. 666. It was there determined, following the authority of the Supreme Court as announced in United States v. Rio Grande Irrigation Company, 174 U. S. 690, 702, 19 Sup. Ct. 770, 43 L. Ed. 1136, and Gutierres v. Albuquerque Land Co., 188 U. S. 545, 554, 23 Sup. Ct. 338, 47 L. Ed. 588, in effect that the United States, as owner of the lands—that is, such as

have been appropriated, set aside, or reserved for the government's use and benefit, bordering upon a public stream—is of right entitled to the continued flow of the waters of such stream, so far at least as may be necessary for the beneficial use of the government property. The Blackfeet Indian reservation is, in the sense defined, to all intents and purposes government property. The government has the legal title, and, while it may be said to hold the lands in trust for the Indians who are in the occupancy thereof for permanent homes (Act Cong. May 1, 1888, c. 213, 25 Stat. 113), yet it is their guardian and protector, and is bound by the policy it has adopted and long maintained towards them to conserve their rights and interests until released from guardianship; it being designed that eventually its release shall come through allotments in severalty in pursuance of the general allotment act of February 8, 1887 (24 Stat. 388, c. 119).

The next question in natural order needs elaboration. Local customs, regulations, and laws are paramount in determining the right to the diversion and use of water from public streams. Act Cong. July 26, 1866, c. 262, 14 Stat. 253 (section 2339, Rev. St. [U. S. Comp. St. 1901, p. 1437]), is in recognition of this, without intending to create any new, other, or different rights than such as existed at the time of its adoption. Atchison v. Peterson, 20 Wall. 507, 22 L. Ed. 414; Basey v. Gallagher, 20 Wall. 670, 22 L. Ed. 452; Broder v. Water Company, 101 U. S. 274, 25 L. Ed. 790. It is said: "The waters of flowing streams are publici juris—the gift of God to all his creatures." Mohl v. Lamar Canal Co. (C. C.) 128 Fed. 776, 778. And again that, the government being the proprietor and owner of the public lands, "it has the power to sell or dispose of any estate therein or any part thereof. The water in an innavigable stream flowing over the public domain is a part thereof, and the national government can sell or grant the same, or the use thereof, separate from the rest of the estate, under such conditions as may seem to it proper." Howell v. Johnson (C. C.) 89 Fed. 556, 558.

And so it has been held, referring to the statute of 1866, and the practical construction thereof has been, that as long as land belonged to the United States the water flowing over the same was subject to appropriation for any of the purposes named, when such appropriation was recognized by the local customs, laws, or decisions of the courts. Cruse v. McCauley (C. C.) 96 Fed. 369, 374. The lands here referred to as belonging to the United States, it is needless to add, are not such as have been previously spoken of as government property. They are the public lands open for settlement, occupancy, or purchase in some form or right. Now, it is a most natural sequence that the waters of a stream cannot lose their public character unless they are disposed of or reserved in some right or need by the general government, or the right to their use is acquired through local customs, laws, and regulations. The mere incident or circumstance therefore that a stream traversing the public lands of the country may border at some point, or for some space, a specific territory reserved by the government for some particular governmental use or purpose, would not of itself destroy the public character of its waters. They would be subject to appropriation the same as if the reserve had not been created,

unless by the creation thereof there was a consequent reservation of the waters also for use in connection therewith. The proposition is susceptible of illustration equivalent to demonstration. Take a reserve created for military purposes, bordered by a stream carrying a large volume of water, yet unnavigable; the need being limited to domestic, stock, and other small uses. It could not be said that the incident of the stream bordering the reserve affected the character of the waters flowing therein. If they were publici juris before the reserve was created, they remained publici juris thereafter, except as to such portion as was essential to the proper needs and use of the government upon the reserve. So it is of a reservation set aside for the exclusive occupancy of the Indians. The mere fact that a stream borders it in some portion of its contour does not relieve the waters thereof of the character of publici juris, if they were such prior to the creation of the reserve, except as to such portion thereof as the proper needs of the government may require for use upon the reservation for the benefit of the Indians. It follows therefore that, if there were any surplus waters of Birch creek over and above the needs of the government for the use of the Indians settled upon the Blackfeet Indian reservation, they were subject to diversion and appropriation by any person, association of persons, or corporation entitled to the benefits thereof under the local laws and customs and the acts of Congress pertaining thereto.

It would seem that, by virtue of the acts of Congress relative to the public lands, and the streams and waters incident thereto, namely: Act July 26, 1866, c. 262, 14 Stat. 253, being section 2339, Rev. St. [U. S. Comp. St. 1901, p. 1437]; Act March 3, 1877, c. 107, 19 Stat. 377 [U. S. Comp. St. 1901, p. 1548] relative to the reclamation of desert lands; sections 18, 19, and 20 of the amendatory act thereto (Act March 3, 1891, c. 561, 26 Stat. 1101, 1102 [U. S. Comp. St. 1901, pp. 1570, 1571]); and Act June 17, 1902, c. 1093, 32 Stat. 388 [U. S. Comp. St. Supp. 1905, p. 349], as construed by the Supreme Court, particularly in the opinion rendered in the case of Gutierres v. Albuquerque Land Co., supra—the defendant, the Conrad Investment Company, could rightfully divert water from streams coursing the public domain, and hence, in view of previous considerations herein, divert the surplus waters of Birch creek, for actual use for irrigation and other purposes. If it was entitled to do this, then it was entitled to do that which was reasonably necessary to effectuate the diversion, by the construction of a dam or other means of turning the water from its natural channel; and if, to this end, it was essential to extend the dam to the bank of the stream bordering the reservation, the right to do so would be but an incident of the right of diversion. So I conclude that, in itself, the construction by the defendant company of the dam to a conjunction with the reservation bank of Birch creek was not a trespass such as would entitle the government to an injunction restraining its maintenance.

I come then to inquire: What is the extent of the government's reservation of the waters of Birch creek for its needs and uses in behalf of the Indians in the occupancy of the Blackfeet reservation? And, subsidiary to this, is the further question as to the manner in which

the government may assert the rights that it possesses in and to such waters of a stream as it is entitled to.

By a reference to the treaty with these Indians, it will be seen that the reservation was assigned to them for their exclusive use and occupancy, and that they might be assured of permanent homes. The avowed purpose of the government was to encourage the Indians in habits of industry, and to induce them to engage in pastoral pursuits and the cultivation of the soil, in order that they might not only become self-supporting, but that they should eventually take on the habits and busy themselves with the enterprises of the civilized races. And, further, through the long-established policy of the general government, it was designed that eventually those Indians would come into individual allotments of these reservation lands, and occupy and own them in severalty, and that when the allotments were made the Indians should utilize them in the more approved manner of which they were susceptible. The lands being arid, the need of water is manifest, and so it must be considered that it was likewise designed that the Indians should have and enjoy the use of water in available streams wherever their needs might require. The Indian problem was and is, however, in a state of development. How well the government will eventually succeed in inducing these Indians to adopt the habits of a pastoral and agricultural people is not yet apparent. It has made progress with other tribes, and why may it not accomplish beneficial results in that line with these? We are informed by the present record that some of these Indians, and especially is this so of the half-bloods, are endeavoring to utilize the soil for grazing and agricultural purposes, and to that end are making use of the water available from streams for irrigation, that their products may be more abundant. And Major Dare, the agent in charge, tells us that about 90 per cent. of the Indians on the reservation have taken up separate settlements. This denotes progress in the way of the government's policy, and gives promise that its full hopes may yet be realized. Manifestly, the Indians cannot be expected to acquire water rights to any considerable extent through prior appropriation, because they are not far enough advanced in the art of agriculture to reduce the water to a continuous use, and the water of the public streams that they shall finally need depends largely upon their progress in this art. The government, however, being their guardian, has a most important trust to perform in this relation; that is, so to conserve the waters of such streams as traverse or border the reserve as to supply the Indians fully in their probable, or, I may say, even possible future needs, when they have ultimately secured their allotments in severalty.' What these needs will be cannot be definitely determined. For the present, the matter is administrative in its detail. These Indians are now but the wards of the government. As it pertains to the lands which the government is holding in trust for them, it is administering them for their proper use and benefit, and in its administrative capacity it ought to be the judge of what amount of the waters of the streams adjacent to the reservation is or will eventually be essential for the needs of the Indians for use in connection with their lands.

The government has not to make a prior appropriation to enable it

to obtain the use of the water. It has only to take that which has been reserved or that which has never been subject to prior appropriation upon the public domain. It has only to come into its own when its needs may require—the Department of the Interior being the instrumentality by which it exercises that right and privilege—and all persons seeking appropriations from public streams must take subject to this paramount right.

It has been developed at the trial that from 8,000 to 10,000 acres of land upon the reserve is susceptible of irrigation from Birch creek. Of much of this the irrigation would be for grazing purposes, which would require less water than if employed for agriculture or the production of wild grasses for hay. Mr. Robinson, an engineer and a witness for the government, estimates that one inch of water is sufficient for the proper irrigation of 2½ acres. This appears to be the government's estimate ordinarily. Mr. Darling, an engineer also, and a witness for the defendant, estimates one-fourth of an inch to the acre, but concedes the government's estimate to be at the rate as stated by Robinson. The government has sought to divert 800 inches. Persons of Indian blood or the husbands of Indian women residing within the reserve have made other large diversions, aggregating possibly 1,740 inches, but have seemingly not applied the half of it; the area susceptible of being covered thereby, so far as the evidence would indicate, amounting to from 500 to 600 acres, possibly more. The government alleges that its diversion by means of the ditch and those made by the settlers amount in the aggregate to 2,000 cubic feet per minute, and that the whole of this amount is essential and necessary for the proper irrigation and reclamation of lands available and adjacent to said creek. There is a confusion arising from the bill putting its estimate upon the basis of cubic feet per minute, while the witnesses speak in inches. To bring the two together, I have made the following deduction: 2,000 cubic feet per minute is equivalent to 33⅓ second feet. Reducing this to inches, according to Mr. Newell's estimate of the ratio of inches to the second foot, which is done by multiplying by 50, we have 1,666⅔ inches. F. H. Newell's article on Irrigation, vol. 8, The Americana.

Although the bill contains other general allegations—that in order to promote the civilization and improvement of the tribes of Indians upon said reservation and to encourage habits of industry among them, and to make all the lands within the said reservation which are adapted and suitable to farming and ranching and the pursuits of agriculture susceptible to cultivation, all the waters of Birch creek will be needed—the testimony adduced does not bear them out, and the question recurs whether the government is now entitled to the amount of water which it alleges has been diverted. I am of the opinion that it is so entitled. It would need more according to the estimate of Mr. Darling, at the rate of one-fourth of an inch of water to the acre. According to the experience of water users in Southern California, however, the above amount of 1,666⅔ inches will be ample for the irrigation of 10,000 acres, if there should be that much contiguous to Birch creek on the reservation side. See Mr. Newell's article above cited. Especially do I think this is so for the present needs, considering that

much of the land will be irrigated for pasture only. What the needs may be in the course of time, or when allotments shall have been made, is a matter that cannot be determined from the present record, and I am of the opinion that it should be left to the Interior Department to determine that as the exigencies may arise.

It is argued by counsel for defendant that water can be brought over from Badger creek, a stream located 13 or 14 miles north of Birch creek, for irrigation of all the Birch creek lands. This, however, is a project of doubtful utility; but conceding that it could be successfully carried out, the government is not required to do so, when the waters of the latter stream are much more available, and are as much subject to use upon the reservation as those of Badger creek. The suggestion is clearly one of expediency, of which the Interior Department ought to be the sole judge, as it is a matter for its initiative, acting in its administrative capacity, in determining the occasion and the needs of the government pertaining to the waters flowing in the stream along and upon the reservation.

It is urged that the government ought to be estopped by its conduct to question the right of the investment company to divert from Birch creek the amount of water that it is claiming, the conduct ascribed consisting in the approval of the survey and plat of the canal traversing the public lands, as it does, and so laid as to take the larger volume of its water from Birch creek, by which it is claimed the government impliedly assented to the diversion; and that, the investment company having expended large sums of money in the construction of its canal, reservoir, and laterals, and many persons having settled in proximity thereto with a view to acquiring the use of water therefrom for irrigation and other purposes, the government ought not now to be heard to deny the rights which it encouraged the parties concerned to acquire at large expense.

Whatever right the investment company had to locate and construct its canal through the public lands and reservations of the United States was accorded by sections 18, 19, and 20 of the act of March 3, 1891, supra. Such a right is granted by these sections to any company formed for the purpose of irrigation, and duly organized under the laws of any state or territory, which shall have filed or may hereafter file with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization; and it is provided that: "All maps of location shall be subject to the approval of the department of the government having jurisdiction of such reservation." This is but a regulation of statute, and the Secretary of the Interior acts in pursuance thereof. He has no power or authority to dispose of any of the waters of the public streams to private parties, nor can he bind the hands of the government by any acts of his looking to such a disposal. Hence his approval of maps of location as it relates to such a project bears with it the assent of the government that the project may go forward in the location and construction of canals, reservoirs, etc., over and across the public lands and reservations; but it can, by no rational canon of construction, carry with it a grant or the force of a permit to take any of the waters of the public streams. It is determined by other regulations altogether what waters may be

so taken, and they are limited to the surplus waters remaining after the needs of the government and the acquisitions of other prior appropriators are satisfied. So that in doing the act of approval the Honorable Secretary of the Interior does not estop the government in any way as it respects the diversion and use of water from the public streams. Nor is the government estopped by the further circumstance of settlers acquiring rights in the project for irrigation purposes. The settlers must necessarily take with full knowledge of the law, and all they can obtain in that relation as against the government is what the laws of Congress have given them the right to acquire. There can be no doubt of this construction of the statute invoked; but, if there were any, that construction would be adopted which is most advantageous to the interests of the government. Hannibal, etc., Railroad Co. v. Packet Co., 125 U. S. 260, 271, 8 Sup. Ct. 874, 31 L. Ed. 731. As to the power of the officers and agents of the government to bind it by estoppel, see United States v. Pine River Logging & Improvement Co., 89 Fed. 907, 32 C. C. A. 406; Pine River Logging Co. v. United States, 186 U. S. 279, 22 Sup. Ct. 920, 46 L. Ed. 1164.

Another question presented is whether complainant can maintain this proceeding without at the same time making all other appropriators and users of water from the same stream parties to the suit, that the correlative rights of all the parties to the use of such water may be settled and adjusted. I am of the opinion that it can. Any invasion of the government's right to the use of the water from said stream would give it cause for suit. And this would be so whether the shortage to the government was caused by one or several parties. All would be trespassers, and the government could sue some or all jointly, or any one of them severally, as it might feel disposed.

These considerations lead to a decree in favor of complainant. One will therefore be entered enjoining the defendant company from diverting any of the waters of Birch creek so as to impinge upon the right of the government to have flowing at all times in the stream the amount of 1,666⅔ inches; and the government will have leave to apply for a modification of this decree at any time that it may determine that its needs will be in excess of the amount of water so designated.

ÆTNA INS. CO. et al. v. ALBANY & S. R. CO. et al.

(Circuit Court, S. D. New York. September 18, 1907.)

1. RAILROADS—LEASE—CONSTRUCTION.

A lease by which a railroad company leased in perpetuity all of its property to another company construed, and a provision by which the lessee agreed to pay an annual rent of $490,000, to be made by paying interest on certain specified bonds and dividends on stock at a stated rate, together with a further provision that "if so many shares do not exist at the time of any such payment, or if the sums required for the payments before mentioned shall not amount to the aforesaid $490,000, the balance not applied to the payment of such interest and dividends shall be paid to the said party of the first part," which was the lessor, *held* to entitle the lessor to the benefit of the saving made by refunding the bonded debt,

on which the interest payments were to be made by the lessee, at a lower rate of interest.

2. SAME—RECOVERY OF RENT—ACTION—LACHES.
Delay by stockholders of a lessor railroad company in bringing suit to recover sums due from the lessee under the terms of the lease for a time less than that in which an action at law would be barred by limitation did not constitute such laches as to defeat the right of recovery, where the questions involved were complicated and the directors of the two companies were in large part the same persons.

3. SAME—LEASE—CONSTRUCTION.
Under a lease of a railroad property in perpetuity, which provided that the lessee would at its own cost repair and keep in order the road, and pay all taxes and assessments upon the railroad property and effects and upon the business done, except income taxes on stockholders and "all expenses for construction, repairs, salaries, and otherwise," the lessee is not entitled to recover from the lessor any sum spent in making improvements on the property, nor in expenses incident to the issuing of new bonds by the lessor, nor for a state tax on its franchise, which, if not a tax on the property or business, was an expense, within such provision.

4. EQUITY—RAILROADS—LEASE—SUIT BY STOCKHOLDERS ON LEASE—MULTIFARIOUSNESS.
The fact that the lessee of the property of a railroad company, as required by the lease, indorsed a guaranty of the payment of dividends on the certificates of stock of the lessor, does not render a suit by such stockholders against the lessee to recover sums alleged to be due under the lease multifarious, as based in part on their stock certificates and in part upon the lease; the latter being in fact the source of the guaranty.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 340–379.]

In Equity. On final hearing.

Howland, Murray & Prentice and Edward W. Sheldon (Adrian H. Joline, George Welwood Murray, Edward W. Sheldon, E. Parmalee Prentice, and Charles P. Howland, of counsel), for complainants.

Herbert S. Barnes, for defendant Albany & Susquehanna Railroad Company.

Opdyke, Ladd & Bristow (Charles F. Brown, Lewis E. Carr, William S. Opdyke, and Alfred Opdyke, of counsel), for defendant Delaware & Hudson Company.

HOLT, District Judge. This is a suit in equity, brought by certain stockholders of the Albany & Susquehanna Railroad Company, in behalf of themselves and of all other stockholders of said company who may join in the suit, to recover certain sums alleged to be due from the defendant the Delaware & Hudson Company, as lessee of the Albany & Susquehanna Company. The principal question involved is whether the lessor or the lessee shall have the benefit of the reduction of interest caused by refunding $3,500,000 of bonds issued by the lessor.

The complainants are citizens either of Connecticut or Rhode Island. The defendant the Delaware & Hudson Company is a corporation organized under the laws of New York in 1823, and since duly authorized to lease and operate railroads in New York. The defendant the Albany & Susquehanna Railroad Company is a corporation organized in 1851 under the laws of New York to construct a railroad

from Albany to Binghamton, through the Susquehanna Valley. Its capital stock was fixed at $4,000,000. The road was completed in 1869. In February, 1870, a lease was executed by which the road was leased to the Delaware Company for the full term of its corporate existence. Some of the provisions of this lease were changed by a supplemental agreement executed in March, 1876. The questions involved in this case depend substantially upon the construction to be given to certain parts of the lease and the supplemental agreement.

When the lease was executed, in 1870, there were four mortgages upon the property of the Susquehanna Company. These were: (1) A first mortgage to secure $1,000,000 of 7 per cent. bonds maturing in 1888. (2) Another mortgage, having an equal lien with the first mortgage, to secure payment by the Susquehanna Company of $1,000,000 of 6 per cent. bonds of the city of Albany, loaned to the Susquehanna Company, maturing in installments of $250,000 on November 1, 1895, May 1, 1896, November 1, 1896, and May 1, 1897. This mortgage provided for a payment to trustees of 1 per cent. per annum for a sinking fund. (3) A second mortgage to secure $2,000,000 of 7 per cent. bonds maturing in 1885. (4) A third or equipment mortgage to secure $500,000 of 7 per cent. bonds maturing in 1881. When the lease was executed, all of above bonds had been issued, except $314,000 of the third mortgage bonds. Of the $4,000,000 of authorized stock, $2,212,600 had been issued as full paid, and $950,000 had been subscribed for and an installment of 10 per cent. paid, leaving $855,000 of stock unpaid. The provisions of the lease bearing upon the questions involved in this case are substantially as follows:

The Delaware Company, in paragraphs 1 and 2, agreed to pay, after January 1, 1871, "the annual rent of $490,000," payable as follows:

Interest on $1,000,000 Albany loan at 6 per cent	$ 60,000 00
Sinking fund for Albany loan, 1 per cent	10,000 00
Interest on $3,500,000 mortgage bonds at 7 per cent	245,000 00
Dividends on stock not exceeding $2,500,000 at 7 per cent	175,000 00
	$490,000 00

The lease also provided, in paragraph 2, that:

"If so many shares do not exist at the time of any such payment, or if the sums required for the payments before mentioned shall not amount to the aforesaid $490,000, the balance not applied to the payment of such interest and dividends shall be paid to the said party of the first part [the Susquehanna Company]."

The lease further provided, in paragraph 12, that the lessor (the Susquehanna Company) would, whenever requested by the lessee (the Delaware Company), require the payment in installments of the balance of the 9,500 shares of stock which had been subscribed and on which an installment of 10 per cent. had been paid, and would pay over the installments when collected to the lessee, and the lessee would apply the same to the laying of additional track, the purchase of additional equipment, and other necessary improvements of said road, and would also "pay an additional rental, semiannually, at the rate of 7 per centum per annum on such installments as may from time to time be paid as aforesaid." The lease further provided, in paragraph 13, that in

case the lessee thereafter desired to enlarge the capacity of the road by building a double track, extending the length thereof, or otherwise, the lessor should execute and deliver to the lessee additional stock or bonds as the lessee might require, to be negotiated by the lessee and the proceeds used in such enlargements and improvements of the road; and the lessee would pay to the holders of such stock or bonds dividends or interest thereon at the rate of 7 per cent. as provided in the lease in respect to the then existing bonds or stock. But the total amount of additional bonds should never be such that the aggregate liabilities of the lessor in stock and bonds should exceed $15,000,000. The lease further provided, in paragraph 17, that in case of foreclosure and sale of either of the class of bonds then existing or which might thereafter be created the $7,000,000 of stock and bonds named in the lease should be first fully paid and discharged from the proceeds of such sale. The lease also contained, among other provisions, clauses providing that the lessee should guarantee the dividends and interest on stock and bonds, and should indorse such guaranties on the certificates and bonds, and that the lessee should pay taxes and have general control and management of the leased property, and pay all the expenses involved in such management.

Upon the execution of this lease the Delaware Company took possession of the road, and has controlled and managed it ever since. There were afterwards issued the $314,000 of the third mortgage bonds remaining unissued and $287,400 of stock, making, with the $2,212,600 already issued, the $2,500,000 of stock, the dividends on which, at 7 per cent. amounting to $175,000, had been agreed to be paid as part of the rent. Thereafter, and before 1876, the Delaware Company expended for double-tracking and improving the road $2,450,000. For this expenditure it received, under some arrangement, the $855,000 of stock subscribed for, but not issued, in lieu of its proceeds, and also $1,595,000 additional shares of stock, making in all $2,450,000, the amount due. In May, 1872, the Delaware Company had converted, as authorized by the lease, $50,000 of the lessor's third mortgage bonds held by it into $50,000 of stock. The total issue of Susquehanna Company's bonds, aside from the Albany loan, was therefore reduced to $3,450,000, and its capital stock increased to $5,000,000.

The situation, then, was this: The Albany loan was to be paid off at some time in future by the operation of the sinking fund. When that occurred, the $70,000 payable annually on that loan would be payable as rent to the Susquehanna Company. It was intended, when that lease was executed, as appears by the circular issued by the Susquehanna Company to its stockholders on March 31, 1876, that the stockholders then existing should receive the benefit of the saving resulting from the payment of the Albany loan. But the stock had been increased from the $2,500,000 authorized as the basis of rental in the lease to $5,000,000. Of this amount $1,000,000 was an unauthorized overissue. The remaining $4,000,000 was authorized; but, in the absence of any agreement to the contrary, it would all be entitled to share in the $70,000 saved by the redemption of the Albany bonds. There was an agreement in the lease that, in case of foreclosure of any of the

bonds (meaning mortgages) then existing or thereafter created, the $7,000,000 of stock and bonds named in the lease—i. e., $4,500,000 of bonds and $2,500,000 of stock—should be first fully paid and discharged; but there was no provision giving a preference to the $2,500,000 stock in respect to the $70,000 of rent released by the payment of the Albany loan. Moreover, the clause giving a preference in case of foreclosure made all the stock issued after the $2,500,000 was issued subordinate to such $2,500,000, and no new mortgage could be placed on the property without its being subordinate, not only to any prior mortgages, but also to the quasi lien of this $2,500,000 of stock.

Under these circumstances, on March 7, 1876, a supplementary contract was made between the Susquehanna Company and the Delaware Company, modifying the lease. By this supplemental contract it was agreed: That the total amount of the lessor's capital stock was fixed and limited at $3,500,000, upon which the lessee agreed to pay annual dividends of 7 per cent. That the provision in the lease that the $2,500,000 of stock should have a preference in case of foreclosure was abrogated. That after the $1,000,000, of the Albany loan should, by the operation of the sinking fund, be paid, the $70,000 a year before required for interest and sinking fund should thereafter be added to the dividends to be paid to the stockholders, thus making dividends of 9 per cent. on $3,500,000 of stock, instead of 7 per cent. on the $2,500,000 of original stock and on the $855,000 subscribed for and afterwards issued to the lessee. That a new mortgage should be issued by the lessor for $10,000,000, to provide for the payments for outstanding mortgage bonds, to pay the lessee for canceling $1,595,000 of stock which the lessee agreed to cancel and surrender on receipt of bonds to a like amount, and for further expenditures by the lessee on the road. That, of the $10,000,000 of bonds, $3,000,000 should bear interest at 7 per cent. in lawful money of the United States, and the residue, at the option of the lessee, at either 7 per cent. in lawful money of the United States or at 6 per cent. in gold or in sterling. That the payment of the principal and interest of all of said bonds should be guaranteed by the lessee. That all outstanding stock should be called in and new certificates issued. That the lessee should indorse its guaranty on the new bonds and stock. That the total amount of stock and bonds to be issued by the lessor should never exceed in the aggregate $13,500,000. That all the covenants, agreements, and provisions in the lease contained, "except so far and to such extent as they are changed, altered, or modified by this agreement," shall remain in full force.

After the execution of this supplemental contract, the new consolidated mortgage for $10,000,000 was executed, and $3,000,000 of 7 per cent. bonds were first issued. The Delaware Company received $1,595,000 of such bonds, and canceled and surrendered a like amount of stock, thus reducing the outstanding stock to $3,500,000, as provided in the supplemental contract. The redemption of the outstanding bonds with new bonds was begun. Prior to April, 1881, $660,000 of the old bonds were exchanged for new 7 per cent. bonds. After that date all the remaining old bonds, amounting to $2,790,000, were exchanged for new 6 per cent. bonds; the last bond having been redeemed in November, 1888. In 1906 the entire $10,000,000 of con-

solidated bonds, $3,000,000 of which bore annual interest at 7 per cent. and $7,000,000 at 6 per cent., were taken up by a new issue of $10,000,000 bonds, bearing annual interest at 3½ per cent.

The Albany loan of $1,000,000 matured in installments of $250,000 on each six months from November 1, 1895, to May 1, 1897. The Delaware Company received from the trustees of the sinking fund $250,000 in November, 1895, and $250,000 in April, 1896, with which it paid each of the first two installments. In November, 1896, it received from such trustees $151,149.40, which was all that had accumulated in the sinking fund. The Delaware Company thereupon borrowed the amount necessary to pay the residue from the Mutual Life Insurance Company, and paid the remaining installments, and took from the Susquehanna Company a debenture bond for $296,378.16, payable in ten semi-annual installments—the first nine being for $35,000 each, and the last for $22,270.74—covering the principal and interest on the bond. This bond was guaranteed, principal and interest, by the Delaware Company. The amount of the installments, as they came due, was in fact paid by the Delaware Company to the Mutual Life Insurance Company. By this arrangement the Albany loan, which had been in fact transferred to the Mutual Life Insurance Company, was in fact paid off in May, 1902, and in 1903 the Delaware Company first paid a dividend of 9, instead of 7, per cent. on the $3,500,000 of stock, as provided in the supplemental contract, and has paid such 9 per cent. dividend annually ever since.

On June 30, 1902, the Albany loan having been finally liquidated in the preceding May, it is admitted that there was a balance of $23,896.02 accrued upon rental account payable to the lessor. The lessee credited this sum to its profit and loss account, claiming that it had paid out larger amounts for the account of the lessor, which it was entitled to set off against the amount so credited. This sum of $23,896.02 is therefore admittedly due from the lessee to the lessor, unless its claims of set-off are valid. That question will be considered later. The complainants claim in this case that the Susquehanna Company, or its stockholders, are entitled to receive from the Delaware Company whatever saving was made by refunding any of the original 7 per cent. bonds for $3,500,000 with 6 per cent. bonds, between 1881 and 1888, and by refunding the substituted bonds with 3½ per cent. bonds in 1906, and also the sum of $23,896.02 accrued on rental account June 30, 1902.

I will first consider the question whether the lessor or the lessee is entitled to the interest saved on refunding the bonds. Upon this question, in my opinion, the controlling fact is that the instrument by which the Susquehanna Company transferred its railroad to the Delaware Company was a lease, reserving a fixed annual rent. The Delaware Company, by that instrument, did not simply agree, in consideration of the transfer of the road, to pay all dividends and interest to accrue on the outstanding stock and bonds, and to indemnify the Susquehanna Company for liability therefor. It agreed, as a lessee, to pay a rent of $490,000. It is true that this rent was to be paid by the lessee by paying certain specified dividends and interest to accrue on certain stock and bonds and the annual contribution to the Albany loan sink-

ing fund; but the lease also provided that, if the sums required for such payments should not amount to the said $490,000, "the balance not applied to the payment of such interest and dividends shall be paid to the party of the first part" (the Susquehanna Company). The full rent of $490,000, therefore, was in all events to be paid by the lessee; and if, for any reason or in any contingency, any part of it should not be required to pay the specified dividends, interest, or sinking fund contribution, such part became, by the express terms of the lease, payable to the Susquehanna Company. If there had been a simple rent fixed of $490,000 in cash, to be paid by the Delaware Company directly to the Susquehanna Company, and the Susquehanna Company had itself distributed it in payment of the dividends, interest, and sinking fund contribution, I do not see how it could be claimed that a refunding of the bonds, causing a diminution in the interest charge, would reduce the rent or inure in any way to the benefit of the Delaware Company, or of anybody except the Susquehanna Company.

The question, therefore, is: Did the fact that the Delaware Company, under the arrangement, paid the dividends and interest directly to the stockholders and bondholders, instead of first paying it to the Susquehanna Company, to be by it distributed, essentially change the relations and rights of the parties? I cannot think so. The arrangement by which the Delaware Company paid the dividends and interest direct to the stockholders and bondholders was one simply for its convenience. It saved the trouble and expense of keeping two sets of accounts and two sets of clerks and bookkeepers. The liability of the Susquehanna Company on the bonds and stock was legally the principal and primary liability; that of the Delaware Company was, in strictness, merely that of a guarantor, and was secondary. It is probably true that the great financial strength and high credit of the Delaware Company gave to its obligation a greater weight than the obligation of the Susquehanna Company; but the fundamental security for the bonds and stock, in this case as in all cases, was the railroad property of the Susquehanna Company, which secured the bonds by the lien of the mortgages upon it, and which constituted the plant with which the business was done which earned the dividends on the stock.

The defendants' counsel argues that the provision in the lease that, if the sums required for the payments therein mentioned should not amount to $490,000, "the balance not applied to the payment of such interest and dividends shall be paid to the said party of the first part," provides only for any balance accruing until the full amount of $3,500,000 of bonds and $2,500,000 of stock should be issued. It will be recalled that when the lease was made $314,000 of bonds under the third mortgage and $287,400 of stock remained to be issued. As the items to which the $490,000 of rent was appropriated included 7 per cent. interest on $3,500,000 of bonds and 7 per cent. dividends on $2,500,000 of stock, it is apparent that, until such $314,000 of bonds and $287,400 of stock were issued, there would be a balance to be paid to the Susquehanna Company. The defendants' counsel claims that this was the only balance referred to in the lease; that, as soon as such $314,000 of bonds and $287,400 of stock were issued, the provision became no longer operative; and that any subsequent diminution of the

amount necessary to be paid by the Delaware Company, by a reduction of the interest charge or otherwise, was not affected by the clause in the lease under consideration. But I cannot so construe the clause. I have no doubt that it would apply, and did apply, to any balance, if there was any, resulting from delay in the issue of such unissued bonds and stock. But, in the first place, there was no delay. The evidence shows that there was issued on April 5, 1870, $150,200, and on April 15, 1870, $137,200, of stock, making the exact amount of $287,400. It may be assumed that the bonds were issued about the same time. Full interest on $500,000 third mortgage bonds was paid in November, 1870. Obviously, unless it was intended or expected, at the time the lease was executed, that the stock and bonds should not be issued for a considerable time, little weight can be given to the argument that the "balance" mentioned in the lease meant the balance to be paid until such stock and bonds were issued.

But, aside from these considerations, I can see no ground for putting such a restricted meaning on the clause. Its language is general and comprehensive. It says that "if the sums required for the payments before mentioned" (i. e., 6 per cent. interest and 1 per cent. sinking fund on $1,000,000 Albany loan, 7 per cent. interest on $3,500,000 bonds, and 7 per cent. interest on $2,500,000 of stock) "shall not amount to the aforesaid $490,000, the balance not applied to such interest and dividends shall be paid to the party of the first part." This applied, in my opinion, to any reduction of the amounts required for any of such payments, whether for interest or dividends, from any cause whatever, either existing or afterwards arising, and whether then foreseen or entirely unanticipated.

The defendants' counsel claims that the provisions of the supplemental contract relating to the payments to be thereafter made by the lessee to the lessor not only modified, but entirely abrogated and superseded, the provisions of the lease relating to the same subject. It is argued that as, in 1876, when the supplemental contract was made, the Albany loan of $1,000,000 was not to mature before 1895, while the other $3,500,000 of bonds were to mature, those secured by the third mortgage in 1881, by the second mortgage in 1885, and by the first mortgage in 1888, the fact that the supplemental contract only provided for an increase of dividends on the $3,500,000 of stock from 7 to 9 per cent. when the Albany loan should be paid, shows that the parties did not intend any increase of rent by reason of any diminution of the interest rate on the $3,500,000 of bonds. It is urged that the parties knew that the $3,500,000 bonds would mature first; that provision was made in the contract for taking them up with new bonds, which might bear interest either at 6 or 7 per cent. at the option of the lessee; that they were taken up principally with 6 per cent. bonds; and that, as the contract made no provision for increasing the dividend by reason of such saving, it must be assumed that the supplemental contract abrogated the provisions of the lease relating to rent, and substituted its own provisions in their place. But the seventh paragraph of the supplemental contract provided expressly that all the covenants, agreements, and provisions in the lease contained, "except

so far as they are changed, altered, or modified by this agreement, shall be and remain in full force."

The question is, therefore: Did the supplemental contract change, alter, or modify the provision of the lease that, if the amounts required for the payment of the interest and dividends required by the lease shall not amount to $490,000, the balance, not applied to the payment of such interest and dividends, shall be paid to the lessor. Admittedly it did not in express terms. But it is claimed that the provisions relating to payments in the supplemental contract make so complete and comprehensive a change in the entire scheme of payment that it is to be deemed to have entirely abrogated the provisions of the lease upon that subject. But I cannot accede to this view. It is true that the three mortgages for $3,500,000 were all to mature before the Albany loan, and that both parties knew it. But it was certain that the Albany loan would be at some time paid by the operation of the sinking fund, while it was not contemplated that any of the $3,500,000 of bonds would be paid at maturity. It was provided by the contract that they should be taken up at maturity by new bonds, which should bear interest at either 7 or 6 per cent. But it probably was not contemplated at that time, at least as anything more than a possibility, that these original 7 per cent. bonds would be renewed by 6 per cent. bonds. The legal rate of interest in New York was not changed from 7 to 6 per cent. until 1879, and no 6 per cent. bonds appear to have been in fact issued until 1881. Of the $3,000,000 of 7 per cent. bonds authorized in the new issue of $10,000,000, it appears in evidence that $1,595,000 was immediately issued to the Delaware Company in exchange for its surrendered stock, and $660,000 was during the succeeding five years issued in refunding old bonds, and it therefore appears probable that it was not until 1881 that a 6 per cent. bond could be successfully put out. None of the old bonds matured before that year.

The real points in the minds of the parties when the supplemental contract was made clearly appear in the circular issued by the Susquehanna Company to its stockholders in 1876. The principal thing needing correction was the overissue of stock. $5,000,000 had been issued. Of this $1,000,000 was an overissue. But, if the stock were reduced to $4,000,000, the authorized capital, the result still would be that the liquidation of the Albany loan would not accrue, as was intended, to the benefit of the original holders of about $2,500,000 of stock, but would have to be distributed in dividends on the entire $4,000,000 of stock. Under these circumstances, the supplemental contract provided, in substance, that the total stock issued should be $3,500,000, an amount probably arrived at by substantially uniting the amounts of $2,500,000 of original stock and the $855,000 of subscribed stock, dividends on which, by the terms of the lease, were payable as rent; that there should be a 7 per cent. dividend on such amount until the Albany loan was paid, and thereafter a 9 per cent. dividend; that the preference of the $7,000,000 of bonds and stock, in case of foreclosure, should be abrogated; that the principal, as well as interest, of all bonds should be guaranteed by the lessee; and that the total amount of stock and bonds to be issued should be limited to $13,500,000, instead of $15,000,000, as provided in the lease. In all these provisions

of the contract I cannot see anything abrogating the provisions of the lease. So far as they modify it, it is modified; but the provisions which are modified all relate to the dividends on the stock, and have nothing to do with the interest on the bonds. In my opinion, all the provisions of the lease which give the lessor the benefit of any reduction in the interest charge remained in full force after the supplemental contract and were entirely unaffected by it.

The defendants' counsel claims that the Albany loan was not paid by the operation of the sinking fund, and that therefore the provision in the supplemental contract that, after the Albany loan "shall, by the operation of the sinking fund, provided for the payment of said bonds, be paid," the sum of $70,000 shall be added to the dividends paid to stockholders, never became operative. But, in the first place, I do not see that this point is material to any question in controversy in this case. The complainants do not charge that anything is due on dividends on stock. Their claim relates wholly to the reduction of interest on bonds. But, in my opinion, on the merits, the Albany loan was paid by the operation of the sinking fund, within the meaning of the contract. It is true that when it matured the sinking fund only amounted to about $650,000. The Delaware Company borrowed from the Mutual Life Insurance Company the necessary amount to pay the deficiency, and paid the entire loan to the city of Albany. It then went on under substantially the original arrangement and ultimately paid off the loan to the Mutual Life Insurance Company. If the city of Albany had extended the loan until the time it was finally paid to the Mutual Life Insurance Company, it would have been paid by the operation of the sinking fund, and, in my opinion, the fact that the sinking fund did not raise the necessary amount as quickly as was expected, and that the Mutual Life Insurance Company was substituted as a creditor in place of the city of Albany, did not change the fact that the loan was ultimately paid off by the operation of the sinking fund. Moreover, the Delaware Company recognized by its action that the provision in the supplemental contract had become operative. In 1903, the year after the final payment on the loan was made, it began, and has since continued, the payment of the dividend of 9, instead of 7, per cent.

The defendants claim that the complainants' right to recover is barred by laches and acquiescence, and, in part at least, by the statute of limitations. This action is brought upon a sealed instrument. I think, therefore, that 20 years is the period of limitation. This suit was begun June 12, 1906. Therefore any recovery is barred for amounts saved by any exchange of bonds before June 12, 1886. Courts of equity usually follow the limitations fixed by the statutes; but in gross cases of laches and acquiescence they refuse relief, although the full period fixed by statutes of limitation has not passed. But I do not think that this is such a case. The attention of the stockholders of the Susquehanna Company may naturally not have been called to the subject of the saving of interest until the refunding of the consolidated loan of $10,000,000 in 1906. The Albany loan was not cleared off till 1902. That was the time when the stockholders would naturally look for an increase in the dividends to 9 per cent., and it imme-

diately followed. The board of directors of the lessor was practically the board of directors of the lessee. The stockholders were receiving a large income on their investment. The question of the construction of the effect of the supplemental contract upon the lease was an obscure and difficult one, requiring an investigation of complicated facts, and it was natural that the stockholders should have acquiesced in whatever was done by the officers of the Delaware Company without investigation.

The question whether the Delaware Company had the right to withhold payment of the sum of $23,896.02, accrued on rental account on June 30, 1902, depends on the question whether it had valid claims against the Susquehanna Company for advances made for its account, which it could set off against it. These claims are: A claim for expenditures in improving the railroad property in excess of the amount for which the Delaware Company was entitled to receive securities of the Susquehanna Company. The amount of this excess is $2,033,603.07. A claim for taxes on the franchise of the Susquehanna Company, imposed under the New York franchise tax law, amounting to $152,345.46. A claim for the expenses of the transfer of stock and bonds of the Susquehanna Company, amounting to about $25,000. A claim for the expenses of issuing and engraving the new 3½ per cent. bonds in 1906, amounting to $18,275.39. A claim for payment of the state tax on the $10,000,000 mortgage made in 1906, amounting to $12,465.75.

In my opinion, none of these claims are valid. The lease is a perpetual lease. It transferred all the assets of the Susquehanna Company. The road, after its execution, became a part of the Delaware Company's system. The expenditures were made in furtherance of the Delaware Company's business. The lease expressly provided, in paragraph 3, that the lessee would, at its own cost, repair and keep in order the road; in paragraph 5, that it would pay all taxes and assessments of every description assessed "upon the railroad property and effects herein described and upon the business done upon the said railroad," except income taxes on stockholders, and that it would "pay all expenses for construction, repairs, salaries, and otherwise, which may be necessarily incurred on account of the railroad and demised premises"; and, in paragraph 14, that it might make, at its own expense, all such alterations, improvements, and additions in or to the property demised as might be proper for its full enjoyment for railroad purposes. I think that under these provisions all of said expenditures were made by the lessee on its own account. The point that the franchise tax was not a tax on the railroad or its business, and therefore was not provided for, seems to me untenable. Such a tax has been held by some courts to be a tax on the stock, and by other courts on the business. If it is neither, I think it was covered by the general provision for the payment of all taxes except income taxes; and, if not, by the general provisions for the payment of all expenses. The whole scheme of the lease shows that all future expenses of the Susquehanna Company's road were to be borne by the Delaware Company.

Various defenses were interposed in this case which were raised by a demurrer. The demurrer was overruled. They have been again urged and elaborately argued on the brief of the defendants' counsel. The fact that they were heard and overruled on the demurrer would perhaps make it unnecessary to consider them further; but as I gave no written opinion on the decision of the demurrer, and as these defenses were strenuously urged on the argument, I will briefly give my reasons for holding them insufficient.

It is claimed that the bill is multifarious, because uniting a claim by the stockholders in their separate individual right for increased dividends on their stock and a claim of the Susquehanna Company asserted by the stockholders, for the $23,896.02 due on rental account on June 30, 1902. This claim is based, as I understand it, on the fact that the Delaware Company indorsed on each stockholder's certificate a guaranty of the payment of dividends, upon which each stockholder could have brought a suit at law. But such indorsed guaranty was not exclusively the basis of the stockholder's claim against the Delaware Company. The lease contained the original agreement to guarantee. Its indorsement on each certificate simply gave the stockholder an additional evidence of it. But the obligation was created by the lease before the guaranty was indorsed on the certificates. Suppose the Delaware Company inadvertently or intentionally omitted to indorse some or all of the certificates. Could not the Susquehanna Company have enforced the guaranty? And, if it could in that case, why cannot it now? I think that the complainants, in their derivative capacity, as representing the corporation, can maintain this suit to enforce each claim made in this case and every liability existing under the lease and the supplemental contract.

The defendants' counsel also urges that the evidence does not sufficiently establish that a demand on the Susquehanna Company to bring the action would have been futile when the suit was brought. But I think that that fact clearly appears from all the evidence in the case.

My conclusion is, therefore, that the complainants are entitled to recover in this suit $23,896.02 accrued on rental account, and interest from June 30, 1902, and whatever amounts have been saved by the refunding of the bonds, with interest and costs. Several computations have been made and put in evidence, showing such amounts. They have been made on different theories of computation, showing different amounts claimed to be due, ranging from about $900,000 to about $1,286,000. The amounts involved are large, the computations are complicated, and the question of the correct method of computation was very little discussed in the briefs or arguments. I think there should be a reference to a master to take testimony, if additional testimony is desired by either party, and to report as to the exact amount due.

The decree should be settled on notice.

THIRD NAT. BANK OF CINCINNATI et al. v. JACKSON et al.

(Circuit Court, N. D. West Virginia. August 10, 1907.)

No. 696.

1. CORPORATIONS—ACTION OF STOCKHOLDERS—VALIDITY.

The action of the stockholders of a corporation in authorizing the execution of a power of attorney to trustees to sell all of its property and collect and disburse the proceeds is not invalidated, because the majority of the stock, which was owned by a single person, was voted by him, although he had previously assigned it to the same persons who were trustees for the benefit of his creditors, with power to vote the same, where no transfer had been made on the books and some or all of the trustees were present at the meeting, and no objection to the action taken was made either by them or any stockholder, and where, moreover, all parties acquiesced in the carrying out of the proposed action.

2. ASSIGNMENTS FOR BENEFIT OF CREDITORS—CREATION—POWER OF EQUITY TO ADMINISTER.

A debtor entered into a trust agreement, pursuant to which he conveyed practically all of his property, which consisted of a large amount of stocks, bonds, and real estate or interests therein, to trustees for the benefit of his creditors, who assented thereto. A coal company, of which he owned nearly all the stock, also executed a power of attorney to the same trustees, authorizing them to sell its property for the same purpose. *Held*, that all such acts created a single trust estate, which a court of equity had power to take jurisdiction of and administer at the suit of creditors interested therein.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assignments for Benefit of Creditors, § 1.]

3. SAME—MANNER OF SALE OF TRUST PROPERTY—RIGHT OF TRUSTEES TO MAKE PRIVATE SALE.

Code W. Va. 1906, § 3053, which requires all sales under deeds of trust "to secure debts or indemnify sureties" to be made at public auction, and which superseded prior statutes giving the parties the right by contract to provide for private sales, if not directly applicable to general assignments for the benefit of creditors, is at least strong evidence that the policy of the law in that state is against private sales by trustees in the administration of such trust estates, and justifies a court of equity in refusing to authorize or approve such a sale over the objection of the debtor and interested creditors.

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

4. JUDICIAL SALES—REAL ESTATE—ASCERTAINMENT OF LIENS.

It is the established policy of the law in West Virginia that real estate will not be sold by a court until all liens and their priorities have been judicially ascertained and determined.

In Equity.

T. Moore Jackson, having assets consisting of bonds, town lots, and other real estate, stocks, notes, choses in action, and personal property aggregating, in estimated value, to about $1,183,000, and with liabilities, direct and indirect, amounting to about $1,035,000, on December 19, 1904, entered into a contract with his creditors, more than 85 per cent. of them joining therein, whereby he agreed to convey all his real estate and transfer all his personalty, except his home property in Clarksburg and the furniture therein, which was to be excepted and released, to Joseph E. Sands, Ira E. Robinson, and John W. Davis, trustees, with power to have full control of the properties, collect interest, rentals, dividends, and profits, to make sale, transfers, deeds, and conveyances, vote any and all shares of stock so conveyed in any meeting

of stockholders of the corporations in which said stock was so held, and to convert said estate, real and personal, into money, and pay same to creditors. This agreement, carefully drawn, contains many other stipulations and matters of detail not necessary to refer to. In accordance with its requirements, said Jackson by deed of January 12, 1905, in which his wife joins, conveyed to said trustees all of his said real estate other than the excepted "Home Property," and on the same day he, in writing, assigned his personal property to said trustees, except that part excepted in the original trust agreement. The greater part of Jackson's assets and liabilities grew out of the fact that in 1893 the Ten Mile Coal & Coke Company, a corporation, with said Jackson and five others as stockholders, had acquired by purchase the coal underlying 33 tracts of land in Harrison county, aggregating 2,210.63 acres. Shortly after purchase, one of the stockholders died, and thereupon the surviving stockholders formed a partnership as T. M. Jackson & Co., and in the name of T. M. Jackson acquired about 1,600 acres more of coal and 184 acres of surface adjoining the first 2,210.63 acres. In 1901 this partnership was dissolved, all other members of it conveying their interests to Jackson for $101,360.84, evidenced by 104 notes given by him, due to said several partners January 1, 1907, and to secure which a deed of trust was executed by him on the property bearing even date, November 30, 1901, with the conveyances by said partners of their interests to him and of the Ten Mile Coal & Coke Company of the 2,210.63 acres standing in its name, which last conveyance was in consideration of $114,800.74 evidenced by 118 notes given by Jackson, due January 1, 1907, and secured by vendor's lien on the face of the deed. Jackson also assumed payment of the balance of purchase money due the farmers from whom the coal was originally bought secured in their deeds by vendor's liens. On December 17, 1903, Jackson formed the Dola Coal & Coke Company Corporation, and on the 28th he conveyed this coal field to it. Its capital stock issued was $600,000 of which Jackson took $500,000 and the other $100,000 was issued to other parties. On January 1, 1904, this Dola Coal & Coke Company executed to the Security Company of Wheeling, as trustee, a trust mortgage to secure bonds to the amount of $500,000. Of these bonds Jackson became the owner of $415,000; the other $85,000 being held by a Pittsburg bank. Jackson hypothecated his bonds or a greater part thereof to secure debts to various creditors of his, and on January 23, 1905, the Dola Coal & Coke Company by contract in writing constituted said trustees of Jackson said Sands, Robinson, and Davis, attorneys in fact to sell all said coal field with its mining rights and privileges, with power to enter into contracts, options, or negotiations, to execute all necessary conveyances, collect all proceeds of sale, and disburse proceeds to parties interested. The trustees under this power energetically sought to sell said coal field, first holding it at a price of $250 per acre, then reducing to $200 per acre, and finally, on September 17, 1906, they by circular letter to the creditors, informed them that they (said trustees) had received an offer of $145 per acre, $20,000 to be paid in cash, $80,000 upon date of execution of deed and the residue in $100,000 annual installments, and that unless a better offer was received on or before September 27, 1906, or they should receive before that date a united request from the holders of the bonds for a public sale of the property, accompanied by assurances that the bidding thereat should be started at not less than the par value of the bonds, they would on that date accept said offer. These conditions not being complied with, they did enter into the contract of sale referred to with C. E. Conaway, who it subsequently appears was acting for J. V. Thompson. Thereupon the plaintiffs herein presented their bill to a judge of this court, in which they set forth the facts substantially as given above, allege themselves to be unsecured creditors of Jackson, holding none of the bonds of the coal company, yet vitally interested in the sale of its property at a fair price, because, from the surplus of the proceeds of such sale after payment of debts secured by the hypothecation of such bonds, they must look almost wholly for the payment of their debts; that at the price of $145 per acre little or nothing will accrue as such surplus, because $141.31 per acre would be required to pay the secured debts by reason of such hypothecation of bonds, and the "farmer" and "partners" liens upon the property; that said price is grossly inadequate as shown by the statement

of the said trustees themselves in their circular letter to creditors; that a sale of such property ought not to be made until the liens and the holders thereof with the true amounts due each had been ascertained and fixed; that adjoining coal property of no better value had recently been sold at $300 per acre, and that, if the property was sold under the protection and direction of this court at public auction, it would bring not less than $200 per acre. The prayer of the bill is for an immediate restraining order against said trustees staying them from consummating said sale; for a full report and settlement of the transactions of said trustees; for full discovery from the trustee in the bond mortgage as to the holders of such bonds and of the stock of said company and the holders thereof with the considerations of such holdings, that a reference be made to a commissioner to ascertain and report all liens and incumbrances, and that a sale of the property at public auction by the trustees be required. The temporary order prayed for was granted on October 29, 1906, and set for hearing on the 1st day of the January, 1907, term at Parkersburg. Prior to that date, on December 15, 1906, the defendant trustees, having given notice, entered a motion to dissolve the restraining order, for a rule for security for costs, and a motion to require plaintiffs to give an injunction bond. The plaintiffs asked leave by petition to file an amended and supplemental bill. The court allowed the filing of this bill, allowed Charles E. Conaway and said trustees at their request until January 8, 1907, to file answers thereto, required plaintiffs by said date to give bond for security for costs, and took the motions to require injunction bond and to dissolve the restraining order under advisement, and on its motion allowed the Braddock Machine and Manufacturing Company, a creditor, to intervene and become a coplaintiff. On January 14, 1907, in term, plaintiffs were allowed to amend bills by making the Dola Coal & Coke Company party, replications were filed by them to the answers of C. E. Conaway and of said trustees to the original and supplemental bills which had been filed, numerous affidavits in support of the motion to dissolve the restraining order and in opposition to such motion were filed, and a motion to appoint a receiver as prayed for by the supplemental bill was entered and the answer of T. Moore Jackson was filed. On January 15, 1907, additional affidavits were filed, the motions to dissolve the restraining order, to require injunction bond, entered by defendants, for an injunction, the removal of trustees, and the appointment of a receiver, entered by plaintiff were argued and submitted.

V. B. Archer, for plaintiffs.
G. C. Lewis, for Braddock Machine & Mfg. Co.
John Bassel and E. B. Templeman, for trustees.
Sperry & Sperry, for Jackson.
Johnson & Hoffheimer, for Hornor.
W. S. Meredith, for Conaway.

DAYTON, District Judge (after stating the facts as above). In the consideration of these pending motions, I have felt constrained to eliminate many matters presented by the amended bill. I do not for a moment undertake to determine the question of whether the defendant Jackson may or may not have a good cause of action against the Baltimore & Ohio Railroad Company for the alleged discriminations made against him or the Dola Coal & Coke Company which he substantially owned and controlled, nor do I attempt to determine whether he has such action against Rogers and said railroad company for violation of Rogers' agreement and contract with him by virtue of the sale of the Short Line Railroad to the said Baltimore & Ohio Railroad Company by Rogers with alleged knowledge at the time of purchase on the part of the Baltimore & Ohio Company of such contract. Nor do I attempt to determine whether a conspiracy, as charged, existed

between the Baltimore & Ohio Company and the Fairmont Coal Company or their officers to depreciate the value of the Dola Coal & Coke Company coal field, prevent its purchase by independent operators, and secure it for the Fairmont Coal Company at a minimum price.

I do not consider these matters as in this case requiring independent action on this court's behalf because neither Rogers, the Baltimore & Ohio Railroad Company, nor the Fairmont Coal Company are parties, and in consequence are not and cannot be bound by the allegations of the bill, and in their absence as such no proper investigation could be made by this court to ascertain whether reasonable ground existed for directing suit to be brought by the trustees, or a receiver appointed, at the expense of the trust funds to recover damages for such alleged wrongs; but there is a stronger reason than this in my mind why I must disregard these matters, and that is I do not regard the terms of the trust agreement, trust conveyances, and power of attorney executed by Jackson and the Dola Coal & Coke Company to these trustees as broad enough to include the right either to institute or to expend the trust funds in prosecution of such actions, but, on the contrary, I regard the rights of both Jackson personally and of the Dola Coal & Coke Company to be wholly reserved and unimpaired to them to institute and prosecute in their own names suits upon such causes of action, if such there be. These allegations of the amended bill could only be considered as tending to show that this court should exercise that discretion which it has under equitable rules to set aside the sale made by the trustees, and, these allegations by the answers and affidavits filed being all denied, I am constrained substantially to ignore them. Nor do I regard the charges of misconduct on the part of these trustees as sustained. It seems to me that, under all the circumstances, they are subject to neither condemnation nor just criticism. It is to be remembered that they undertook what has been almost universally found to be an impossibility, to wit, to administer and settle a very large trust estate composed of much realty, and various kinds of personalty, without the aid of a court of equity, to the satisfaction of three naturally antagonistic classes—preferred creditors, unsecured creditors, and the debtor himself. Nothing was more natural on the part of the first than impatience at all delays, and a sense that having the first right to the proceeds of sale they ought to have that sale speedily consummated. The unsecured creditors on their part might well demand that delay to prevent sacrifice was absolutely a right and necessity. This latter plea could also be asserted by the debtor above all others. In this case Jackson is clearly shown to be an accomplished civil and mining engineer—a man accustomed to large business transactions, who, with scientific knowledge, had examined the coals underlying a large section of country, and had selected and purchased this Dola field as being the very best and most valuable to be found. He found that he had overreached himself by reason, as he firmly believed, of the bad faith towards him on the part of Rogers and the railroad company. Whether this was true or not, he was convinced of the value of this field, and, if sold for what he deemed its value, he felt confident the proceeds would pay his debts. Most naturally he could not contemplate with equanimity sales of his property indicat-

ing that near a half million dollars of debts due to those who had trusted him should go unpaid, and, notwithstanding he was released by the contract from the payment of these debts, no one can justly criticise him for earnestly desiring their payment and doubting the wisdom of the policy by which any other result would transpire.

Under such irreconcilable conditions I am constrained to believe these trustees have done the very best they could to solve the problem, and have come as near doing so as any one ever has under like circumstances.

To one other matter in this cause I attach little or no importance, namely, the objection made to the authorization of the power of attorney to these trustees by the stockholders of the Dola Company. It is insisted that the minutes of this company show that Jackson's stock was represented and voted by himself when he had, at the time, assigned this stock to these trustees who alone in consequence could vote it, and therefore this power is void. I do not regard this contention as sound for these reasons: First, the stock had not been transferred to these trustees from Jackson on the books of the company, and was therefore properly voted in his name; second, it appears that both he and one or more of these trustees were present at the stockholders' meeting when this action was taken. It was taken with no record protest on the part of any, and it must be conclusively presumed that it was taken by concerted action of both Jackson and said trustees, and, finally, these trustees assumed to act under this power, and they are estopped from denying the regularity of said power; so, too, are Jackson and the company, because both have acquiesced in such action by said trustees.

The whole matter, therefore, narrows itself down to this question: Shall this court of equity intervene at the instance of creditors, take control of this property, set aside the private sale made by the trustees, and direct them to make public sale of this coal field under such terms and conditions as it may determine upon? After long and patient study of this question, I have reached the conclusion that such intervention by this court cannot be avoided. I reach this conclusion for these reasons: First. It is well settled that it is immaterial as to the form and character of the instrument by which a trust may be created. It may also be created by more than one instrument in different forms, each bearing different technical names. The question in equity is always one of substance, and not of form. I therefore construe the original agreement between Jackson and these trustees, the deed for his realty, the memorandum of assignment of his personal property and the power of attorney of the Dola Company to them, as means resorted to, to accomplish a single purpose, the creation of a trust in these trustees for the benefit of his creditors. The power of attorney, it is true, goes a step beyond the other writings, and gives the right of disposition of the coal property of the Dola Company in which Jackson was not alone interested. However, it cannot be denied that his interest was almost the whole thereof, that this power was executed solely because of his transfers before made, and with the sole purpose of better obtaining and securing his interests therein and vesting the

same in the trustees. It must, therefore, in my judgment, be considered as a part of the whole trust and administered as such. This being so, it is not to be forgotten that equity has always exercised the most complete and exclusive jurisdiction over such trust estates, and, further, that it is and has been the uniform policy of equity, except in very rare instances under very exceptional cases, to require sales of realty especially so conveyed in trust to be sold at public outcry. It is well settled that even an agreement on the part of a person interested in such trust estate not to institute suit in equity in aid of its administration is contrary to public policy, and cannot be enforced. It is the inherent right of every one to appeal to the courts for the ascertainment and settlement of his legal rights, and no other form can be established, by contract or otherwise, to destroy this right of appeal thereto. The general policy of courts of equity to require sales of realty under trusts made for benefit of creditors to be at public auction, is also very clear. It is to be remembered that the modern deed of trust is simply the child of the mortgage; that its raison d'être was the complaint that the mortgage proper could only be made effective by a resort to a suit in equity wherein the title to the land conveyed could be quieted in the mortgagee and all equity of redemption in the mortgagor cut off, or by a public sale of the property itself or of this equity of redemption, the former being the usual practice in England, the latter in Ireland and Virginia. The expense and delay involved in these equitable proceedings, especially in the early days of Virginia where the court circuits covered large territory, the terms were not numerous, and above all, where the values were not great, very naturally turned the legal mind to devising some means by which the same results could be obtained without the delay and expense. Hence it was natural that the deed of trust should rapidly become popular as a substitute for the mortgage. Its integrity rested at first, and, to a measure at least, still rests, upon the right of contract between debtor and creditor by which they could agree upon the terms whereby the property of the one could be sold and the proceeds paid to the other by an intermediary acting as agent for both. At first these deeds of trust were not governed by statute, and the first act of the Virginia Legislature in relation thereto appears in chapter 117 of the Code of 1849. Section 6 of this chapter provides that in all such trust deeds designed "to secure debts or indemnify sureties," as follows:

"Sec. 6. The trustee in any such deed, *except so far as may be therein otherwise provided*, shall, whenever required by any creditor secured, or any surety indemnified by the deed, * * * after the debt due to such creditor or for which such surety may be liable, shall become payable, and default shall have been made in the payment thereof, * * * sell the property conveyed by the deed * * * at public auction," etc.

The provision of the Virginia Code of 1860, in chapter 117, § 6, in this particular is the same, as also our Code (W. Va.) 1868, c. 72, § 6, and the amended act passed February 28, 1870 (Acts 1870, p. 65, c. 51). Under these legislative provisions public sales under this class of trusts, while favored, were allowed to be subject to the contract of the parties contained in the deed, as shown by the italicized part of the quota-

tion. By the act of March 25, 1882 (Acts 1882, p. 440, c. 140), this provision was changed and amended so as to read:

"Sec. 6. The trustee in any such deed shall, whenever required by any creditor secured, or any surety indemnified by the deed, * * * after the debt due to such creditor or for which such surety may be liable, shall have become payable, and default shall have been made in the payment thereof * * * sell the property * * * at public auction upon the following terms * * * unless a different provision as to the terms of sale has been inserted in the deed."

By Act Feb. 25, 1887 (Acts 1887, p. 177, c. 54), this section was further amended as follows:

"The trustee in any such deed, whenever required by any creditor secured, or any surety indemnified by the deed, * * * after the debt due to such creditor or for which such surety may be liable, shall have become payable, and default shall have been made in the payment thereof by the grantor, sell the property conveyed by the deed or so much thereof as may be necessary, at public auctions upon such terms as are mentioned in said deed; and if no terms are therein mentioned, then upon the following terms," etc.

And very specific provisions are then made for the advertisement of such sale. This section was again amended by the act of March 7, 1891 (Acts 1891, p. 199, c. 77), contained in our Code (W. Va. 1906) as section 3053, but the provision above quoted remains the same.

It will be noticed that in a deed of trust "to secure a debt or indemnify a surety" the statute requiring a sale at public auction has become absolutely mandatory, regardless of the provisions of the deed itself. This change has not been made through these series of amendments, I conceive, undesignedly, and it illustrates very forcibly the proposition that the policy of the law is against private sales of trust properties. But it is argued very ably by counsel for these trustees that there is a distinct difference between deeds of trust "to secure a debt or to indemnify a surety" and general assignments to such trustees for the benefit of creditors; that, in the first class of cases, an equity of redemption remains in the debtor, while the latter is an absolute sale of all the debtor's rights and interests which immediately vest in the trustees. It is therefore insisted that this section 6 (or section 3053 of the Code) does not apply to the latter class of instruments.

The first proposition I concede without a moment's hesitation. It is clearly set forth in Sandusky v. Faris, 49 W. Va. 150, 38 S. E. 563, and the authorities therein cited. As to the second, that this section 6 does not apply to such general assignments, I have grave doubt. In fact, I am inclined to the belief that it does for this reason: That, in the latter amendments made to it, full provisions are made for the advertisement of the sale, for its expenses, the payments of the debts secured, the disposition of the surplus, for bond to be given by trustee when required, what facts the advertisement of sale shall state; and then adds:

"And in all cases where a debtor conveys all his property to a trustee for the benefit of his creditors, or where he conveys all his property except what is exempt from execution or other process, every such trustee shall settle his accounts before a commissioner of accounts of the county in which such bond is recorded, and the provisions of chapter 87 of the Code of West Virginia as amended, shall apply to such settlement as far as applicable."

It is very difficult to conceive why this provision should be incorporated in this section if it were to be construed as wholly irrelevant to the section's general scope and purpose. On the other hand, it may be well reasoned that this distinction between a deed of trust to secure creditors and sureties, and a general assignment for the benefit of creditors, being practically one without a difference—the right of the debtor to pay off his debts and redeem his property under the latter being admitted—no reason can be advanced why it should be held to exclude general assignments from the safeguards provided by this section, but, on the contrary, that in such assignments, especially upon demand of the creditors who have little hope of securing payment of their debts otherwise than by it, its provisions should be especially applicable and enforced. I am fully aware that the Supreme Court of Appeals of this state has held in such cases as Harden v. Wagner, 22 W. Va. 356, Kyle v. Harveys, 25 W. Va. 716, 52 Am. Rep. 235, Landeman v. Wilson, 29 W. Va. 702, 2 S. E. 203, and Cohn v. Ward, 32 W. Va. 34, 9 S. E. 41, that provisions in deeds of trust providing for private sales by trustees do not render such trust deeds void on their face. Most of these cases relate to trust conveyances of perishable personal property, such as stocks of goods and merchandise, although in the two latter cases the ruling is extended to such provisions as to both real and personal property. The exact question does not arise in those cases. It may very well be held that such provisions may not render the security of the creditors void, but the very fact that it has been held in Kyle v. Harveys, supra, that:

"If, when the assignor provided in his assignment that the stock of goods should be sold at private sale, he did so with the bona fide purpose of realizing for his creditor the largest amount possible, then this assignment is not fraudulent and void as against his creditors. But if the provision that these goods should be sold at private sale was inserted by the assignor, believing at the time that the interests of his creditors would thereby be prejudiced and with a view only of furnishing remunerative employment to himself or to the assignee, and the assignee knew this when he took possession of the stock of goods, then the assignment is fraudulent, and will be void as against all the creditors of the assignor"

—would seem to strengthen the proposition I am contending for, that the whole policy of the law is against private sales by trustees in the administration of these trust estates. And I am driven to the conclusion that it would be under most extraordinary circumstances, if ever, such trustees would be allowed to so sell such trust estate, especially realty of great value, against the express protest of both debtor and interested creditors. The very reason for this is apparent, in that the man seeking to buy may just as well do so at public as private sale. I have not been able to find a single case in this state where such sale at public auction has been refused and the private sale of the trustee confirmed, and the very absence of such decision is significant if not decisive. It may be said that Barnett v. Higgins, 2 W. Va. 485, contradicts this statement, but, unsatisfactory as the opinion there is, it is apparent that the trustee made private sale only after offering at public outcry and then for advanced price. The cases cited by counsel of Braford v. McConihay, 15 W. Va. 732, Lallance

v. Fisher, 29 W. Va. 512, 2 S. E. 775, and Jones v. Neale, 2 Pat. & H. 339, where sales of trustees were not set aside for inadequacy of price all relate to public and not private sales.

Second. I am led to believe that this bill must be sustained and this property be required to be sold under the supervision of this court upon demand of these creditors, because it is the well-established policy of the law in this state to sell real estate only after the liens and their priorities have been ascertained and settled. Section 4147 of our Code (W. Va. 1906) expressly requires such liens to be ascertained, notice to lienholders to be published, and that all rights to parties to except and contest shall be preserved. It is needless to cite the multitude of cases construing this statute. I have not the slightest doubt of the sincerity of these trustees in their statement that they have accurately, as they believe, ascertained the creditors, their debts and priorities, secured by this deed of trust. We must admit, however, that this is private judgment, and not judicial determination. It was expressly provided in the trust agreement that creditors should have the right to sue to establish their debts and liens, and, if it had not been so provided, I think this right clear and undisputable if exercised within proper time. And, finally, while no man can tell whether this large and valuable property, if sold at public auction, will or will not realize a larger sum than the one offered at this private sale, it is nevertheless true that many think it will, that a considerable larger sum has been offered for it whether by one who could fulfill his offer or not we cannot tell, and that these trustees themselves expressly state in their circular letter to creditors that the sale price of $145 per acre is much below the true value of the property. Under such conditions, it seems to me I must set aside this private sale, entertain this bill, ascertain the liens and charges against this real estate, and direct the sale thereof to be made by these trustees under the direction and orders of this court.

It follows, therefore, that I overrule the motion to dissolve the restraining order, although its purpose has been accomplished, also the motion for injunction and for a receiver, for I do not regard either as necessary, and I further overrule the motion to require injunction bond, the plaintiff having already given security for costs in the sum of $1,000, which I regard as amply sufficient.

CHICAGO, R. I. & P. RY. CO. v. LUDWIG, Secretary of State of Arkansas.

(Circuit Court, E. D. Arkansas, W. D. October 5, 1907.)

No. 1,600.

1. COURTS—JURISDICTION OF FEDERAL COURTS—SUIT AGAINST STATE.

A suit to enjoin a state officer from taking action to forfeit the franchise rights of a corporation under a statute alleged to be in violation of the Constitution of the United States is not one against the state within the meaning of the eleventh constitutional amendment, and is within the jurisdiction of a federal court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, §§ 844, 844½.

Federal jurisdiction of suits against state, see note to 13 C. C. A. 165].

2. CONSTITUTIONAL LAW—OBLIGATION OF CONTRACTS—FOREIGN CORPORATIONS —RIGHT OF STATE TO EXCLUDE.

While a state which has admitted a foreign corporation to the right to do business therein has the power to withdraw such permission at pleasure, the exercise of such power is subject to the limitation that, where the corporation has been granted a franchise in the nature of a contract, it is protected from impairment by the contract clause of the national Constitution.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, §§ 372–413.]

3. SAME.

A foreign railroad corporation which acquired valuable railroad property in Arkansas, and by compliance with Act Ark. March 13, 1889 (Laws 1889, p. 43; Kirby's Dig. §§ 6743–6748), became under said act and section 11, art. 2, of the state Constitution, "to all intents and purposes a railroad corporation of this state, subject to all of the laws of the state now in force or hereafter enacted the same as if formally incorporated in this state," acquired thereby the contract right to be subjected by the state to only such treatment and liabilities as domestic railroad corporations, and such right is unconstitutionally impaired by the provision of Act Ark. May 13, 1907, which subjects it to a forfeiture of all its franchise and charter rights to do business in the state and to ouster therefrom in case it shall remove any action or suit into a federal court without the consent of the adverse party, or institute a suit in such court against a citizen of the state; no such restriction being placed on domestic railroad corporations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, §§ 372–413.]

In Equity. Suit for injunction. On demurrer to bill.

The bill charges: That complainant is a railway corporation created by and existing under the laws of the states of Iowa and Illinois, engaged in operating lines of railroad and conducting a business as a common carrier in and through the states of Illinois, Iowa, Minnesota, South Dakota, Nebraska, Colorado, Missouri, Kansas, Tennessee, Arkansas, Louisiana, and Oklahoma and Indian Territories. That on May 24, 1904, it filed a certified copy of its articles of incorporation with the Secretary of State of the state of Arkansas, paid the fees prescribed by law, and otherwise complied with all the laws of the state of Arkansas regulating the terms and conditions upon which railroad companies organized and existing under the laws of states or a territory other than the state of Arkansas are permitted to do business in that state, and thereby it became a domestic corporation of said state. That its business is interstate as well as intrastate. That, for the purpose of conducting its business in this state as authorized by its laws, it leased for a valuable consideration for a term of 999 years all of the rights, privileges, franchises, and other property of the Choctaw, Oklahoma & Gulf Railway Company, a corporation organized under an act of Congress, and owned and operated railroads through the state. That complainant now owns, leases, and operates 604.13 miles of railroad, right of way, depots, station grounds, shops, warehouses, rolling stock, etc., assessed for taxes in the state of Arkansas by the authorities of said state at $6,912,482.00. That now the defendant, as Secretary of State, notwithstanding the aforesaid premises, threatens to forfeit complainant's right to conduct its business as a railroad company in his state by authority, as he claims, of an act of the Legislature of the state of Arkansas, approved May 13, 1907, for the reason that the complainant removed a cause instituted against it by a citizen of this state in one of the courts of the state to the United States court of the Eastern District of Arkansas. The bill then attacks the constitutionality of the act, in so far as it applies to it upon several grounds which it is unnecessary to set out, the principle grounds, which, in the view of the court, determine this case and also the other cases submitted at the same time, being that its effect is to impair the obligations of

a contract in violation of section 10, art. 1, and section 1 of the fourteenth amendment to the Constitution of the United States.

It is also charged that complainant conducts its business upon as economical a basis as it is safe and practicable to operate lines of railroad; that, to enable it to safely maintain and operate its railroad, it is necessary that it receive the revenues occasioned from handling of freight and passengers from points within the State of Arkansas; that, if it is denied the right to handle such intrastate traffic and receive such revenue, the receipts derived from handling of interstate traffic alone will not enable it to continue to pay the necessary expenses of maintenance and operation and handling of such interstate traffic and pay a fair return upon its investment.

The prayer of the bill is for an injunction to prevent the defendant from revoking the charter or its right to carry on business in this state. The defendant demurs upon the grounds, first, that this is in effect an action against the state, and, therefore, not cognizable in a court of the United States, as provided in the eleventh amendment to the Constitution of the United States; and, second, that there is no equity in the bill. The provisions of the Constitution and the various acts of the Legislature of the state of Arkansas which it is necessary to consider in the determination of the issues involved are as follows:

Section 11, art. 12, of the Constitution provides:

"Foreign corporations may be authorized to do business in this state under such limitations and restrictions as may be prescribed by law. Provided, that no such corporation shall do any business in this state except while it maintains therein one or more known places of business and an authorized agent or agents in the same upon whom process may be served; and, as to contracts made or business done in this state, they shall be subject to the same regulations, limitations and liabilities as like corporations of this state, and shall exercise no other or greater powers, privileges or franchises than may be exercised by like corporations of this state, nor shall they have power to condemn or appropriate private property."

Section 2 of the acts of the General Assembly of the state of Arkansas, approved March 13, 1889 (Laws 1889, p. 43), and digested as sections 6743 to 6748 (Kirby's Dig.), inclusive, is as follows:

"Any railroad company in this state, existing under general or special laws, may sell or lease its road, property and franchises to any other railroad company duly organized and existing under the laws of any other state or territory, whose line of railroad shall so connect with the leased or purchased road by bridge, ferry or otherwise, as to practically form a continuous line of railroad, and any railroad company in this state existing under general or special laws, may buy or lease, or otherwise acquire, any railroad or railroads, with all the property, rights, privileges and franchises thereto pertaining, or buy the stock and bonds, or guarantee the bonds of any railroad company or companies incorporated or organized within or without this state whenever the roads of such companies shall form in the operation thereof of a continuous line or lines. Provided, that before any such lease or sale is valid, it must be approved and ratified by persons holding or representing two-thirds of the capital stock of each of such companies respectively, at a stockholders' meeting called for that purpose; and any railroad company existing under the general or special laws of any other state or territory may buy or lease, or otherwise acquire, any railroad or railroads, the whole or part of which is in this state, with all the rights, privileges and franchises thereto pertaining, or buy the stock and bonds, or guarantee the bonds of any railroad company incorporated or organized under the laws of this state, whenever the roads of such companies shall form in the operation thereof a continuous line or lines. Provided, that the road so purchased shall not be parallel or competing with the purchasing road; and any railroad company existing under the laws of any other state or territory may extend and construct its railroad into or through this state. Provided, further, that any agreement of any company existing under the general or special laws of this state, or of any other state or territory, to lease or buy a railroad and appurtenances, or to buy the stock or bonds, or guarantee the bonds of any railroad company incorporated and organized within this state, heretofore executed by the proper officers of such

companies and ratified by the companies parties thereto, by the assent of persons holding two-thirds of the capital stock in each of such companies, expressed at a meeting of such stockholders called for that purpose, shall be taken and held to be binding from the date of its execution. Provided, further, that nothing in the foregoing provisions shall be held or construed as curtailing the right of state or counties through which said consolidated, leased or purchased road or roads may be located, to levy and collect taxes upon the same and the rolling stock thereof, pro rata, in conformity with the provisions of the laws of this state upon that subject. Provided, further, that before any railroad corporation of any other state or territory shall be permitted to avail itself of the benefits of this act, or any part thereof, such corporation shall file with the Secretary of State of this state, a certified copy of its articles of incorporation, if incorporated under a general law of such state or territory or a certified copy of the statute laws of such state or territory incorporating such company, where the charter of such railroad corporation was granted by special statute of such state; and upon the filing of such articles of incorporation or such charter, with a map and profile of the proposed line and paying the fees prescribed by law for railroad charters, such railroad company shall, to all intents and purposes, become a railroad corporation of this state, subject to all of the laws of the state now in force or hereafter enacted, the same as if formally incorporated in this state, anything in its articles of incorporation or charter to the contrary notwithstanding, and such acts on the part of such corporation shall be conclusive evidence of the intent of such corporation to create and become a domestic corporation, and, provided further, that every railroad corporation of any other state which has heretofore leased or purchased any railroad in this state, shall, within sixty days from the passage of this act, file a duly certified copy of its articles of incorporation or charter with the Secretary of State of this state, and shall, thereupon, become a corporation of this state, anything in its articles of incorporation or charter to the contrary notwithstanding, and in all suits or proceedings instituted against any such corporation, process may be served upon the agent or agents of such corporation or corporations in this state, in the same manner that process is authorized by law to be served upon the agents of railroad corporations in this state, organized and existing under the laws of this state."

Acts of May 23, 1901, digested as sections 6749 and 6750 of Kirby's Digest is as follows:

"The franchise and all charter rights whatsoever of any railroad company in and to all railroad, roadbed, bridge, depot, or other railroad property, as well as the possession of, and right to operate same, which may have been acquired by such railroad under and by virtue of any lease, shall be forfeited and such railroad company ousted of its right thereunder to operate, possess or control the same, if such lease shall not have been made in conformity with the statute governing the making of such leases, or if such lessee shall fail to maintain said property in good repair so as to afford safe and reasonably prompt facilities of travel to the public, or shall fail to furnish reasonable shipping accommodations for freight to its patrons.

"This act may be enforced at the instance of the state by her Attorney General, by information in the nature of quo warranto, or other proper suit in any court having jurisdiction."

The act of May 13, 1907, under which it is now claimed the defendant is about to revoke complainant's franchise, is as follows:

"Section 1. Every company or corporation incorporated under the laws of any other state, territory, or country, including foreign railroad and foreign fire and life insurance companies, now or hereafter doing business in this state, shall file in the office of the Secretary of State of this state a copy of its charter or articles of incorporation or association, or a copy of its certificate of incorporation, duly authenticated and certified by the proper authority, together with a statement of its assets and liabilities and the amount of its capital employed in this state, and shall also designate its general office or place of business in this state, and shall name an agent upon whom process may be served. Provided before authority is granted to any foreign

corporation to do business in this state, it must file with the Secretary of State a resolution adopted by its board of directors, consenting that service of process upon any agent of such company in this state, or upon the Secretary of State of this state, in any action brought or pending in this state, shall be a valid service upon said company; and if process is served upon the Secretary of State it shall be his duty to at once send it by mail, addressed to the company at its principal office; and if any company shall, without the consent of the other party to any suit or proceeding brought by or against it in any court of this state, remove said suit or proceeding to any federal court, or shall institute any suit or proceeding against any citizen of this state in any federal court, it shall be the duty of the Secretary of State to forthwith revoke all authority to such company and its agents to do business in this state, and to publish such revocation in some newspaper of general circulation published in this state; and if such corporation shall thereafter continue to do business in this state, it shall be subject to the penalty of this act for each day it shall continue to do business in this state after such revocation.

"Sec. 2. Any foreign corporation, which shall fail to comply with the provisions of this act, and shall do any business in this state, shall be subject to a fine of not less than $1,000, to be recovered before any court of competent jurisdiction and all such fines so recovered shall be paid into the general revenue fund of the county in which the cause of action shall accrue, and it is hereby made the duty of the prosecuting attorneys to institute said suits in the name of the state, for the use and benefit of the county in which the suit is brought, and such prosecuting attorney shall receive as his compensation one-fourth of the amount recovered, and as an additional penalty, any foreign corporation which shall fail or refuse to file its articles of incorporation or certificate as aforesaid, cannot make any contract in this state which can be enforced by it either in law or in equity, and the complying with the provisions of this act after suit is instituted shall in no way validate said contract.

"Sec. 3. That all corporations hereafter incorporated in this state and all foreign corporations seeking to do business in this state shall pay into the treasury of this state for the filing of said articles a fee of $25.00 where the capital stock is $50,000.00 or under; $75.00 where the capital stock is over $50,000.00 and not more than $100,000.00; and $25.00 additional for each $1,000,000.00 of capital stock."

Buzbee & Hicks and W. F. Evans, for complainant.
W. F. Kirby, Atty. Gen. of Arkansas, for defendant.

TRIEBER, District Judge. 1. In Western Union Telegraph Co. v. Andrews, 154 Fed. 95, this court had occasion to pass upon the jurisdiction of national courts in actions against officers of the state, and determine when such an action is in effect a suit against the state within the meaning of the eleventh amendment to the Constitution. In that case the court reviewed the authorities quite fully, and it would serve no useful purpose to repeat them in this opinion. Among the conclusions there reached, and which the court adheres to now, are the following:

"(c) The exemption of the state from judicial process does not protect its officers and agents from being personally liable to an action of tort by a private person whose rights or property they have wrongfully invaded or injured, even by authority of the state, and, when the remedy at law is inadequate, its officers may be restrained by injunction from doing positive acts for which they would be personally liable for taking or injuring plaintiff's property in violation of the Constitution or laws of the United States."

"(e) The fact that the state has a governmental interest in the welfare of its citizens in compelling obedience to the legal orders of its officials for the benefit of the public at large is not that which makes the state as the organized political community a party in interest to the litigation. The interest must

be one in the state as an artificial person, as distinguished from that of a government for the benefit of its citizens."

"(g) That an action to prevent the enforcement of a tariff which is unreasonable and confiscatory, and which is to be enforced by a commission or other officials who are merely acting as administrative agents for the state, is not one against the state, if the act itself is unconstitutional and void as against the complainant."

A franchise to a railroad company to own and operate a railway is a valuable right, and has always been held to be property. Dartmouth College v. Woodward, 4 Wheat. 518, 4 L. Ed. 629, and numerous cases cited and followed with approval collected in 1 Roses' Notes on U. S. Reports, 914.

An interesting case showing that such a franchise is property of which a corporation cannot be deprived without compensation, even under the power of eminent domain, is Monongahela Navigation Co. v. United States, 148 U. S. 312–329, 13 Sup. Ct. 622, 627, 37 L. Ed. 463, where the court said, in speaking of such franchise:

"The latter [meaning the franchise] can no more be taken without compensation than can its tangible corporeal property."

Upon the allegations of the bill, which for the purpose of determining the demurrer are confessed to be true, this is not an action against the state within the meaning of the eleventh amendment.

2. That the state has the power to prevent a foreign corporation from doing business at all within its boundaries unless such prohibition is so conditioned as to violate the federal or its own Constitution has been finally determined in Security Mutual Life Ins. Co. v. Prewitt, 202 U. S. 246, 26 Sup. Ct. 619, 50 L. Ed. 1013, and is now no longer open to question. As stated in the opinion of the court:

"As a state has the power to refuse permission to a foreign insurance company to do business at all within its confines, and as it has the power to withdraw that permission when once given, without stating any reason for its action, the fact that it may give what some may think a poor reason or none for a valid act is immaterial."

But, on the other hand, it is equally well settled that if the state has induced a corporation to enter it by the granting of a franchise, which is in the nature of a contract, then it is protected in the enjoyment thereof by article 1, § 10, of the national Constitution, prohibiting any state from passing any law impairing the obligations of a contract. Without citing the numerous authorities on that subject, it is sufficient to refer to the American Smelting Co. v. Colorado, 204 U. S. 103, 27 Sup. Ct. 198, 51 L. Ed. 393, decided at the last term of the court. Therefore the only thing now left for determination in this case is what acts of a state constitute a contract with a foreign corporation to do business in the state. The statutes of Colorado construed in that case are not quite as strong as those of this state; for, while that statute provided that "such corporations [foreign corporations permitted to do business in the state] should be subject to all the liabilities, restrictions and duties which are or may be imposed upon corporations of like character organized under the general laws of this state, and shall have no other or greater powers" (section 499, Mills' Ann. St. Colo.) the Constitution of this state contains a similar provision (article 12, §

11, supra), and, in addition thereto, the statute regulating the right of foreign railroad corporations to do business in this state provides:

"And upon the filing of such articles of incorporation or such charter, etc., * * * such railroad company shall to all intents and purposes become a railroad corporation of this state, subject to all the laws of the state now in force or hereafter enacted, the same as if formally incorporated in this state," etc. Act March 13, 1889, p. 44, c. 34, § 2.

That these provisions clearly entitle a foreign corporation complying therewith to all rights and privileges of a domestic corporation can hardly be doubted in view of what was decided in the American Smelting Co. Case; but, were there any room for doubt on that subject, it has been removed by the decision of the Supreme Court of the state of Arkansas when construing the effect of that act. As will be noticed by reference to the constitutional provision of the state set out in the statement of facts, the power "to condemn or appropriate private property" was expressly excluded, but the Supreme Court in Russell v. St. L. & S. W. R. R. Co., 71 Ark. 451, 75 S. W. 725, expressly held that under the statute in question a foreign railroad corporation complying with the terms of the act (as is charged in this bill to have been done by complainant) became a domestic corporation of this state "with all its rights and powers, subject to all its duties and obligations," including the right of eminent domain. The fact that a corporation for jurisdictional purposes in the courts of the United States was still held to be a foreign corporation, as was decided by the Supreme Court in St. L. & S. F. R. R. Co. v. James, 161 U. S. 545, 16 Sup. Ct. 621, 40 L. Ed. 802, was held not to affect that question; the court distinguishing that case from the one before it. This was reaffirmed by that court in St. L. & S. F. Ry. v. Hale, 100 S. W. 1148, decided March 18, 1907. Since the rendition of the opinion in the American Smelting Co. Case, the identical question came before the Supreme Court of South Carolina in British-American Mortgage Co. v. Jones, 56 S. E. 983, and that court, following the decision of the Supreme Court of the United States, held that:

"Where a foreign corporation paid the license fee required by the act of 1893 to enable it to do business in the state, it cannot be required by the act of 1904 to pay an additional tax not levied on domestic corporations; such a requirement being an impairment of the contract of admission to do business in the state on the same terms as domestic corporations."

But, assuming that such foreign corporation when entering the state in pursuance to the laws of Arkansas has not become a domestic one, it must still be held that the decision of the Supreme Court in the Prewitt Case is limited by the proviso that the revocation of the right of a foreign corporation to do business in a state other than that of its creation must not in any way impair the obligations of a contract entered into by the state with a foreign corporation. The learned Attorney General of the state appearing for the defendant frankly admitted that the decision of the Supreme Court of the United States on questions of this nature involving a right claimed under a provision of the Constitution of the United States is conclusive, not only on this, but also all other courts, including the Supreme Court of the State. But he insists, and very ingeniously argues, that:

"If the foreign corporation became entitled to all the rights and privileges of a domestic corporation of like nature, as the Constitution of this state also provides that 'it shall exercise no other regular powers, privileges or franchises than may be exercised by a like corporation of this state,' it is subject to section 6 of article 12 of that instrument, which provides that the General Assembly shall have the power to alter, revoke, or annul any charter of incorporation now existing and revocable at the adoption of this constitution, or that may hereafter be created whenever in their opinion it may be injurious to the citizens of this state, in such manner, however, that no injustice shall be done to the corporators, and therefore," he proceeds to argue, "the Legislature has the right to revoke their charter or right to do business in this state as a foreign corporation, without stating any reason for its action, or what it may think a proper reason."

Assuming, without deciding, that this provision giving to the Legislature the right to amend, revoke, or annul any charters granted by it applies to foreign corporations as well as domestic corporations, and also assuming that the courts are powerless to inquire as to its reasons, the determination by the Legislature being conclusive, still this provision must be taken in connection with the constitutional provision prohibiting the impairment of the obligations of a contract, as the national Constitution provides that:

"This Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made under the authority of the United States shall be the supreme law of the land and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

When the corporation entered the state by authority of its laws, it was not, in the language of the court in the Smelting Company Case, "a mere license to come into the state and do business therein upon payment of a sum named, liable to be revoked or the sum increased at the pleasure of the state, without further limitation. It was a clear contract that the liability, etc., shall be the same as the domestic corporations and the same treatment shall be measured out to both." Such being the case, did the power retained by the state to alter, revoke, or amend any charter of a corporation, with the proviso "that no injustice shall be done to the corporators," authorize the impairment of the obligations of a contract?

It is urged that, when the corporation came into the state, it knew that its charter could be revoked, as the constitutional provision was as much a part of the statute authorizing it to enter the state as if included therein. The framers of the Constitution, composed as it was of some of the ablest lawyers of the state of Arkansas, were, of course, familiar with the provisions of the Constitution of the United States, and no doubt knew that to retain the power to revoke it absolutely, regardless of any contract rights of the parties might be in violation of that instrument prohibiting the states from enacting laws impairing the obligations of contracts, and for this reason added the proviso: "In such manner, however, that no injustice shall be done to the corporators." The effect of such a constitutional proviso was passed upon in Vicksburg v. Waterworks Co., 202 U. S. 453, 26 Sup. Ct. 660, 50 L. Ed. 1102, distinguishing Hamilton Gas, etc., Co. v. Hamilton, 146 U. S. 258, 13 Sup. Ct. 90, 36 L. Ed. 963. But, even if it be assumed that the proviso has not that effect, still it cannot in any way affect the

determination of this cause. The contract between the foreign corporation and the state, as declared in the American Smelting Company Case, was "a clear contract that the liabilities," etc., should be the same as the domestic corporations, and the same treatment should be measured out to both. If it was desired to increase the liabilities of the foreign corporation, it could only be done by increasing those of the domestic corporation at the same time and to the same extent.

That the act of 1907 deprived foreign corporations then doing business in the state under the acts in force prior thereto of valuable rights and privileges, and imposed on them onerous liabilities of which domestic corporations are not deprived nor have imposed on them, is too clear to require argument. Section 1 of the act deprives them of the right, without the consent of the other party, to remove any suit or proceeding brought by any one against it in any court of the state to any federal court, or to institute any original suit or proceeding against any citizens of this state in any federal court, and as a penalty it forfeits its right to do business in the state. Corporations organized under the laws of the state are not deprived of this privilege or right. They may institute proceedings in the federal courts originally or remove such a cause, if, under the acts of Congress, there is authority to do so. This is a valuable right conferred by Congress in pursuance of the authority of the Constitution of the United States of which the states cannot deprive a citizen or corporation. Insurance Co. v. Morse, 20 Wall. 445, 22 L. Ed. 365; Barron v. Burnside, 121 U. S. 186, 7 Sup. Ct. 931, 30 L. Ed. 915; Sou. Pac. Co. v. Denton, 146 U. S. 202, 13 Sup. Ct. 44, 36 L. Ed. 942; Martin v. Railroad Co., 151 U. S. 673, 14 Sup. Ct. 533, 38 L. Ed. 311; Barrow Steamship Co. v. Kane, 170 U. S. 100, 18 Sup. Ct. 526, 42 L. Ed. 964. Section 3 of the act requires all foreign corporations, although they have complied with the laws of the state when they entered the state, to pay again heavy incorporating fees, while domestic corporations chartered before the passage of the act are not subject to this burden.

It is impossible to distinguish this case from American Smelting Co. v. Colorado; and, for this reason, the demurrer to the bill must be overruled.

JEWETT BROS. & JEWETT v. CHICAGO, M. & ST. P. RY. CO.

(Circuit Court, D. South Dakota. September 27, 1907.)

No. 497.

1. COURTS—JURISDICTION OF FEDERAL COURT—SUIT TO ENJOIN INTERSTATE CARRIER FROM PUTTING INTO EFFECT UNLAWFUL RATE.

A Circuit Court as a court of the United States has jurisdiction of a suit by a shipper to enjoin a railroad company from putting into effect a proposed rate alleged to be unlawful, as in violation of the interstate commerce law, either as unreasonable and unjust in itself or discriminatory, when the jurisdictional amount is involved.

2. EQUITY—JURISDICTION—ADEQUATE REMEDY AT LAW.

Such a suit is also within the jurisdiction of the court as a court of equity; the complainant being without adequate remedy at law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 151–163.]

8. SAME—ANCILLARY SUIT FOR INJUNCTION.

A court of equity cannot entertain a suit for a temporary injunction to restrain an interstate carrier from putting into effect an alleged unlawful rate, where such suit is merely in aid of a proceeding instituted before the Interstate Commerce Commission to have such rate declared unlawful, since the commission is without power to pass on a rate which is merely proposed by a carrier, but which has not been put into effect.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 99–102.]

In Equity. On final hearing.

Bailey & Voorhees (A. B. Kittridge, of counsel), for complainant.
Burton Hanson and William G. Porter, for defendant.

CARLAND, District Judge. The above action has been submitted to the court upon the pleadings and certain stipulated facts.

From said pleadings and stipulation, the following material facts appear: The complainant is a corporation organized under and by virtue of the laws of the state of South Dakota, and is doing business at the city of Sioux Falls, in said state. It is engaged in the business of a wholesaler and jobber in groceries, fruits, cured meats, and other commodities, generally dealt in by wholesale jobbers and retail grocers. In carrying on its said business of a wholesaler and jobber it purchases in the markets the commodities in which it deals in large quantities, and ships the same from the centers of manufacture or of distribution to the said city of Sioux Falls. A large portion of the commodities so purchased, shipped, and dealt in are purchased in the markets at Chicago, Ill., or other west shore Lake Michigan points, or at a market located east of Chicago, Milwaukee, and other west shore Lake Michigan points. Commodities purchased by complainant east of Chicago must pass through Chicago, Milwaukee, or some other west shore Lake Michigan point on their way to Sioux Falls, and become subjected to the freight rates in force between Chicago, Milwaukee, and other west shore Lake Michigan points and Sioux Falls. For many years last past complainant has annually received many car loads of freight shipped from or through Chicago to Sioux Falls, and many other car loads of freight shipped from or through Milwaukee to Sioux Falls. In carrying on its business in the past, complainant has found it necessary to ship a large proportion of said commodities, purchased as aforesaid, over the lines of the defendant, and that in the proper, necessary, and economical conduct of its business complainant will be obliged in the future to make its shipments, as in the past, over the defendant's lines. The freight tariffs upon such shipments heretofore made over defendant's lines from Chicago and other west shore Lake Michigan points have exceeded annually many times the sum of $2,000, and in the future conduct of its business complainant will be obliged to pay to defendant for like services many times the sum of $2,000 per annum. The business of complainant was commenced about the year 1889 by a copartnership under the name of Jewett Bros. & Jewett, and complainant succeeded to the business of said copartnership in or about the year 1892. The territory throughout which the complainant conducts its business is southwestern Minnesota, northwestern Iowa, and

South Dakota. Throughout said territory complainant has built up a large and extensive business, amounting to many hundred thousands of dollars of sales annually, and, for the purpose of carrying on said business, complainant has expended large sums of money in the purchase of real property in the said city of Sioux Falls, and in the erection of a large business block thereon and has also expended large sums of money in the building up of said business; the good will of said business amounting to $100,000. The defendant is engaged in the business of operating lines of railroad between the cities of Chicago, in the state of Illinois, and Green Bay, in the state of Wisconsin, and Kansas City, in the state of Missouri, Omaha in the state of Nebraska, and Sioux City in the state of Iowa, and Sioux Falls in the state of South Dakota, and is also engaged in operating lines of railroad traversing the states of South Dakota, Iowa, and Minnesota, throughout the territory in which the business of complainant is carried on. Prior to September 22, 1890, there were in effect between Chicago and other places on the west shore of Lake Michigan and the city of Sioux City in the state of Iowa what are commonly known as "Missouri river rates," while the rates from Chicago and other west shore Lake Michigan points to Sioux Falls averaged about 108 per cent. of the Missouri river rates. Between September 22, 1890, and February 14, 1891, the Missouri river rates were extended to Sioux Falls. Upon February 14, 1891, the rates between Chicago and Sioux Falls were again raised to an average of about 108 per cent. of the Missouri river rates in effect at Sioux City, Iowa. In the month of December, 1895, the freight rates between Chicago and Sioux Falls were placed upon the basis of 104 per cent. of the rates from Chicago to Sioux City and other Missouri river points.

This action of the defendant and other competing lines was caused by the decision of the Interstate Commerce Commission in the case of E. J. Daniels, against the defendant and other carriers, operating lines of railroad between Chicago and Sioux City, Iowa, and Sioux Falls, S. D., reported in volume 6, page 458, Interstate Commerce Commission Reports; the decision in the case referred to being that the rates from Chicago and other west shore Lake Michigan points and Sioux Falls should not exceed 104 per cent. of the Sioux City, Iowa, rate. These rates remained in effect on defendant's lines until on or about the 27th day of December, 1906, when defendant was compelled by reason of the lowering of the rates by the Great Northern Railway Company from Duluth to Sioux Falls, S. D., and Sioux City, Iowa, and adjacent territory, to lower its rates between Chicago and other west shore Lake Michigan points to Sioux Falls, by giving Sioux Falls the same rate as Sioux City, Iowa, or, in other words, what are called "Missouri river rates." The cities of Duluth, Minn., Chicago, and other west shore Lake Michigan points, are so located and related as to shipments of freight as to make carriers carrying freight from said points to the city of Sioux Falls, S. D., and Sioux City, Iowa, and adjacent territory, competitors of each other. The carriers, other than defendant, operating lines of railroad between Chicago and Sioux Falls, S. D., are Chicago, Rock Island & Pacific Railway Company,

Illinois Central Railway Company, and the Chicago, St. Paul, Minneapolis & Omaha Railway Company. The Great Northern Railway Company operates a railroad from Duluth, on Lake Superior, to Sioux Falls, S. D., and, as the Chicago roads are all competitors of each other in the hauling of Sioux Falls freight, their rates for the same class of freight must necessarily be the same. Prior to the 25th of May, 1907, the Great Northern Railway restored its rates from Duluth to Sioux Falls, which had been reduced in December, 1906, to the rates formerly existing, and, following such restoration, the defendant and other Chicago lines about the 26th day of May, 1907, gave notice as required by the interstate commerce act that at the expiration of 30 days their rates to Sioux Falls would be restored, as they were prior to December, 1906.

At the time said notice was given, there was pending and undetermined before the Interstate Commerce Commission a proceeding wherein the Sioux City Commercial Club of Sioux City, Iowa, was complaining that the giving of Sioux Falls the so-called Missouri river rates was an unlawful and unjust discrimination as against the jobbers and shippers of Sioux City, Iowa. All railways herein mentioned were made defendants in that proceeding. The Jobbers' & Shippers' Association of Sioux Falls also filed an intervening petition, asking that the Interstate Commerce Commission should decide that the city of Sioux Falls was entitled to Missouri river rates. On June 24, 1907, said proceeding before the Interstate Commerce Commission was dismissed on motion of the petitioner. On or about July 8, 1907, the complainant herein filed with the Interstate Commerce Commission a petition against the defendant and the Chicago, Rock Island & Pacific Railway Company, and the Chicago, St. Paul, Minneapolis & Omaha Railway, and the Illinois Central Railway Company, alleging that the rates which the defendant proposed to put into effect on June 27, 1907, between Chicago and other Lake Michigan points and Sioux Falls, and being 104 per cent. of the so-called Missouri river rates, were unreasonable and unjust and relatively unreasonable and unjust as compared with the rates from Chicago, Milwaukee, Green Bay, and other Lake Michigan points to Sioux City, Iowa, and that they subjected Sioux Falls and its locality and the wholesale merchants and jobbers thereof to unjust discrimination and undue and unreasonable prejudice and disadvantage. The different defendants in said last-named proceeding have answered said petition, and said proceeding is still pending and undetermined before the Interstate Commerce Commission. Complainant filed their original bill in this action in this court on June 22, 1907, and an order to show cause was issued upon the filing of the bill, which order contained a restraining clause enjoining the defendant from putting into effect the rates which it had given notice would go into effect on June 27, 1907. Upon the dismissal of the proceeding before the Interstate Commerce Commission by the Sioux City Commercial Club, complainant filed a supplemental bill in this action, setting forth the dismissal of said proceeding, and setting forth the facts concerning the commencement of a new proceeding by complainant before the Interstate Commerce Commission, asking that Sioux Falls be decided to be entitled to the so-

called Missouri river rates. A demurrer was filed herein by the defendant to the original bill. The bill was then amended by complainant and the demurrer overruled as to the amended bill, whereupon the supplemental bill was subsequently filed and the hearing of the order to show cause was continued until September 23, 1907. The restraining clause in the order to show cause remaining in effect has prevented the proposed rates which were to go into effect June 27th from becoming effective so far as the city of Sioux Falls is concerned. On September 23, 1907, being the day upon which the order to show cause was to be heard, why a temporary injunction should not issue, complainant and defendant filed a stipulation of facts, and submitted the case for final hearing upon the pleadings and said stipulation.

The bill filed in this action alleges that the rates which the defendant has given notice of and threatens to put into effect between Chicago and other west shore Lake Michigan points and Sioux Falls are unfair and unjust, and are unjustly discriminatory to the wholesale merchant and the manufacturers, jobbers, and shippers of Sioux Falls, and give an undue preference and advantage to the merchants of Sioux City to which Sioux City and its merchants are not entitled by either their geographical position, or the commercial importance of said city. The city of Sioux Falls is the largest city in the state of South Dakota, and the only city of the first class in the state. It is and for some years past has been the commercial and industrial metropolis of South Dakota. Since the decision of the Interstate Commerce Commission in the Daniels Case, supra, both the city of Sioux Falls and the city of Sioux City have largely increased in population and in commercial and industrial importance, and while along some lines, such as the distribution of agricultural implements, the growth of Sioux Falls has relatively exceeded that of Sioux City, along other lines, such as the packing industry, the growth of Sioux City has exceeded that of Sioux Falls. The city of Sioux Falls is a natural distributing center from which to supply southwestern Minnesota, northwestern Iowa, and South Dakota. The defendant in its unsworn answer interposed to the proceeding instituted by the Sioux City Commercial Club before the Interstate Commerce Commission denied that any of the rates set forth in the petition in said proceeding were excessive, unreasonable, or unjust, either of itself or in relation to any other rate in force upon its said lines, and alleged that each of said rates was just and reasonable. The allegation in the bill that the amount in controversy in this action exclusive of interest and costs exceeds $2,000 is not denied.

Upon this record counsel for complainant ask the court to render a final decree enjoining the defendant from putting into effect the proposed schedule of rates, so far as Sioux Falls is concerned, until the Interstate Commerce Commission can act on complainant's petition and determine the question as to whether the proposed rates are unjust or unreasonable and discriminatory as alleged. This position is taken by counsel, as the court understands, for the reason that they are of the opinion that on the authority of Texas & Pacific Railway Co. v. Abilene Cotton Oil Company, 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, this court has no jurisdiction to inquire into the reason-

ableness or discriminatory character of the proposed schedule of rates; the power and authority to do this being in the Interstate Commerce Commission.

Counsel for defendant insist that the court, on the record presented, has no jurisdiction to grant any relief whatever, under the decision of the Supreme Court in the case last cited. The court overruled the demurrer to the original bill on the theory that the court had jurisdiction to enter into an investigation as to whether the rates complained of were unjust and unreasonable in themselves or discriminatory. The question first to be considered is: Has this court as a court of the United States jurisdiction to decide the question as to whether the proposed rate is lawful? In deciding this question, it will be well to bear in mind that the power to initiate and establish rates for the transportation of interstate freight over its lines, as the law now stands, is vested in the defendant, and it alone, subject only to the limitations prescribed by law that such rates shall be reasonable and just in themselves, and not unjustly discriminatory as between places, persons, or traffic, and subject, also, to the power of the Interstate Commerce Commission when satisfied after full hearing upon complaint made that any of the rates demanded, charged, or collected by said defendant are unjust and unreasonable or unjustly discriminatory or unduly preferential or prejudicial, to determine and prescribe what shall be just and reasonable rates thereafter to be charged as a maximum. The Interstate Commerce Commission has never directly or by implication been given the power to fix the rates for the carriage of interstate freight by common carriers in the first instance. Any power in the Interstate Commerce Commission to control or to have anything to say as to what rates a common carrier shall put in effect in the first instance for the transportation of interstate freight would be inconsistent with the power which the carrier beyond question now possesses. It is only when upon complaint the Interstate Commerce Commission finds that the carrier is demanding, charging, or collecting rates in violation of law that this power to interfere with the rates arises. The carrier cannot be said to be demanding, charging, or collecting a rate until it has put the same into effect. It results that the Interstate Commerce Commission has nothing to do with the rates which are not in effect, or, in other words, which are not being demanded, charged, or collected by the carrier. It is unnecessary to remark that the Interstate Commerce Commission is not a court of law or equity. We are not speaking now of the jurisdiction of this court as a court of equity, but as a court of the United States. Whether or not a given rate is reasonable and just, or whether it is unjustly discriminatory or prejudicial, are clearly judicial questions.

In this case we have not only a controversy between citizens of different states with the requisite amount in controversy, but the case is one arising under the laws of the United States. Then, why has not this court jurisdiction as a court of the United States? The case of Texas & Pacific Railway Co. v. Abilene Cotton Oil Co., supra, is cited as holding that the court has no jurisdiction in this action. That was a case where a shipper sought to recover in a court of law unreasonable rates from a carrier which had been exacted in accordance with

the schedule of rates put into effect and filed with the Interstate Commerce Commission. It was held that the interstate commerce act by implication deprived the courts of jurisdiction of such an action prior to any investigation of the unreasonableness of the rates by the Interstate Commerce Commission. The case is not parallel with the case at bar. The controversy in this case is over threatened action of the defendant concerning which the Interstate Commerce Commission has no authority whatever. In the later case of Southern Railway Co. v. Tift et al., 206 U. S. 428, 27 Sup. Ct. 709, 51 L. Ed. 1124, Justice McKenna, in delivering the opinion of the court, remarks concerning the case of Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., supra:

"We are not required to say, however, that, because an action at law for damages to recover unreasonable rates which have been exacted in accordance with the schedule of rates as filed is forbidden by the interstate commerce act, a suit in equity is also forbidden to prevent a filing or enforcement of a schedule of unreasonable rates or a change to unjust or unreasonable rates."

Strictly speaking, this language may be obiter, as the judgment of the court below was sustained on other grounds, but it is a declaration of an eminent jurist who took part in the decision of the Abilene Cotton Oil Case, that the decision in that case does not necessarily compel a decision that the court has no jurisdiction of the case at bar. If this court has no jurisdiction over the case stated in the bill, then complainant has no remedy; but this certainly cannot be true. It seems clear that as a court of the United States this court has jurisdiction. It is urged by counsel for defendant that to maintain jurisdiction in this case would cause the court in cases where relief is granted to make discriminatory rates, as the court can only act as between the parties to the suit, and a successful termination of the suit at bar in behalf of complainant would give Sioux Falls better rates than other towns similarly situated. It certainly can be no objection to the jurisdiction of a court that one who successfully invokes its aid fares better than one who does not. The courts are open to all for the protection of personal and property rights, and a want of uniformity in their decisions is no objection to the exercise of jurisdiction.

It is again urged that, if the court shall take jurisdiction in cases like the one at bar, it would be an assumption by the court of the rate-making power which it clearly does not possess. This objection, so far as it relates to courts of justice, involves a misapprehension of the power exercised by the court in taking jurisdiction of cases like the present one. The carrier has the undoubted power to fix a lawful rate for the transportation of interstate freight. It has no power to fix an unlawful rate. The court when it enjoins a proposed unlawful rate does not make any rate. It simply restrains the commission by the carrier of an unlawful act. The courts have for years enjoined the putting in force of rates promulgated by state boards of railroad commissioners on the ground that the rates were confiscatory, yet the carriers at least have not complained in those cases that the courts were exercising the rate-making power. The courts in enjoining a proposed unlawful rate do not, nor do they pretend to, disturb in any way rates

already in existence and in force. It also seems clear that complainant has no plain, speedy, and adequate remedy at law. In these days of fierce business competition a difference of a fraction of a cent in a freight rate may mean to the jobber or wholesaler success or failure in business. The damages which a shipper will suffer from an unjust or discriminatory freight rate is not the mere difference between a reasonable and just rate and an unreasonable and unjust rate. The putting in of an unjust rate or an unjustly discriminatory rate may, in addition to the damage caused by the payment of the rate itself, cause business ruin. Must the shipper when notice is given that a carrier intends to put in effect an unjust rate or an unjustly discriminatory rate which the shipper knows will ruin his business sit still, and let the rate go into effect, and then complain to the Interstate Commerce Commission, which after three or four years may decide the rate to be reasonable or unreasonable? Daniels v. Chicago, Milwaukee & St. Paul Ry. et al., 6 Interstate Commerce Commission Reports, 458 (complaint filed April 28, 1892, decided November 16, 1895). And, if the shipper is successful in his contention, he may then with business ruined go into court to enforce the award of the commission and at the end of three or four years more collect his damages, not those arising from the ruination of his business, but merely the excess paid by him over and above a reasonable rate. There is no plain and adequate remedy in such a proceeding. Courts of equity have often in similar cases enjoined the putting in effect of unlawful rates. Menacho v. Ward (C. C.) 27 Fed. 529; Southern Express Co. v. Memphis, etc., Ry. Co. (C. C.) 8 Fed. 799, affirmed in 10 Fed. 210; Coe v. Louisville, etc., Ry. Co. (C. C.) 3 Fed. 775; Tift v. Southern Ry. Co. (C. C.) 123 Fed. 790, and authorities cited. Also the numerous cases in which courts of equity have enjoined unlawful rates sought to be enforced by state authorities.

It results from the foregoing remarks that it is the opinion of this court that the court has jurisdiction of the case made by the pleadings both as a court of the United States and as a court of equity. Coming to the merits, the court is prohibited from going into an investigation of the lawfulness of the proposed rate complained of, for the reason that it has not been asked to do that, and the case has not been tried nor has evidence been taken on that theory. The relief asked is that the court enter a final decree enjoining the defendant from putting into effect the proposed rates complained of until the Interstate Commerce Commission decides the controversy arising upon the petition of complainant filed on or about July 8, 1907.

Complainant by its petition filed as aforesaid is not complaining of any rates of the defendant which are now in effect, and being demanded, charged, or collected by it, but is complaining of rates which the defendant intends to put in effect in the future, being the same rates that are complained of in this action. In accordance with what has been said heretofore in this opinion, this court is of the opinion that the Interstate Commerce Commission possesses no power or authority to pass upon the lawfulness of a rate merely threatened to be put in effect by the carrier. Such commission does not possess such power as a court of law or equity, nor has such power been conferred

upon it by law. This court, therefore, will not enjoin the defendant from putting into effect the proposed rates complained of, as prayed, as the tribunal whose power is invoked has no jurisdiction to decide the question presented to it and the issuance of an injunction would prevent the Interstate Commerce Commission from ever obtaining jurisdiction to investigate the lawfulness of the rate complained of.

If the court is in error upon this point, there is another fatal objection to the granting of the relief prayed for. The relief prayed for in the bill is asked on the theory, as the court supposes, as no definite theory has been advanced by counsel, that the proceeding may be likened to an equitable proceeding to restrain the commission of an injurious act threatened or being committed by a defendant in an action at law, such as the staying of waste pending an action in ejectment; but one of the necessary elements that must exist, before equity will grant relief in the supposed analogous cases, is that complainant's right to recover at law must be clear; for instance, in ejectment, his title must be perfect.

Without passing upon the lawfulness of the proposed rates complained of herein, the court must say that taking into consideration the fact that the business of complainant has grown to the proportions shown by the record under the rate proposed to be put into effect by the defendant, and taking into consideration the other facts shown by the record, that the cities of Sioux Falls, South Dakota, and Sioux City, Iowa, and adjacent territory, have prospered and developed equally, that there is no reasonable probability that the decision of the Interstate Commerce Commission upon complainant's petition would be other than what it was upon the petition of E. J. Daniels in 1895.

It results that the bill must be dismissed, with costs for want of equity; and it is so ordered.

RUTLAND COUNTY NAT. BANK v. GRAVES.

(District Court, D. Vermont. September 21, 1907.)

1. BANKRUPTCY—VOIDABLE PREFERENCES—INTENT TO PREFER.

In determining the question of a bankrupt's insolvency at the time he made a payment to a creditor, as bearing upon the question of his intent to give a preference, his property should be taken at a fair valuation, and not at the amount it afterward brought when sold at auction by the trustee in bankruptcy.

2. SAME.

A bankrupt, at the time he made a partial payment on a note to a bank which he had signed as surety owned and conducted a large store, was director and president of a manufacturing concern and a national bank. He was a man of good reputation and credit, and at his own estimate the value of his property as a going concern was several thousand dollars more than his indebtedness. His bankruptcy shortly after was brought chiefly if not entirely through the insolvency of the manufacturing company caused by the burning of its plant, which was at the time uninsured, through default of a lessee. *Held*, that under such circumstances the payment could not be found to have been made with intent to give a preference such as would render it voidable, and require its surrender under Bankr. Act July 1, 1898, c. 541, § 57g, 30 Stat. 560 [U. S. Comp. St.

1901, p. 3443], as amended by Act Feb. 5, 1903, c. 487, § 12, 32 Stat. 799 [U. S. Comp. St. Supp. 1905, p. 689], before the creditor could prove the remainder of its claim.

In Bankruptcy. On review of decision of referee.

R. A. Lawrence, for claimant.

J. K. Batchelder, for trustee.

MARTIN, District Judge. In this case a payment was made by the bankrupt to a creditor within four months of bankruptcy proceedings. The question is whether that payment was made with intent to prefer, and whether it was received under such circumstances that there was reason to believe that a preference was intended.

In weighing the evidence relating thereto, it becomes necessary to consider the meaning of the statute of February 5, 1903, and the necessary and legal inferences arising from the circumstances under which the payment was made.

Section 57, subd. "g," of the statute of July 1, 1898, c. 541, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443], reads thus:

"The claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences."

The amendment (Act Feb. 5, 1903, c. 487, § 12, 32 Stat. 799 [U. S. Comp. St. Supp. 1905, p. 689]), changed said subdivision "g" to read thus:

"The claims of creditors who have received preferences, voidable under section 60, subdivision 'b,' or to whom conveyances, transfers, assignments, or incumbrances, void or voidable under section 67, subdivision 'e,' have been made or given, shall not be allowed unless such creditors shall surrender such preferences, conveyances, transfers, assignments or encumbrances."

It will be observed that this amendment of said subdivision "g" is limited to creditors who have received preferences voidable under section 60, subd. "b," and section 67, subd. "e." No such limitation existed until this amendment was made.

Subdivision "a" of section 60, which provides, in substance, that a person shall be deemed to have given a preference if, being insolvent, he has within four months before filing of the petition, etc., suffered judgment or made a transfer of his property, etc., was not included in the amendment. Subdivision "b" of said section 60, which provides, in substance, that if a bankrupt shall have given a preference, and the person receiving it, etc., shall have reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable, and subdivision "e" of section 67, which provides, in substance, that conveyances, transfers, etc., made or given by a person adjudged a bankrupt within four months prior to the filing of the petition, with intent and purpose on his part to hinder, delay, or defraud his creditors, shall be void, are included. Before the amendment, a creditor could not be allowed for the balance due if he had received a preference for any portion of a debt unless he surrendered the preference so received, and an insolvent person, who, within four months of filing his petition in bankruptcy, made a transfer of his property to a creditor whereby the creditor obtained a larger percentage of his debt than any other of

such creditors of the same class, was deemed to have given a preference whatever might have been his intent.

In Pirie v. Chicago Title & Trust Co., 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171, the Supreme Court, by a divided opinion, four judges dissenting, construed the statute of 1898 as above stated. There the court held that, if a person receiving payment did not have cause to believe that it was intended as a preference, he may keep the property transferred; but, if it be only a partial discharge of his debt, he cannot prove the balance without returning the payment. This case was decided May 27, 1901. The amendment above referred to was approved February 5, 1903. It is apparent that Congress intended, by this amendment, that creditors of a bankrupt receiving partial payment and those receiving full payment should stand on the same basis. Of course, Congress could have provided that they should all come under the principle defined in subdivision "a" of section 60, which would have been, in effect, that any payment made within four months of bankruptcy should be recoverable by the trustee, whatever may have been the intent of the payor or payee; but it did not so provide, but did expressly provide, by the elimination in the amendment of subdivision "a" of section 60, and by the inclusion of only subdivision "b" of said section, and subdivision "e" of section 67, that in order to make a payment a preference it must have been made by the debtor with intent to prefer, and the creditor who received it must have had reasonable cause to believe that a preference was intended. To enable a trustee to recover, the equivalent of both these conditions must appear.

In Re Andrews, 16 Am. Bankr. Rep. 387, 144 Fed. 922, 75 C. C. A. 562, Judge Putnam, speaking for the First Circuit, discusses at length the effect of the amendment of 1903 upon payments, and therein that court held that said amendment involves the element that a creditor cannot be held to have had a good reason to believe a preference was intended unless a preference was actually intended on the part of the debtor, or unless there existed what the law regards as the equivalent thereof. This change in the law makes inapplicable a large number of the decisions of the courts relative to payments made by a bankrupt within four months of the bankruptcy proceedings, some of which appear upon the brief of counsel for the trustee, notably Benedict v. Deshel, 11 Am. Bankr. Rep. 20, 177 N. Y. 1, 68 N. E. 999. It was there held under the law previous to the amendment that a trustee need not prove an intent on the part of the insolvent in making the payment. This case arose before the amendment of 1903.

The case of Western Tie & Timber Co. v. Brown, 12 Am. Bankr. Rep. 111, 129 Fed. 728, 64 C. C. A. 256, illustrates what the law regards as the equivalent of an intent in making payment by the bankrupt. In that case the bankrupt was running two stores and was engaged in gathering ties for the Western Tie & Timber Company and selling supplies from his stores to the laborers engaged in this work. Once in two or three weeks an inspector sent to the company a pay roll upon which appeared the name of each workman, and the amount owing to him for his services and the price of the supplies which the bankrupt had furnished him. The company uniformly deducted from the wages due each workman the price of the supplies which Harrison, the bank-

rupt, had delivered to him, sent the workman his check for the balance, and sent said Harrison the price of the supplies he had furnished the laborers. There came a time when the company ascertained that Harrison was insolvent. He was owing the company upwards of $20,000 and other creditors many thousand dollars. The company, after discovering the bankrupt condition of Harrison, sent the laborers their checks as before, but, instead of sending Harrison his check for the supplies furnished the laborers, they withheld it, and applied it as part payment of the debt he owed the company, and against his protest, and this within four months of his bankruptcy. The mooted question there was whether there was any transfer. It is true that the trial judge, who wrote the opinion, used this language:

"But an intention on the part of the insolvent to give a preference by means of a transfer which he makes is not always indispensable to its existence. It is sufficient if he has given the preference, and the party receiving it has reasonable cause to believe that it was intended thereby to give it. The statute does not require that it should be intended by the debtor, but is fully satisfied by the existence of an intention on the part of the actor—the person who procures, brings about or effects the transfer."

In that case the creditor practically seized this money and applied it on the debt due him from the bankrupt. Such action amounts in law to an equivalent of an intent on the part of the debtor. An attachment on the part of the creditor may have the same effect. This holding is not in conflict with the amendment, as that applies to voluntary payments by the hand of the bankrupt. In that event, the debtor must intend to prefer in order to render the payment void.

From a careful examination of the testimony given before the referee, these facts appear: The claimant is a national bank, located at Rutland, Vt., some 28 or 29 miles from Manchester, where the bankrupt resides. On March 13, 1901, the claimant made loans amounting to $12,000 to the Vail Light & Lumber Company, a corporation having its place of business at said Manchester. Said corporation executed its notes for the amount of said loan, and Allen L. Graves of said Manchester, the bankrupt, and J. D. S. Packer, signed said notes as surety. Said Packer was a director of said corporation, and said Graves, the bankrupt, was a director and its president. He was also president of the Factory Point National Bank, located at Manchester Center, where he lives. When the notes became due, payments were made and new notes given for the amount remaining unpaid. On the 13th of March, 1906, $7,000 of the original loan had been paid, leaving $5,000 then due. The officers of the bank then told Mr. Graves that said loan might be extended another four months on condition that a payment of at least $1,000 should be made at the end of said four months (July 13th). This was then agreed to by Mr. Graves. It appears that the officers of the bank wanted the note reduced from time to time until paid, as it was getting to be "an old loan." They then inquired of Mr. Graves, who was a reputable man, as to the condition of said corporation, and were informed by him that it had sufficient property to pay its debts. He also told them that there were no incumbrances upon his property, and no suits had ever been brought against him. The bank officers were then contented to extend the

loan four mnoths and did so. On July 13th said Graves paid $500, and said Packer $500, and gave a new note, signed as before, for the remaining $4,000. At the time of this payment, July 13th, said corporation had many hundred acres of timbered land and a valuable mill being operated by parties who had agreed to keep it insured, pay all of the debts of the company, including over $7,000 to said Graves, and then take the property.

Mr. Graves had been for many years, and then was, running a large country store at Manchester Center. He testified that his then valuation of his store of goods, as a going business, was $20,000. I find from the evidence that he also had: Accounts due, over $1,500; real estate, $5,000; bank stock, $6,000; life insurance, over $5,000; other property valued at over $1,500; due from Vail Light & Lumber Company, over $7,000—making a total of $46,000. His individual liabilities were $33,000.

On September 4, 1906, over seven weeks after the payment in question, the mill of the Vail Light & Lumber Company was destroyed by fire. The parties operating the mill under the contract aforesaid failed to keep the mill insured. It was valued over $20,000 and was a total loss to said company. This was the cause, or at least the immediate cause, of the bankruptcy of said Allen L. Graves. Had the officers of the bank, before the burning of the mill, made careful inquiries of the ordinary sources of information, they doubtless would have been informed that Mr. Graves had property in assets of over $40,000; that there had never been any attachments on his property or other incumbrances; and that he had good credit and was apparently solvent. Mr. Graves filed his petition in bankruptcy soon after the burning of said mill. The trustee, under the direction of the referee, sold the store of goods in a lump at a bankrupt auction sale for $11,140. It was bid off by friends of the bankrupt, and the bankrupt is now carrying on the business of that country store as before.

Usually the finding of facts by the referee is affirmed by the court; but in this case the referee determined that the fair value of the bankrupt's estate at the time of making the payment in question was the amount it brought at the bankrupt auction sale, and also assumed that the debt due the bankrupt from the Vail Light & Lumber Company of upwards of $7,000 was then of no value. Thus his estimation of the bankrupt's assets was over $15,000 less as a bankrupt concern than the bankrupt estimated them as a going concern, and by that computation he finds the bankrupt to have been insolvent by about $2,000, and that Mr. Graves, the bankrupt, ought to have known it, and therefore he finds that the bankrupt intended a preference in making said payment, and that the officers of the bank had reasonable cause to believe that he was insolvent and thereby intended a preference.

I cannot concur in this finding. A party in making collections of a debtor is not bound by law to estimate the value of the payee's property on the basis of a bankrupt auction sale; a fortiori, this principle applies to the payee's intent in making payment. In re Gilbert (D. C.) 8 Am. Bankr. Rep. 101, 112 Fed. 951; Duncan v. Landis, 5 Am. Bankr. Rep. 649, 106 Fed. 839, 45 C. C. A. 666; Chicago Title & Trust Co. v. John A. Roebling's Sons (C. C.) 5 Am. Bankr. Rep. 368, 107 Fed. 71.

We are to look at these parties at the time this payment was made as viewing the situation with ordinary common sense. What did they understand the condition and financial standing of the payee to be? He was then owning and operating a large store of goods as a running concern. He then had a good reputation and good credit. On that basis, which is the true basis, I find that Mr. Graves understood he was solvent at the time of making this payment, and thereby intended no preference, and that the officers of the bank had no reasonable cause to believe that the payee was insolvent or intended a preference.

Evidently Congress intended by the amendment above referred to to so change the law as not to place an embargo upon common business affairs. To hold that a party receiving payment must estimate the assets of the payee at what they would bring at a bankrupt auction sale surely would be an embargo on business, if not to say an imposition of a penalty upon due diligence in the making of collections in ordinary business affairs.

Counsel for the trustee forcibly and ably presented the theory that there must be added to the bankrupt's personal liabilities his liability on the Vail Light & Lumber Company notes, which amounted to many thousand dollars. I concur in this view, but in that event the property of the Vail Light & Lumber Company must be treated as assets in considering Mr. Graves' intent in making the payment. Mr. Graves testified that at the time of this payment he believed the Vail Light & Lumber Company had property enough to pay its debts, and that he so stated to the officers of the bank. I find that he testified truthfully. Hence his liability on obligations of the Vail Light & Lumber Company cannot be construed as evidence that Mr. Graves intended a preference in making this payment.

After full hearing of the case before me, counsel for the trustee raised some question as to the pleadings, but upon examination of the papers I do not find any irregularity except what was waived or could have been cured by amendment if the question had been raised at the hearing. At the hearing before the referee, full evidence was adduced by both parties, and the same was sent to me for review. The referee allowed the full claim of the claimant on condition that said payment of $500 be returned to the estate. This order of the referee that said payment be returned is reversed.

Let the claim be allowed at $4,000, with interest.

NATIONAL TELEPHONE CO. OF WEST VIRGINIA v. KENT et al.

(Circuit Court, N. D. West Virginia. September 26, 1907.)

INJUNCTION—RIGHT TO PRELIMINARY INJUNCTION—AIDING UNLAWFUL ACTS OF STRIKING WORKMEN.

A bill by a telephone company against defendants, one of whom was the editor of a newspaper, and the others officers of a labor organization, *held* to state facts which entitled complainant to a preliminary injunction, where it alleged that defendants had entered into a conspiracy with striking workmen formerly employed by complainant, pursuant to which the strikers had abused, intimidated, and assaulted employés of complainant, cut its wires, and otherwise so injured its equipment that it could not

furnish proper service to the public, and that defendants, through the newspaper and by means of a circular issued by the labor organization, were encouraging such unlawful acts and inciting the public to boycott complainant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, §§ 302–306.]

In Equity. On demurrer to amended bill.

The complainant telephone company filed a bill, complaining: That William Kent and a great number of other defendants, electrical workers, members of a labor union, had formed and organized a conspiracy to tie up the telephone and telegraph business of the plaintiff and of the Central District & Printing Telegraph Company; that in pursuance of the said conspiracy they all quit work and organized a strike; that the company employed other workmen to fill their places, whereupon the defendants pursued, abused, threatened, and assaulted the men who had taken their places; that the defendants cut a great number of the company's cables and lines and drilled holes and poured acid into other cables, injured and destroyed a great deal of the plaintiff's property, and intimidated its employés so that they were unable to repair the injury done. It is also alleged that the plaintiff is engaged in the business of carrying messages by telephone and telegraph from Wheeling, in the state of West Virginia, to various other states in the United States. A great number of affidavits supporting the averments of the bill were filed, and on the bill and affidavits a preliminary injunction was granted.

At a later date the plaintiff filed an amended and supplemental bill, incorporating all of the averments of the original bill, and alleging, further: That Walter B. Hilton, the editor and proprietor of a newspaper known as the "Wheeling Majority," J. T. Hecker, Harry B. Corcoran, and H. B. Wessel, officers of the Ohio Valley Trades & Labor Assembly, had joined the conspiracy alleged in the original bill; that said Hilton had published in several issues of this paper matter obviously intended to make the injunction ineffective and to make effective a boycott which the conspirators named in the original bill, with the aid of the said Ohio Valley Trades & Labor Assembly, had inaugurated against the complainant. Copies of the paper containing these publications were exhibited with the amended bill.

The amended bill further alleges that Harry Corcoran, J. T. Hecker, and H. B. Wessel, as officers of the said trades assembly, had issued and caused to be circulated a boycott circular against the complainant, which circular was exhibited with the amended bill.

It is further alleged in the amended bill that the said Hilton, Hecker, Corcoran, and Wessel, having joined in the conspiracy and combination alleged in the original bill, threatened by the circulation of the said newspaper, the circulation of the said boycott circulars, and by soliciting, persuading, threatening, and intimidating the complainant's patrons, to injure the complainant's business. The amended bill and the original bill allege irreparable injury and the insolvency of the defendants. On the amended bill and exhibits and affidavits a preliminary injunction against Hilton, Hecker, Corcoran, and Wessel was granted. These defendants demur to the amended bill on the ground that a sufficient cause for the preliminary injunction is not presented.

John J. Conniff and Alfred Caldwell, for plaintiff.
Charles A. Goodwin and John P. Arbenz, for defendants.

DAYTON, District Judge (orally). The questions of law involved in this case have arisen so frequently within the past few years that court and counsel alike have become familiar with the principles arising for consideration, and most of us are quite familiar with the precedents established in the leading cases. I have since the granting of

the preliminary injunctions taken occasion to review the cases, and, being familiar with the averments of the original bill and the amended bill, I am prepared to pass upon the demurrer now. Counsel for these new defendants, Hilton and the officers of the Ohio Valley Trades & Labor Assembly, have very ably presented their case as it appears from their view point, but to my mind the principles of law applicable to the case, as interpreted by the Supreme Court of the United States and the various United States Circuit Courts of Appeals in like cases, are not in accord with the view presented by counsel for these defendants. And it is equally plain to me that the amended bill, to which this demurrer is interposed, presents with clearness and certainty a state of facts which, being undenied, afford sufficient grounds for the injunction which has been granted.

Here is an original bill in which it is charged that a great number of persons named as defendants formed a conspiracy for the purpose of coercing this and another telephone company by organizing a strike and by threats, menaces, and even by assault preventing others who desired to work from taking their places, and for the purpose of unlawfully injuring and destroying the complainant's telephone lines and property. In this bill it is further alleged that the defendants, in pursuance of the conspiracy, did actually cut, injure, interfere with, and destroy a great many of the complainant's telephone lines, and that they pursued complainant's employés with opprobrious epithets, calling them "scabs," and like offensive names, and even assaulted them. It is alleged in the amended bill that these new defendants, Hilton, Hecker, Corcoran, and Wessel, the three last mentioned acting in their capacity as officers of the Ohio Valley Trades & Labor Assembly, did subsequently to the granting of the preliminary injunction, granted upon the prayer of the original bill, join the conspiracy alleged in the original bill, and that they did, in pursuance of the said conspiracy, print and distribute a boycott circular, which appears among the exhibits to the amended bill, and that the defendant Hilton published in his paper certain matters intended to explain the carefully worded circular and to make the boycott inaugurated effective. Several copies of the newspaper are filed as exhibits with amended bill. The original bill is made a part of the amended bill, and these pleadings, with the exhibits filed, being for the purposes of this demurrer uncontradicted, make a plain case in which the defendants are charged with conspiring together for the expressly avowed purpose of unlawfully injuring the complainant's business by persuading, threatening, and coercing its patrons and its employés, and by unlawfully cutting its lines and injuring and destroying its property.

Counsel for the defendants, in the very able arguments presented, have very aptly said that this is an age of combinations. It is an age of combinations—combinations of capital and combinations of labor. These combinations, so long as they are kept within the bounds of the law, are certainly lawful, are in many instances beneficial to the persons interested, and may be, in some cases, of benefit to the general public; but when a combination of capital is made for unlawful purposes, or, being made for an avowed lawful purpose, seeks to accomplish its purpose by unlawful methods, it becomes the duty of the

courts to restrain the unlawful practices and to punish the unlawful acts. Likewise, when a combination of labor is made for unlawful purposes, or, being made for an avowed lawful purpose, seeks to accomplish its purpose by unlawful methods, it becomes the duty of the courts to restrain the unlawful practices and to punish the unlawful acts. The law knows no distinction between the rich and the poor, recognizes no distinction between unlawful acts of combinations of capital and unlawful acts of combinations of labor. The same principles applying to one must apply to the other, and when a combination of laborers is organized for unlawful purposes, or, being organized for lawful purpose, employs unlawful methods, it will be suppressed by the courts, its unlawful acts restrained, and its crimes punished as promptly and as effectively as like combinations of capital are suppressed, restrained, and punished.

There is further involved here, after considering the rights of the complainant company and the rights of the defendants, the rights of those citizens who desire to exercise their God given right to earn their bread by the sweat of their brow in the employment of this telephone company. It is charged that the defendants threatened, abused, pursued, and even assaulted these men, who were doing no wrong, but were merely exercising their right to work upon terms satisfactory to them; yet they were made to suffer the persecution of these defendants, and their rights, as it is charged, were denied them. There is to be considered also the rights of the general public. It appears from the bill that this company and another company are engaged in the interstate commerce of carrying messages between the states, and that the conspiracy and combination complained of sought to interfere with and tie up this interstate commerce. This being a public business by a "quasi" public corporation, the rights of the public are involved and are not to be interfered with by any unlawful methods.

It is urged by counsel for the defendants that the injunction interferes with the rights of the press. The injunction granted does not deprive the newspaper in question of any lawful right to publish the truth or express its opinions in a lawful manner, but no newspaper has the right to publish any matter intended to aid wrongdoers in accomplishing a wrongful purpose or doing unlawful things, or to aid unlawful combinations in making effective an unlawful conspiracy. Some newspapers, certainly the one involved in this case, have misconstrued the freedom of the press until they seem to interpret the right to be a license to publish what may please them, even though the publication should be an express violation of the law. There is no intention on the part of the court to interfere with the freedom of the press, but this court is not ready to accept the theory that the freedom of the press means a right to advocate crime or to encourage the violation of the law.

The laborers in the organization, appearing as defendants in this case, have the right to organize for lawful purposes and to proceed to accomplish their purposes by lawful methods; but when they resort to force, violence, and destruction of property, coercion of peaceable citizens, combinations, and conspiracies to injure property and interfere with business by threats, menaces, and boycotts, as has been charged in

this case, they lose the moral support of the public and bring upon themselves the condemnation and restraining as well as the punishing power of the court. They approve the application of these principles to combinations of capital, and they cannot be heard to complain of the application of the same principles to their own combinations, when they step beyond the bounds of the law.

Applying these principles to this case, and considering the bill as being uncontradicted, I have no hesitation whatever in promptly overruling the demurrer, and an order to that effect may be now entered.

OLIVER TYPEWRITER CO. v. AMERICAN WRITING MACH. CO.

(Circuit Court, N. D. New York. October 15, 1907.)

TRADE-MARKS AND TRADE-NAMES—SUIT FOR UNFAIR COMPETITION—PRELIMINARY INJUNCTION.

In a suit for unfair competition by defendant in obtaining and selling typewriters made by complainant at less than its established prices, and in so representing them in its circulars as to injure complainant's business, the showing made on an application for a preliminary injunction *held* not such as to entitle complainant to an injunction in advance of a full hearing on the merits.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, § 108.

Unfair competition, see notes to Scheuer v. Muller, 20 C. C. A. 165; Lare v. Harper & Bros., 30 C. C. A. 376.]

In Equity. Motion by complainant for preliminary injunction in suit to restrain acts alleged to constitute unfair competition in trade.

Poole & Brown, for complainant.

Gifford, Hobbs & Beard (Henry R. Follett, of counsel), for defendant.

RAY, District Judge. The Oliver Typewriter Company is a corporation organized and existing under the laws of the state of Illinois and is engaged in making and selling typewriting machines under various letters patent, and which machines are known as "Oliver Typewriter" or "Oliver Machine." It does a large and an extensive business and manufactures and sells an excellent machine of its kind, which meets with favor and large sales. This machine has novel features and belongs to the type or class known as "visible writing" machines. It is not made by the defendant, and defendant can only supply and sell such machines by purchasing same in the market or of complainant. Complainant has an established retail price for its machines—$100 and $97.50. The complainant does not sell knowingly to its competitors in business or allow its agents so to do. It has a price which its agents must pay in advance for typewriters ordered by them, varying from $60 to $75 per machine. The agency contract or "agency arrangement" contains the following:

"Fifth. I understand that the retail price of the regular Oliver Typewriter is $95.00 without case, or $97.50 with case."

There is no license restriction on purchasers, or other contract restriction on agents, purchasers, or users. As a consequence, the de-

fendant has been able to become the purchaser and owner of many of these Oliver typewriters at various times. Some were new, and some worn and required repairs. Being the owner and under no contract or license agreement or restriction, defendant has sold and caused to be sold such typewriters at its own prices, and has advertised Oliver typewriters for sale by it in the manner hereafter stated.

The defendant, American Writing Machine Company, is a corporation organized and existing under the laws of the state of New York, and acts as sales agent of a competing machine, "New Century," and has also taken up and is engaged in the business of purchasing and selling second-hand machines of all or nearly all makes, and, also, such new machines of all makes as it can obtain and handle at a profit. The defendant company has put out, or caused to be put out, a catalogue, stating therein, among other things:

"All Makes, Typewriters, all Prices. The Typewriter Exchange, 319 Dearborn St., Chicago, Executive Offices 343 Broadway, New York City. Please do not confuse us with irresponsible second-hand dealers. The Typewriter Exchange deals in used, shopworn, and rebuilt typewriters and has branches in [various cities named]. It is itself a branch of the American Writing Machine Company. * * * We offer you a chance for a choice, an opportunity for your selection; but if you are in doubt, we can advise you as no one else can. * * * Remember it is not what we want to sell you but what you want and ought to buy, because since we have every good typewriter manufactured, it makes no difference to us which one you buy, except we want you to be satisfied and pleased in order that you may become our permanent customer. We are here to sell you a typewriter, not any one to the exclusion of all others, but the one you want, the one best adapted to your requirements. Rebuilt Typewriters. The term 'second-hand' is often misunderstood. A new typewriter used for a month, a week, or for only a few days is 'second-hand'; but if it has not been abused or broken it is as good as when first bought. Some of our machines are scarcely worn at all. Just the tightening of a screw here or a new type there will sometimes put them in as good shape as when they left the factory. And then our prices are ever so much lower than the regular selling prices of the new machines. Our workmen are factory trained, expert, and experienced. We employ no other. When a typewriter leaves their hands we have no hesitation in guaranteeing it. A postal card will bring you samples of work and prices. Prices. In the following pages we have noted the approximate prices at which we are able to furnish the various typewriters. You can readily understand that prices are governed largely by supply and demand, as well as by the condition of the machines when they are received by us."

Then shipping terms are stated, including the offer to send machines on a deposit of $5 for examination and trial; the machine to be returned if not satisfactory, also the deposit, in such event, less transportation charges paid by defendant. Then follow pictures of various machines with names, and under each is stated "manufacturer's price" and "our price." This list includes "Remington," six styles; "Smith Premier," four styles; "Densmore," four styles; and several others. Then comes the following:

"On the following pages we quote prices on a number of cheap typewriters. Some of these machines are no longer manufactured, and it is difficult to get parts to repair them. However, they do nice work now, and we consider them worth the prices we ask. We cannot promise that they will do satisfactory work for any great length of time."

Then follows, "Oliver, No. 2, Model," the picture of such a typewriter, and, under it:

"Manufacturer's price, $95.00. Our price $30 to $50. No. 3 Model rebuilt, $40 to $55; No. 3 Model new, $65.00."

Then follow pictures of the "Bar Lock," "Bleckersderfer," "Hammond," "Chicago or Munson," "Wellington," "Williams," and "Jewett."

It is contended by the complainant that the "Oliver" is not only put in bad company, but represented as a "cheap" typewriter, not in price or cost alone, but in quality, workmanship, and efficiency, and that defendant represents itself as able and prepared to sell the No. 3 model Oliver typewriter, new, at $65, when it is not, and that this, coupled with the fact that defendant has purchased some of the new Olivers of this model from complainant's agents and others and sold them at far less than the regular price, constitutes unfair competition in trade.

It can hardly be said that this catalogue necessarily represents untruly that defendant has supplied, and can supply, the new Oliver, No. 3 model, which has not been used at all, at $65, or at any other price. The prior statement is that "the Typewriter Exchange deals in used, shopworn and rebuilt typewriters," and "a new typewriter used for a month, a week, or for only a few days, is second-hand," etc. In short, one that has been used a month, a week, or only a few days, is still "new" within the meaning of this catalogue. If not abused or broken, "it is as good as when first bought." "On the following pages we quote prices on a number of cheap typewriters." Among them is the No. 3 model new Oliver, at $65. The fair inference from the whole statement is that it has been used some, fixed over, or repaired to some extent, but that it is still a new typewriter, inasmuch as not one that has been in use long. It is not a cut in the price of absolutely new Oliver typewriters, or a statement that such a repaired, made over, or slightly used typewriter is "cheap" in any sense except price or cost to the user. It is not a statement that such typewriters as are here mentioned are inferior in workmanship or operation or efficiency, or that they are not desirable for any such reason. Nor is it a statement on its face that new Oliver typewriters sold by it are "cheap" in the sense of inferiority in either workmanship, quality, or efficiency. The defendant starts off in this catalogue with the express statement that it "deals in used, shopworn, and rebuilt typewriters," and that it has branches in New York City, Boston, Chicago, and other places. It does appear that defendant has been able to purchase and sell some of the new Oliver typewriters, not used at all, and has sold them at about the price named in the catalogue. There is some evidence tending to show that the defendant has induced complainant's agents to sell machines to them at less than the regular retail prices. But defendant controverts this allegation.

While complainant presents affidavits tending, perhaps, to show that these statements of the catalogue are used for other purposes and are intended to convey other impressions and belittle complainant's machines and interfere with its business, these are met and contradicted and explained to such an extent that in my judgment the court is not

justified in attempting to determine the controversy on these affidavits or on the showing made. There should be a full hearing and the benefit of an opportunity to cross-examine the witnesses. It cannot be said there is no substantial doubt of defendant's objects and purposes, or of the result of its acts. It cannot safely be said, on the whole case as presented and met by defendant, that defendant is intending to defraud, mislead, or deceive, or that it has done so. To determine now that complainant is entitled to a preliminary injunction is to pass on the merits of the case on conflicting affidavits. This court is not justified in holding, on the showing made, that defendant has induced complainant's agents, or any one of them, to violate their agency contracts, or that it purposes so to do. With reasonable diligence the evidence can be taken, witnesses cross-examined, and all the facts developed. The court can then render an intelligent judgment on the merits.

I do not think the case strong enough, or so free from doubt, as to justify the granting of a preliminary injunction. It is stated that, since complaint was made, defendant has issued a new catalogue omitting all reference to new Oliver typewriters. If so, complainant is now suffering no injury in that regard. I know of no law that forbids the defendant to purchase and sell new Oliver typewriters, or second-hand Oliver typewriters, after repair, if guilty of no fraud or misrepresentation or violation of contract in so doing. It is said that defendant by its advertisements induces would-be purchasers of the Oliver machine to visit or communicate with the defendant's salesmen or sales agents, who then misrepresent to them the character and efficiency of the Oliver machine and induce the intending purchaser to take some other machine. Defendant denies these alleged acts.

On the whole, as the case now stands, the application for a preliminary injunction must be denied. This court is not to be understood as approving some of the acts which seem to be conceded, or which at best are not disproved; but not all censurable acts constitute unfair competition in trade.

UNITED STATES v. CHICAGO, B. & Q. RY. CO.

(District Court, D. Nebraska. October 5, 1907.)

RAILROADS—EQUIPMENT OF TRAINS—DEFECTIVE APPLIANCES.

Knowledge is not an element of an offense under the safety appliance act. The failure to include knowledge as an element of the offense must have been present in the mind of the enacting body, and its omission was intentional, in order that this statute might induce such a high degree of care and diligence on the part of the railway company as to necessitate a change in the manner of inspecting appliances, and to protect the lives and safety of employés from accident due to a defective appliance such as is designated in this act.

[Ed. Note.—Duty of railroad companies to furnish safe appliances, see note to Felton v. Bullard, 37 C. C. A. 8.]

(Syllabus by the Court.)

On Information for Violation of Safety Appliance Act.

The Interstate Commerce Commission lodged with the United States attorney information showing violations of the safety appliance law

by the Chicago, Burlington & Quincy Railway Company. There were two petitions; one alleging the hauling of a car with a defective coupler, and one alleging the hauling of two cars with defective couplers and one car with missing handholds. The petitions were consolidated. Defendant made general denial as to all the counts, and at the trial offered evidence to show due diligence in inspection and repair of the cars alleged to be defective.

Charles A. Goss, U. S. Atty., and Luther M. Walter, Sp. Asst. U. S. Atty.

Greene & Breckenridge, for defendant.

THOMAS C. MUNGER, District Judge (charging jury). In the case now on trial, both parties have presented motions asking that the jury be peremptorily instructed, and I have considered the requests and have concluded to so instruct the jury on each count in the petition.

The facts showing a violation of the act of Congress relating to safety appliances are sufficient to support each count in the petition, provided it is not necessary that the carrier shall knowingly offend against the statute. If the statute declares an offense, whether the act denounced by the statute is knowingly committed or not, then the case is sufficient upon the undisputed evidence to require a verdict in favor of the government.

There is considerable contrariety of opinion between the different courts as to the proper construction of this act. I have reached the conclusion that knowledge is not an element of the offense under the statute. The chief purpose of the act of Congress, as pronounced by the various courts that have passed upon it, was the protection of the lives and the safety of the trainmen who have occasion to pass between the cars or to work in and about them, and the act should be construed so as to give this intent full force, if such a construction can be given to the act without doing violence to the language. Any other construction than this requires, not only that the carrier should fail to have the cars properly equipped, but also that the defect should have existed for such a length of time as would reasonably allow the presumption of inspection and notice on the part of the carrier. That interval would then depend upon the verdict of the jury in each instance—in some cases it might exist only for an hour; in other cases it might exist for days, or for a sufficient number of hours to move from one inspecting station on the railway to another inspecting station. This construction of the act concludes that Congress did not intend to protect the lives or provide for the safety of a train crew during such period as the jury should find would be sufficient for the company in the ordinary method of doing business to discover and remedy this defect. This seems to me an unreasonable construction. If the offense that is specifically charged here depends upon its being knowingly committed, it would seem that under each section of this act, in order to render a railway guilty of noncompliance, such an offense should be knowingly committed, and that leads to what seems to me an absurdity. For instance, the fifth section of the act requires that the standard height of the drawbar above the top of the rails is to be fixed at a certain distance, from which distance a maximum variation is al-

lowed. If the act is not violated when there is a variation within that maximum distance, then it would appear that if there is an additional variation of another inch, or 2 or 3 inches, not knowingly allowed, and there has been ordinary care and diligence used, no offense is committed under this act. By the same process of reasoning, under section 2 of the amended act, it would not be a violation of the law to have less than the designated percentage of cars operated by power brakes, but such less percentage must be known to the company.

I find upon an examination of the opinions cited in the argument that there have been decisions by a number of courts, all holding, in effect, that knowledge and diligence are not ingredients of the offense. United States v. Southern Ry. Co. (D. C.) 135 Fed. 122; United States v. C., M. & St. P. Ry. Co., 149 Fed. 486; United States v. G. N. Ry. (D. C.) 150 Fed. 229; United States v. S. P. Ry. (D. C.) 154 Fed. 897; United States v. Atlantic, etc., Ry. (decision by Judge Purnell, May 11, 1907) 153 Fed. 918. While the decision in the case of United States v. A., T. & S. F. R. R. (D. C.) 150 Fed. 442, is to the contrary, yet it seems to me that, Congress having the power to make certain acts an offense regardless of knowledge, and having failed to make knowledge an element by express words in this act, it must have been within the contemplation of Congress that accidents were liable to occur between stations and for some time before repairs could be made, and that therefore the failure to include knowledge as an element of the offense must have been present in the mind of the enacting body. Its omission was intentional, in order that this statute might induce such a high degree of care and diligence on the part of the railway company as to necessitate a change in the manner of inspecting appliances, and to protect the lives and the safety of its employés, provided the accident occurs from a defective appliance such as is designated in this act.

And for these reasons the jury will be peremptorily instructed to return a verdict for the government on each count of the petition.

UNITED STATES v. ILLINOIS CENT. R. CO. (two cases).

(District Court, W. D. Kentucky. November 1, 1907.)

1. RAILROADS—SAFETY APPLIANCE ACT—CONSTRUCTION.

Safety Appliance Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174], which makes "unlawful" certain acts by common carriers engaged in interstate commerce by railroad, and provides that for a violation of its provisions such a carrier shall be liable to a penalty, to be recovered in a suit to be brought for the purpose, is a criminal statute creating public offenses, and is to be construed in accordance with the rules governing the construction of such statutes, and trials thereunder are governed by the rules of criminal procedure and evidence; the defendant being presumed innocent until every element necessary to constitute the offense has been proved beyond a reasonable doubt.

[Ed. Note.—Duty of railroad companies to furnish safe appliances, see note to Fulton v. Ballard, 37 C. C. A. 8.]

2. SAME—VIOLATION OF ACT—ELEMENTS OF OFFENSE.

A railroad company is not guilty of a violation of the provisions of Safety Appliance Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St.

1901, p. 3174], by using on its line in moving interstate traffic an engine or car not equipped as therein required, if it was properly so equipped at the beginning of its interstate journey, but became defective during such journey, unless such company failed to supply the deficiency at the first opportunity after it was actually discovered, or should have been discovered by the use of the utmost care that a highly prudent man would use under the circumstances of the case.

3. SAME.

To entitle the United States to recover the prescribed penalty for a violation of Safety Appliance Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174], by using a car not equipped as required, it must prove beyond a reasonable doubt the following facts: First, that the car was used in hauling interstate traffic; second, that when so used it was either not equipped or provided with the required safety appliances at all, or else that some part of those appliances had become inoperative; and, third, if those appliances were all in good order and condition when the car was originally started on its interstate journey, and afterwards became defective in transit, that the defects had respectively been either in fact discovered by the carrier, or else that they could have been discovered and corrected by it by the exercise of the utmost degree of care and diligence which could be expected at the hands of a highly prudent man under similar circumstances.

4. SAME.

Safety Appliance Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174], while in terms it requires only that engines and cars shall be "equipped" with the required appliances, must be construed to mean equipment which, if there, is capable of being operated, and that it shall be kept in good order and repair; but it cannot be construed to require that the equipment shall in fact be efficiently operated by those in charge of the train.

5. SAME.

In case of an empty car being hauled in an interstate train, in order to subject the carrier to the penalty prescribed for violation of Safety Appliance Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174], for a failure to have such car equipped with the required safety appliances, it must be shown that the car was used or intended to be used in moving interstate traffic.

On Trial by the Court Without a Jury.

George Du Relle, Dist. Atty., and Luther M. Walter, for the United States.

Trabue, Doolan & Cox, for defendant.

EVANS, District Judge. Section 1 of the act of March 2, 1893 (27 Stat. 531, c. 196 [U. S. Comp. St. 1901, p. 3174]), as amended, known as the "Safety Appliance Act," provides that:

"It shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving wheel brake and appliances for operating the train brake system."

Section 2 provides that:

"It shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

Section 4 provides that:

"It shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab-irons or handholds in the

ends and sides of each for greater security to men in coupling and uncoupling cars."

Section 5 forbids the use of cars in interstate traffic which are not provided with a standard drawbar.

Section 6 provides that any common carrier who shall violate any of the provisions of the act "shall be liable to a penalty of $100 for each and every violation, to be recovered in a suit or suits to be brought" in the District Courts of the United States having jurisdiction in the locality where the violation shall have been committed.

Under these provisions these suits were brought by petition as in a civil action at law, and in 27 separate paragraphs the plaintiff has charged the defendant with that many separate violations of the statute. One of these was under section 1, 18 under section 2, 7 under section 4, and 1 under section 5. The defendant, by pleading, raised the issue as to whether it was guilty of any one of the alleged violations of law, and by stipulation the cases were heard by the court without a jury. The testimony developed no very difficult questions of fact, but the questions of law involved, and which were argued at length, are not only of great importance, but are difficult and perplexing, in the absence of authoritative rulings by the higher courts.

That the enforcement of the safety appliance act is demanded, alike because it is a law of the United States and because it was intended to serve an extremely important purpose, goes without saying. The laws of the United States are made to be enforced; but this implies and requires that the courts, when appealed to for that purpose, shall with rigid impartiality and the utmost care endeavor to ascertain what the law is which is to be enforced. If the courts fail in this, they may on the one hand enforce what Congress did not intend to be law, or on the other permit persons to escape who ought to be punished. These cases have strenuously exacted this character of labor, although a casual reading of the clauses of the act above cited might not suggest it.

And, first, we must definitely determine whether the act creates "criminal offenses," for, until we do this, we cannot say what rules of construction must govern, nor whether certain rules of evidence should be applied, namely, rules in civil or rules in criminal cases. The fourth clause of the act authorizes "suits" to be brought for the recovery of the penalties, and from this fact it seems in some jurisdictions to have been inferred that the liability imposed was in the nature of a mere indebtedness, and consequently that the rule as to preponderance of evidence should be applied. The language used in sections 1, 2, and 4 is alike that certain acts shall be "unlawful." Before the passage of the law such acts were not unlawful, and the statute for the first time made them so. For doing those unlawful acts a penalty is prescribed as a punishment. In the very important case of Huntington v. Attrill, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123, the Supreme Court had before it the question of whether a certain statute of New York was a penal statute, within the meaning of that phrase in the rule that one state will not enforce the penal or criminal laws of another. Huntington had obtained a judgment in New York upon which he brought a suit in Maryland. The Maryland court had refused to enforce the

judgment, or to give it the full faith and credit required by the Constitution of the United States, because in its opinion the judgment was based upon a penal statute of New York, and in such cases it is clearly established that the constitutional provision referred to does not apply. The opinion of the Supreme Court, delivered by Mr. Justice Gray, was elaborate, and clearly stated the criteria upon which the question was determinable. We need not here do more than extract such parts of the opinion as are decisive of the question we are trying to solve. At page 667 of 146 U. S., at page 227 of 13 Sup. Ct. (36 L. Ed. 1123), it is said:

"Penal laws, strictly and properly, are those imposing punishment for an offense committed against the state, and which, by the English and American Constitutions, the executive of the state has the power to pardon. Statutes giving a private action against the wrongdoer are sometimes spoken of as penal in their nature, but in such cases it has been pointed out that neither the liability imposed nor the remedy given is strictly penal."

At page 668 of 146 U. S., at page 228, of 13 Sup. Ct. (36 L. Ed. 1123), the opinion continues as follows:

"The test whether a law is penal, in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual, according to the familiar classification of Blackstone: 'Wrongs are divisible into two sorts or species: Private wrongs and public wrongs. The former are an infringement or privation of the private or civil rights belonging to individuals, considered as individuals, and are thereupon frequently termed "civil injuries." The latter are a breach and violation of public rights and duties, which affect the whole community, considered as a community, and are distinguished by the harsher appellation of "crimes and misdemeanors."' 3 Bl. Com. 2."

While we only quote these short parts of it, the entire opinion is most instructive. See, also, Lees v. U. S., 150 U. S. 480, 14 Sup. Ct. 163, 37 L. Ed. 1150.

The safety appliance act makes certain things "unlawful." It imposes penalties. Those penalties go to the United States, and not to individual persons, and indubitably the Chief Executive might grant pardons to those who violate its provisions.

Under these tests the conclusion is reached that the safety appliance act is a criminal law, and that all violations of its provisions are, in the broad sense, crimes or misdemeanors. Nor can this result be changed by the fact that under section 8 in certain contingencies an employé's suit for damages shall not be defeated by the doctrine of "assumed risks." As pointed out in the opinion in the Huntington Case, a statute may embrace provisions which relate to civil rights, as well as provisions which relate to public offenses, but that does not change the essential nature of either class of provisions.

Nor does it affect the result here that section 4 of the act provides that the penalties it prescribes shall be recovered by "suit." While in case of capital or other infamous crimes it is otherwise under the fifth amendment to the Constitution, yet in misdemeanor cases indictments are not always necessary, and, as stated by Bouvier in his Law Dictionary, even an indictment is a "suit." Whatever form the pleading in the "suit" may take, either that of indictment, information, or petition, the character of the safety appliance act remains the same, viz., it is a criminal statute creating public offenses, and when one is accused of

violating its provisions his trial must be governed by the general rules which govern in other like cases. Having ascertained the character of the enactment, we are to inquire as to the rules which must govern its interpretation. And this inquiry is relieved of all doubt in cases where the legislative intent is "obvious," by the opinion of the Supreme Court in Johnson v. Southern Pacific Co., 196 U. S. 17, 18, 25 Sup. Ct. 161, 162, 49 L. Ed. 363, wherein the court, through Mr. Chief Justice Fuller, said:

"Moreover it is settled that, though penal laws are to be construed strictly, yet the intention of the Legislature must govern in the construction of penal as well as other statutes; and they are not to be construed so strictly as to defeat the obvious intention of the Legislature. United States v. Lacher, 134 U. S. 624, 10 Sup. Ct. 625, 33 L. Ed. 1080."

If in any essential respect, however, the legislative intent is not fairly to be called "obvious," then we may assume that we are to be governed by other rules in interpreting it. Where the provisions of a statute cannot fairly be called "obvious," and where, therefore, construction must be resorted to to ascertain the legislative intent, the following rules may be invoked, viz.:

"All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will also, therefore, be presumed that the Legislature intended exceptions to its language, which would avoid results of that character." United States v. Kirby, 7 Wall. 486, 487, 19 L. Ed. 278.

In Carlisle v. United States, 16 Wall. 153, 21 L. Ed. 426, the rule is thus stated:

"All general terms in statutes should be limited in their application, so as not to lead to injustice or oppression, * * * if that be possible. It will be presumed that the exceptions were intended which avoid results of that character."

Blackstone has pointed out that statutes which forbade the laying of hands on a priest and punished all who drew blood in the streets should not be literally construed, lest the friend of the priest on the one hand, or the surgeon on the other, might be hanged.

Bishop, in his work on Statutory Crimes (section 82), says that:

"The interpretation should lean strongly to avoid absurd consequences, injustice, and even great inconvenience; for the legislative meaning is to be carried out, and it cannot be supposed to be any of these."

In many civil suits the Supreme Court has restricted the literal meaning of language used in statutes, where it was supposed that Congress did not intend that a case should be included therein. See United States v. Bell Telephone Co., 159 U. S. 550, 16 Sup. Ct. 69, 40 L. Ed. 255. And this court, in construing certain provisions of the act of June 29, 1906 (34 Stat. 584, c. 3591 [U. S. Comp. St. Supp. 1907, p. 892]), commonly called the "Rate Bill," invoked and applied these principles in Mottley v. L. & N. R. R. Co., 150 Fed. 406. If they should be applied in civil causes, for still greater reasons should criminal statutes be construed sensibly, and so as to avoid injustice and oppression in cases where it may be fairly presumed that such results were not contemplated by Congress in its use of general language.

Assuming that we have correctly ascertained the character of the safety appliance act so far as it is applicable to the cases before us, as well as the rules by which we are to construe it in its application to them, it follows that in the hearing and disposition of them we are to recognize certain elementary rules of criminal jurisprudence, among the most essential of which are, first, that the defendant is presumed to be innocent; second, that he cannot be found guilty until the evidence removes all reasonable doubt of his guilt (see The Burdett, 9 Pet. 690, 9 L. Ed. 273, and Chaffee v. United States, 18 Wall. 545, 21 L. Ed. 908); third, that the burden of proof rests upon the United States to show beyond a reasonable doubt the existence of every element necessary to constitute the offense (see Clyatt v. United States, 197 U. S. 207, 25 Sup. Ct. 429, 49 L. Ed. 726; Kirby v. United States, 174 U. S. 55, 19 Sup. Ct. 574, 43 L. Ed. 890); and, fourth, that this burden continues throughout the case and never shifts to the defendant (Agnew v. United States, 165 U. S. 50, 17 Sup. Ct. 235, 41 L. Ed. 624). It cannot be presumed that, even if Congress had power to nullify any of those fundamental rules, it intended to do so by enacting the law in question.

Now, one of the necessary results of the presumption of innocence is that you cannot presume the existence of one factor or element of a public offense from the proved existence of another, unless the one to be presumed logically and necessarily infers the existence of the other, such, for example, as intent, which may, even in a criminal case, be presumed from satisfactory evidence of the voluntary doing of certain acts which unmistakably indicate the quo animo. Said the Supreme Court in Clyatt v. United States, 197 U. S., at page 222, 25 Sup. Ct., at page 433 (49 L. Ed. 726):

"No matter how severe may be the condemnation which is due to the conduct of a party charged with a criminal offense, it is the imperative duty of a court to see that all the elements of his crime are proved, or at least that testimony is offered which justifies a jury in finding those elements. Only in the exact administration of the law will justice in the long run be done and the confidence of the public in such administration be maintained."

In the cases before us the testimony showed that the cars had certainly at one time been equipped in the manner required by law, and we cannot presume that any part of the required equipment was imperfect when the respective cars had, some time previously to the discovery of the defects, been started on their interstate journeys, inasmuch as, with one or two exceptions, there was no evidence whatever to the effect that the safety appliances were in any wise defective when that previous starting had taken place. The presumption of innocence will leave no room for the inference that the cars were not properly equipped when that journey was begun, especially as no intelligent person can shut his eyes to the fact that the rapid motion, rough jostling and jolting of the trains, and their immense weight may at some time result in injury to such equipment. There cannot be much nicety in the movements of freight trains.

The only offenses imputed to the defendant in these cases is the use of the various cars at the times specified in the pleadings and covered by the evidence. Except these, no other offenses are charged or at-

tempted to be proved. The testimony on behalf of the government shows that nearly every one of the cars had started from the initial point of their respective journeys at least one day, and usually longer, before the inspectors of the United States discovered the defects at some intermediate station. The testimony was very brief, and was directed altogether to what the inspectors then saw. No information was given which might enable the court to determine how long the defect had existed. Obviously, under these circumstances, we could not conclude that any defects existed when the car started several days before. We must, on the contrary, presume that the defects were in some way caused during the long previous journey from the initial point to the point of discovery, and therefore, presuming that no violation of the act occurred until after the cars had left the original starting points, and having ascertained from the clear and explicit evidence offered by the United States that defects were found during the subsequent journey, we come to the point where our greatest difficulty begins.

We should not lightly suppose that Congress intended, in case a properly equipped car started on its interstate journey with all the required safety appliances in perfect condition, but some part of which afterwards, in its rough and rapid journey, in some unknown way and at some time when the fact was practically, if not actually, undiscoverable, was broken or otherwise made defective, that the running of that car for the least distance under those circumstances should be held to be a criminal offense. Yet such is the contention for the United States, and it is true that the act, literally construed, would lead to that result and would embrace just such a case. To make crimes out of such inevitable, unavoidable, and unintentional acts, of the happening of which the carrier would usually be unconscious, would obviously be unjust and oppressive, and in a certain sense absurd for that reason. It would be shocking to any well-regulated moral sense to uphold the contention if only an individual citizen were involved, and as we know of no rule that differentiates one sort of person from another in the application of the rules of criminal law, we cannot willingly hold that such was the intention of Congress, even though the language used might literally indicate it. We are not, however, permitted to depart from the words of the act of Congress, or to read exceptions into it, unless upon established principles of interpretation which would authorize it. Some departure from a literal construction may be admissible in this instance; but, if so, we must not only find the principles upon which that course may be justified, but also the points where we may begin and where we must end; and this, we think, has been done in the authorities we have cited.

It was insisted on behalf of the government that the statute should be construed with the utmost strictness, and so literally as to make it a criminal offense under the statute if the car was used or operated for one moment, even at night, after the breakage of any part of the required equipment, even though such breakage occurred while the train was in rapid motion between stations, when it was impossible for anybody connected with its operations to ascertain the facts. In short, the contention was that the act should be construed in the strictest and most literal manner, without regard to any other considerations whatever. If this con-

tention be sound, nothing could be simpler, and the government was accordingly content to prove, as it did by two of its inspectors, that they passed alongside of the defendant's trains while at intermediate stations upon the several occasions involved and discovered the defects alleged in the respective paragraphs of the petition, and saw the cars proceed on their journey in that condition. It was also shown that this was done without in any wise informing any of the employés of the defendant of the defects. This was the course pursued in one instance at Fulton, Ky., where at least seven separate couplings had been ascertained to be out of repair in one train, although the defects may have endangered the lives of the crew in charge of that train during the trip to its destination, and although several of these defects could have been very easily repaired at that point if their existence had been disclosed. If the inspectors had pointed out the defects, and if those defects had not been repaired before the cars were moved (if under the circumstances that were reasonably possible), the offense would certainly have been complete. And if the repairs had then been made the object of the law would have been accomplished, and the protection of the train hands would have been cared for so far as the safety appliances were concerned. The inspectors, however, seem to have thought it to be their duty to permit defectively equipped cars to move without giving any information that would have enabled the defendant to remove the dangers to the crew by supplying or repairing the defects.

On the other hand, it was insisted that the statute should be so construed as not to visit criminal consequences upon a defendant in cases where it had started its cars with the proper equipment, but which, during the journey, had become deficient from unavoidable occurrences and under circumstances where the discovery of needed repairs was in most instances impossible. It was urged that the construction contended for by the government would lead to gross injustice and oppression and to the absurd consequences of punishing one for a wholly involuntary act, the doing of which could not be discovered until a greater or less time had elapsed after the offense had been completed. The defendant accordingly, while complaining of the impossibility of being able to show the exact facts at all times in reference to the innumerable couplings and handholds on the vast number of cars hauled, offered evidence tending to show that it had inspected all its cars; that it had not discovered the defects alleged, unless in one or two instances, in which the cars had to be moved short distances in order to reach a point where repairing was possible. And thus we are brought to the question whether, if safety appliances, which are in good condition when the journey of a car on which interstate traffic is being carried begins, afterwards, without the knowledge of the carrier, get broken or otherwise out of repair, it is sufficient proof of the violation of the law to show that fact simply, without also showing that the defendant had learned of the defect or had had reasonable opportunity to do so. Manifestly the act does not contain any words implying that the use of the car without the required safety appliance equipment shall be with intent to violate the statute, or be knowingly and willfully done; nor, indeed, does the language make any exceptions where

an unavoidable accident impairs or destroys the operative powers of any of these appliances while the train in which the car is placed is moving on its journey. Speaking generally, the rule is that in such cases we cannot by construction take from nor add to the language used by Congress, but what we are to ascertain in these cases is, not what general rules require, but whether there are any exceptions to those general rules, and, if any, what they are. The authorities we have cited seem clearly to show that, if a strict and literal construction would lead to manifest injustice and oppression, then the language used should be so construed as to avoid those results. The defendant is a common carrier, engaged in the performance of important duties to the public, involving great and various obligations, to which it is strictly held. For the most part the several things alleged against it in these cases were the result of what had occurred while its trains were in motion between stations on its railroad. Those occurrences were practically inevitable in the ordinary operation of its trains. It was impossible to avoid them, or to know of them until long afterwards; and, however it may strike others, in the opinion of this court it would obviously be unjust and oppressive to so construe the safety appliance act as to make such occurrences criminal offenses under its provisions, unless the defendant had reasonable opportunity to learn of them before it afterwards used its car in hauling interstate traffic. For this reason the court readily yields to those rules of construction fixed by the Supreme Court in the cases cited, and by which it can properly construe the act upon canons of interpretation which justify and demand the limitation of its general language within the bounds we shall indicate.

In support of their respective contentions several opinions were cited upon the one side or the other. Such, for example: United States v. Southern Railway Co. (D. C.) 135 Fed. 122; Same v. P., C., C. & St. L. Ry. (D. C.) 143 Fed. 360; Same v. N. P. Terminal Co. (D. C.) 144 Fed. 861; Same v. Indiana Harbor R. R. Co. (D. C.) 157 Fed. 565; Same v. C., B. & Q. R. Co. (D. C.) 156 Fed. 180; Same v. Great Northern Ry. Co. (D. C.) 150 Fed. 229; Same v. Southern Pacific Co. (D. C.) 154 Fed. 897; Same v. A., T. & S. F. Ry. (D. C.) 150 Fed. 442; Same v. St. L., I. M. & S. R. R. Co. (D. C.) 154 Fed. 516; Voelker v. C., M. & St. P. Ry. Co. (C. C.) 116 Fed. 867, and the same case in the Circuit Court of Appeals.[1] One of these cases, it will be noted, was an action for damages by an individual, and the others were for the enforcement of the criminal provisions of the statute. While we have been instructed by those cases, we have preferred to look at the questions now in litigation from a point of view somewhat different, and, without going into much elaboration, will state the conclusions reached.

It probably in this connection should not be forgotten that the safety appliance act was intended to promote the safety of the very men who are in charge of the train—men whose duty and interest require them to discover any breakage or defect that might occur; and, if they could not do so, it seems to the court that the literal construction contended for upon the part of the United States would not be a sensible construction, but would work out, probably in most instances, the pal-

[1] 129 Fed. 522, 65 C. C. A. 226, 70 L. R. A. 264.

pably unjust and oppressive result of inflicting a punishment for an unavoidable act of which the offender was at the time of its commission necessarily unconscious and without any sort of intention of doing a wrong. As Congress must be presumed not to have intended such a result, we should hold that it did not intend to punish the unavoidable and unconscious doing even of an otherwise unlawful act. This view is emphasized by the obvious facts that trains, especially on single-track railroads, could not, without great danger to the traveling public, stop between stations to readjust or put on, for example, a new handhold, or a new pin or clevis, on some car in a freight train, even if the defect were discovered; that in respect to automatic couplers no very great danger to train hands could arise until a point is reached where coupling or uncoupling would be necessary; and that the carrier's duty to the general public should not altogether be forgotten.

We cannot resist the conviction that the most urgent insistence upon a literal construction of the statute would balk in a case where a train running at speed between stations in some way broke some part of the safety appliance equipment. The literal interpretation contended for by the counsel for the United States demands, and counsel insists upon, the conclusion that, if the train proceeds at all for any distance (even the shortest) after the break occurs, the offense is complete, and that it is not for the courts to say that an offense has not been committed, but that it is for the executive officers to decide whether the government will overlook the offense or prosecute it. The courts, however, if appealed to, could hardly yield to a view which would exclude them from the function and the duty of passing upon the proper meaning of the act, and determining for themselves whether a person accused was guilty of a public offense; and in the exercise of that duty they can scarcely fail to say that common sense demands some relaxation from a literal construction in the case supposed. If we relax from it at all, we logically surrender it altogether, and thenceforward our labors must be directed to finding the exact point where we may begin and where we may end in order to reach a sensible and just conclusion as to what should be done in such cases. That some relaxation from the literal construction contended for is unavoidable, is clear, and we think we may best interpret the intention of Congress by holding that the carrier should be made liable when it is shown that a safety appliance equipment has become deficient and inoperative after the interstate journey of the car had begun, if it does not supply the deficiency at the first opportunity after it is actually discovered, or after its discovery could have been made by the use of the utmost care that a highly prudent man would use under the circumstances of the case. The determination of the question of that degree of care would, of course, in some instances, depend upon complex conditions; but the necessity for its determination would seem to be unavoidable, unless we are to have a too literal or a too loose construction of the act in applying it to practical affairs in which the great questions of human safety and necessary business are alike involved. This view seems to the court to approximate as nearly as possible the presumed purpose of Congress to punish intentional or avoidable acts, and not those which

were unknown and absolutely unavoidable when they occurred. To impute to Congress an intent to do the latter would seem to be inadmissible, though we should probably punish in every instance where any deficiency in safety appliances existed when the car was started on its interstate journey. At that point knowledge of the defect could in most, if not all, cases be discovered. But, if the operative functions of such appliances become defective during that journey, then punishment as for a criminal offense should only be visited upon the carrier in cases where he, by the use of the utmost degree of diligence which would be used by a highly prudent person under the circumstances, could have discovered and repaired the defect. A less stringent rule should not, we think, be tolerated.

Assuming, as we must from the evidence and legal presumptions, that each of the offenses alleged in these cases was committed, if at all, while the car was upon an interstate journey, and not before such journey began, we think the government, in order to be entitled to recover the prescribed penalty for the offense, must by the evidence show to the exclusion of a reasonable doubt the following facts: First, that the car was used in hauling interstate traffic; second, that when so used the car was either not equipped or provided with the required safety appliances at all, or else that some part of those appliances had become inoperative; and, third, if, as must be presumed was the case with most of the cars now involved, those appliances were all in good order and condition when the car was originally started on its interstate journey, and afterwards became defective during the transit, then, in order to convict, the evidence must show to the exclusion of a reasonable doubt that the alleged defects had respectively been either in fact discovered by the carrier or else that they could have been discovered and corrected by it by the exercise of the utmost degree of care and diligence which could be expected at the hands of a highly prudent man under similar circumstances.

Having regard to the foregoing propositions and to the rules herein propounded, and which are believed to be correct, but without going into details, we are content to find that the evidence does not remove doubts, which we regard as reasonable, of the guilt of the defendant as charged in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 13, 19, 20, 21, and 22 in case No. 5, and as charged in paragraphs 1 and 3 in case No. 9, and as to each of the charges covered by those paragraphs the defendant is found not guilty, and each and every of those paragraphs will be dismissed; but we do consider the evidence sufficient to remove all reasonable doubt of the guilt of the defendant as charged in paragraphs 9, 12, 14, 15, 16, 17, 18, 23, and 24 in case No. 5, and as charged in paragraph 2 in case No. 9.

It may be proper to add that the car used as charged in the paragraph 13 of the petition in case No. 5 was duly equipped with the safety appliance alleged to have been defective. The equipment was all there, only the chain had not been connected when the coupling was made. While we have also upon other sufficient grounds found the defendant not guilty under this paragraph, it may be well to note that the statute only makes it unlawful to use a car which is not equipped with the required couplers, and it cannot be held—certainly not upon

any strict construction of this penal act—to make it unlawful for a carrier's employés to fail properly to adjust the appliance with which the car has been and at the time is properly equipped. The act requires equipment, and, although there is no express language to that effect, the act must be construed to mean equipment which, if there, is capable of being operated; but no penalty is imposed, if, being there, it is not in fact efficiently operated by those in charge of the train. Equipment only is the required thing, and not the proper manipulation of that equipment by the employés. In order to fairly construe the statute, we must aid its express terms with the added idea that the car shall not only be equipped, but that equipment shall be kept in good order and repair. We think this addition is as fair and proper as, but no more so than, is the reading into the act of exceptions upon the grounds which we have elaborated. In no event, however, can we construe into it a penalty for what is neither forbidden nor made unlawful.

Furthermore, we may remark that in passing upon the charges made in paragraphs 21 and 23 we have treated the proof as not being sufficient to show that an empty car was used or intended to be used in moving interstate traffic. There was a failure of proof upon that element of the offense charged. The engine, however, which pulled that empty car, and also other cars, was sufficiently shown to have been so used. The case of an empty car, as to which there is no proof as to the purpose of its being hauled, must be different from that of an engine which hauls a train, some of the cars in which are carrying merchandise from one state to another.

Judgment will be entered for a penalty of $100 upon each of the paragraphs in the pleadings where the defendant has been found guilty. This will amount in the aggregate to $1,000 in the two cases, and judgments will be entered accordingly. The costs of both actions will also be adjudged against the defendant.

UNITED STATES v. LOUISVILLE & N. R. CO.

(District Court, W. D. Kentucky. November 1, 1907.)

RAILROADS—SAFETY APPLIANCE ACT—USE OF DEFECTIVE CAR.

A car owned by defendant railroad company came into its yards loaded with interstate traffic, with one of the handholds missing. It was moved by defendant to other yards, and then for delivery to a connecting carrier, still in the same condition. Defendant had facilities for repairing the car at its yards, and during the time made two inspections of it, but did not discover the defect. *Held*, that it failed to exercise the measure of care required by Safety Appliance Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174], and was subject to the penalty prescribed for its violation.

[Ed. Note.—Duty of railroad companies to furnish safe appliances, see note to Felton v. Bullard, 37 C. C. A. 8.]

On Trial to the Court Without a Jury.

George Du Relle, Dist. Atty., and Luther M. Walter, for the United States.

Benjamin D. Warfield and Helm & Helm, for defendant.

EVANS, District Judge. The penalty of $100 sought to be recovered in this suit is for the alleged using by the defendant in the movement of interstate traffic on May 29, 1907, of Louisville & Nashville car No. 31,793, when the grab iron or handhold on the right-hand side of the "B" end of the car was missing. Issues having been formed by the pleadings, the parties agreed in writing to submit the case to the court without a jury. They also filed a stipulation as to the facts, and no other testimony was heard at the trial. From that stipulation the court finds that the defendant is a common carrier by railroad of interstate traffic; that while the car referred to was loaded with coke, and en route from Virginia to its destination in Illinois, it came to defendant's yards at East Louisville on May 29, 1907, and at that time and place the handhold on the right-hand side of the "B" end of the car was missing; that a grab iron had theretofore been on at that place, and that the lag screw holes were then apparent; that while said car was in that condition on that day defendant hauled it from East Louisville to its yards at Floyd street for delivery to the Louisville & Jeffersonville Bridge Company, to be delivered to the Big Four Railroad, and that the defendant helped the bridge company haul the car through the Chesapeake & Ohio yards for that purpose; that the government inspectors examined the car at East Louisville, and found the grab iron then gone, and later at another inspection at Floyd street found that the defect still existed; that the defendant has repair shops at South Louisville and a repair track at its Floyd street yards; and that defendant made two inspections of the car at night—one at South Louisville and another at East Louisville, and at neither discovered any defect.

We are left to conjecture as to precisely where the shipment originated and as to the route by which it reached South Louisville; but, if it did not come over defendant's road from the region of Cumberland Gap, nevertheless it was evidently for a considerable time in defendant's various yards in Louisville, where its inspections, made at night, were evidently not thorough. The car belonged to the defendant. The defect was one which could easily and with little time have been repaired on the track. The utmost diligence does not seem to have been used to discover and repair the defect in this car. Grab irons are much needed in yards where switching is done. All of these matters being considered, and having in mind the principles this day announced in an opinion delivered in the case of United States v. Illinois Central Railroad Co., 156 Fed 182, we think every element of the offense charged has been proved beyond a reasonable doubt, and defendant is found guilty as charged.

Judgment will be entered for the penalty of $100 and the costs of this suit.

UNITED STATES v. LOUISVILLE & N. R. CO.

(District Court, W. D. Kentucky. November 1, 1907.)

RAILROADS—SAFETY APPLIANCE ACT—USE OF DEFECTIVE CAR.

A car of defendant railroad company was found in its yards in Louisville loaded with pig iron which had been shipped from another state, and with the chain forming a part of the coupler on one end broken, rendering the device inoperative. The defect was discovered by defendant, but could not be repaired where the car was without blocking the entire business of the yards, and the place of business of the consignee of the iron was only four blocks distant and nearer than the repair track, and defendant therefore took the car to the consignee, where it was unloaded, and from there to the repair track, where it was repaired. It did not appear what company had brought the car to the yards. *Held*, that defendant took the most practicable course after discovering the defect, and was not guilty of a violation of Safety Appliance Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174].

[Ed. Note.—Duty of railroad companies to furnish safe appliances, see note to Felton v. Bullard, 37 C. C. A. 8.]

On Trial to the Court Without a Jury.

George Du Relle, and Luther M. Walter, for the United States.

Benjamin D. Warfield and Helm & Helm, for defendant.

EVANS, District Judge. The government seeks in this suit to recover the penalty of $100 for an alleged violation of the safety appliance act in using Chesapeake & Ohio car No. 26,285 in the movement of interstate traffic on or about March 26, 1907, when the coupling and uncoupling apparatus on the "B" end of the car was out of repair and inoperative, in this: That the chain connecting the lock pin or lock block of the coupling lever was broken on that end of the car, thus making it necessary for a man to go between cars in order to couple or uncouple them. The parties by stipulation waived a jury, and the case was heard by the court. It appears from the testimony that at or about 7:55 a. m., on March 26, 1907, the government inspectors examined the car on one of defendant's tracks in its Water Street yards, and found that the alleged defects existed. There was nothing, however, to show how the car came to defendant's yards from the other side of the Ohio river, though it contained pig iron from Ironton, O., consigned to the Ewald Iron Company, whose business is conducted near by the place where the inspection was made. When the defect came to defendant's knowledge, as it did that morning, the problem presented itself as to whether the defendant would block its entire business at that very important point of connection with other railroads by endeavoring to make the repairs on a busy track, or remove the car either to its repair track in that vicinity, or take it first to the consignee and unload it. The consignee was the most accessible, being only four city blocks distant, and about 10:30 a. m. of the same day the car was taken to Ewald's place near by and unloaded, and then taken to a repairing point where the defect was remedied.

Knowing something of the localities mentioned and of the great business done there, the court credits the evidence on that point, and is of opinion that the course pursued was the most sensible and practical

one; and, having regard to the principles this day announced in an opinion delivered in the case of United States v. Illinois Central Railroad Co., 156 Fed. 182, the court thinks that the testimony fails to show beyond a reasonable doubt the existence of every element necessary to constitute the offense alleged in the petition, within the true intent and meaning of the act of Congress, and will, therefore, find and adjudge that the defendant is not guilty as charged in the petition. And any other result would be obviously unjust and oppressive, and not warranted, we think, by any sensible construction of the statute. The only use of the car by the defendant was to get it as speedily as possible off the busy track and to a place where the defects in the coupling could be supplied. Unloading it at Ewald's was an incident in the accomplishment of this object. No course could well have been more reasonable under the circumstances than the one pursued, and there was no testimony offered by the government tending to show that such defects could practically have been remedied away from repairing points. It was not the case of a handhold merely, as to which the ease of putting one on is obvious.

GOEPFERT v. COMPAGNIE GENERALE TRANSATLANTIQUE.

(Circuit Court, E. D. Pennsylvania. October 11, 1907.)

No. 82.

1. CORPORATIONS—FOREIGN CORPORATIONS—DOING BUSINESS IN STATE.

Defendant was a corporation of France, having its principal place of business in Paris, and operating a line of passenger steamers between Havre and New York. It maintained a general agency in New York, with a resident agent, who represented it in the United States and Canada. It had numerous ticket agents throughout the United States, who sold its tickets, among others a company in Philadelphia. Such company maintained offices in the principal cities of the United States and Europe, and arranged tours and sold tickets over the principal railway and steamship lines of the world. It sold tickets over defendant's line, among others, at its Philadelphia office, receiving a commission therefor, and also $600 per year on account of its office rent. It painted defendant's name on its office door, as also the names of other steamship and railway lines. Except for the sale of such tickets, no business was done on behalf of defendant in the Eastern district of Pennsylvania. *Held*, that it was not doing business in the district in such sense that a federal court there obtained jurisdiction over it by service on the local agent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 2520–2527.

Service of process on foreign corporations, see notes to Eldred v. American Palace Car Co., 45 C. C. A. 3; Cella Commission Co. v. Bohlinger, 78 C. C. A. 473.]

2. COURTS—JURISDICTION OF FEDERAL COURTS—RECORD IN CAUSE REMOVED.

Every fact that is essential to bring a cause within the limited jurisdiction of a Circuit Court of the United States must appear affirmatively upon the record; and if, therefore, a record that has been removed into such court from a state court would be fatally defective if the suit had been originally brought in the federal tribunal, it is none the less defective because it was originally brought in a state court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 817.]

On Rule to Set Aside Service of Summons.

Sandberg & Heymann, for plaintiff.

B. Franklin Pepper, W. B. Bodine, Jr., and George Wharton Pepper, for defendant.

J. B. McPHERSON, District Judge. This suit was originally brought in the court of common pleas of Philadelphia county, and in due season was removed to the Circuit Court. The writ of summons was served by the sheriff of the county, and it is his service that I am now asked to set aside. The return is as follows:

"Served the Compagnie Generale Transatlantique, a foreign corporation, by serving Raymond, Whitcomb & Company, Inc., agents of the said Compagnie Generale Transatlantique, a foreign corporation, by handing 7—27—1906 a true and attested copy of the within writ to Charles S. Knowlton, personally, the vice president of Raymond, Whitcomb & Co., Inc., agents."

The ground of the defendant's attack upon the service of the writ is thus set forth in the petition for the rule:

"Your petitioner is a corporation duly organized and existing under the laws of the republic of France, and having its principal place of business in the city of Paris, in the said republic of France, and your petitioner owns and operates a line of steamships plying between the ports of Havre, in the said republic of France, and the city of New York, in the United States of America, and your petitioner has established and maintains a general agency, with a resident general agent and an assistant general agent, at the city of New York, in the state of New York, for the transaction of your petitioner's business in the United States and Canada. During all of the time above mentioned [that is, since the bringing of the suit] your petitioner has done and does now no business of any sort, and has had and has now no office or agent whatsoever, in Pennsylvania; excepting that Raymond, Whitcomb & Co., Inc., mentioned in the said sheriff's return, are authorized and permitted by your petitioner to sell its tickets on commission, and upon the exclusive responsibility of said Raymond, Whitcomb & Co., Inc."

The plaintiff filed an answer to the petition, asserting that business was done in this jurisdiction by Raymond, Whitcomb & Co. as agents, and thereupon certain testimony was taken, from which the following undisputed facts appear: The defendant is a corporation under the laws of France, having its principal place of business in the city of Paris. It owns and operates a line of steamships plying between Havre and the city of New York. It has a general agent in New York to transact all its business in the United States and Canada. Raymond, Whitcomb & Co. are tourists and ticket agents, having offices in the principal cities of the United States and Europe. They arrange tours, and sell tickets, over the principal railway and steamship lines of the world, including the tickets of the defendant, which they sell in the city of Philadelphia. For such sale they are paid a commission, and also $600 on account of their office rent. They are not authorized to make any other contract on behalf of the defendant. One of the defendant's printed circulars, which gives information in regard to tickets, names Raymond, Whitcomb & Co. among eight principal agencies in the United States and Canada; this prominence being due to the fact that, with few exceptions, they sell more tickets than other agents. When an application for passage is received at the Philadelphia office of Ray-

mond, Whitcomb & Co., it is their custom to telegraph to New York for the desired cabin accommodations. They have the defendant's tickets for sale in their Philadelphia office, as well as the tickets of many other steamship and railway companies. They print the defendant's name on their door, with the names of other railway and steamship lines. When they sell one of the defendant's tickets, the purchase money is put into their general account, from which they remit periodically to the defendant, as they do in the case of other railway and steamship companies, whose tickets they also sell. The defendant has other ticket agencies in Philadelphia, and has about 3,000 throughout the United States and Canada. Except the sale of tickets in Pennsylvania, as above set forth, no business is done on behalf of the defendant within the jurisdiction of this court.

If these facts are compared with the facts in Green v. Chicago, etc., Ry. Co., 205 U. S. 530, 27 Sup. Ct. 595, 51 L. Ed. 916, as they are condensed in the opinion of Mr. Justice Moody, it will be apparent, I think, that the decision in Green's Case controls the question now before the court. The scope of that decision may perhaps be better understood if the facts upon which it is founded are stated in a little more detail. The following extract from the brief of counsel for the plaintiff in error accurately describes the situation as it was presented to the Circuit Court (whose opinion is reported in 147 Fed., at page 767), and before the Supreme Court:

"The Chicago, Burlington & Quincy Railway Co., the defendant in the case, is an Iowa corporation, operating a line of railroad from Chicago, Ill., and St. Louis, Mo., to Denver, Colo., with various branches. It does not operate any railroad in the state of Pennsylvania. In order to secure business in competition with other lines, the company maintains in the city of Philadelphia an office at No. 836 Chestnut street. It pays the rent of this office, and prominently displays its name upon it; and, with its knowledge, its name, with its location at this office, is inserted in the city directory and the telephone directory. At this office it has a general freight and passenger agent, who has charge of a district comprising portions of the states of Pennsylvania, Maryland, West Virginia, and Virginia, and under him are various traveling freight and passenger agents, who report to him. A staff of employés, consisting of two clerks and two stenographers, are also maintained at this office, who are in the employ of, and paid by, the company by pay roll from Chicago. The company advertises the names and locations of its 'general agents,' among which it gives: 'Philadelphia, Pennsylvania, 836 Chestnut street, Harry E. Heller, District Freight and Passenger Agent.' The correspondence from the office at Philadelphia is carried on on letter paper bearing the following printed heading: 'Chicago, Burlington and Quincy Railway Company, Office of District Freight and Passenger Agent, 836 Chestnut Street, Philadelphia.'

"The character of the business carried on at the office is the securing of business over the railway lines, none of which are situated in Pennsylvania. In order to do this, the railway, through its agency at Philadelphia, advertises in the territory which is in charge of the agent, answers inquiries as to rates of passenger and freight transportation, endeavors by correspondence and personal calls to secure a share of the business, and enters into arrangements with prospective passengers and shippers for transportation as hereinafter stated.

"No tickets to ordinary passengers are kept on hand at the office of the company in Philadelphia, but, when a prospective passenger desires a ticket and applies at the office of the company in Philadelphia, the agent there will take the applicant's money, go to one of the railroad companies running out of Philadelphia, and get from that company a prepaid order, which it gives to the applicant, who can then, on his arrival at Chicago, present the order at

the Chicago, Burlington & Quincy Railway office there, and receive his ticket. The Chicago, Burlington & Quincy Railway also issues from its office at Philadelphia orders to railroad employés at reduced rates for transportation over other lines. In a few cases the money is received from such employés at the Philadelphia office, and orders for tickets issued to them. In more of the cases, no money is received, but an order is issued at the Philadelphia office which the railroad employé can present at the Western office and there receive and pay for his ticket. For the convenience of shippers, also, the Chicago, Burlington & Quincy Railway, at its office at Philadelphia, receives from freight shippers, who have shipped goods over lines running out from Philadelphia to points reached by the Chicago, Burlington & Quincy Railway Company, a surrender of their bills of lading over the initial line, and in return issues a receipt therefor, entitled a 'Bill of Lading,' and which provides that, if the goods are duly delivered to the Chicago, Burlington & Quincy Railway Company, they shall be transported over the line of such company at a certain rate of freight, subject to the conditions and regulations of the published tariff and rules, etc., and which further provides as follows:

"'It is expressly understood and agreed that this bill of lading is issued at the request of, and for the convenience of, the shipper, and that said freight has not yet been received by the railway company, and that no obligation in respect to said freight is assumed by this railway company, nor will this bill of lading be in force, until said freight is received by this railway company. ———, Freight Agent.'"

Upon the ruling in Green's Case, therefore, it must be held, in my opinion, that the present defendant was not doing business within this district at the time when the summons was served. See, also, the cases cited by Mr. Justice Moody on page 534 of 205 U. S., and on page 596 of 27 Sup. Ct. (51 L. Ed. 916).

The plaintiff contends, however, that the present suit differs materially from Green v. Railway Co., because that proceeding was brought originally in the Circuit Court, and the service of the writ was therefore to be judged by the federal law; whereas, the action now before the court was brought originally in the common pleas of Philadelphia county, and the service must therefore be judged by the statutes of Pennsylvania, which (so it is argued) support the service and require the Circuit Court to declare it to be good. I am unable to agree with this proposition. Whatever the decision of a state court might be, if it were considering the validity of a sheriff's return, a Circuit Court is not under all circumstances bound to follow such decision. It is true that, after a suit has been removed to this court, the principal change in the proceeding is a change of forum; but it is not to be forgotten that the one forum is a court of general jurisdiction, while the jurisdiction of the federal court is limited only. While, therefore, a state court may perhaps indulge in presumptions and intendments to help out a sheriff's return, a federal court has no such power. Every fact that is essential to bring a cause within its limited jurisdiction must appear affirmatively upon the record, and omission is ordinarily as fatal as misstatement. If, therefore, a record that has been removed from the state court to a Circuit Court would be fatally defective if the suit had been originally brought in the federal tribunal, it is none the less defective although it was originally brought in a court of the state; and its defects may be successfully attacked in the Circuit Court, unless the proper amendments can there be made. As was said by the Supreme Court of the United States in Goldey v. Morning News, 156 U. S., on page 522, 15 Sup. Ct., on page 561, 39 L. Ed. 517:

"For the same reason, service of mesne process from a court of a state, not made upon the defendant or his authorized agent within the state, although there made in some other manner recognized as valid by its legislative acts and judicial decisions, can be allowed no validity in the Circuit Court of the United States after the removal of the case into that court, pursuant to the acts of Congress, unless the defendant can be held, by virtue of a general appearance or otherwise, to have waived the defect in the service, and to have submitted himself to the jurisdiction of the court."

And in Courtney v. Pradt, 196 U. S., on page 92, 25 Sup. Ct., on page 210, 49 L. Ed. 398, the court also declares that:

"When a case has been removed into the Circuit Court on the ground of diversity of citizenship, that court is entitled to pass on all questions arising, including the question of jurisdiction over the subject-matter in the state courts, or the sufficiency of the service of mesne process to authorize the recovery of personal judgment. Goldey v. Morning News, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517; Wabash Western R. Co. v. Brown, 164 U. S. 271, 17 Sup. Ct. 126, 41 L. Ed. 431; De Lima v. Bidwell, 182 U. S. 1, 21 Sup. Ct. 743, 45 L. Ed. 1041; Conley v. Mathieson Alkali Works, 190 U. S. 406, 23 Sup. Ct. 728, 47 L. Ed. 1113."

See, also, Remington v. Railroad Co., 198 U. S. 95, 25 Sup. Ct. 577, 49 L. Ed. 959.

It is, I think, beyond dispute, that the present record could not support a personal judgment, because it offends against the rule which was thus distinctly laid down in St. Clair v. Cox, 106 U. S., at page 359, 1 Sup. Ct., on page 362, 27 L. Ed. 222:

"We are of opinion that when service is made within the state upon an agent of a foreign corporation, it is essential, in order to support the jurisdiction of the court to render a personal judgment, that it should appear somewhere in the record—either in the application for the writ, or accompanying its service, or in the pleadings, or the finding of the court—that the corporation was engaged in business in the state. The transaction of business by the corporation in the state, general or special, appearing, a certificate of service by the proper officer on a person who is its agent there would, in our opinion, be sufficient prima facie evidence that the agent represented the company in the business. It would then be open, when the record is offered as evidence in another state, to show that the agent stood in no representative character to the company, that his duties were limited to those of a subordinate employé, or to a particular transaction, or that his agency had ceased when the matter in suit arose."

Until the answer to the present rule was filed, the record of this case will be examined in vain to find an averment that the defendant was engaged in business in Pennsylvania at the time when the summons was issued and served. No such averment is to be found in the præcipe, in the writ of summons, in the return of the sheriff, in the statement of claim, or in the rule to plead—this constituting the whole record in the court of common pleas—and no evidence was laid before the Circuit Court upon this rule to justify a finding that defendant was at that time so engaged. It follows that the service is without adequate support, and must be set aside.

The general subject of the service of process upon foreign corporations is discussed in two elaborate notes in the Lawyers' Reports Annotated, one in volume 23, at page 490, and the other in volume 50, at page 589.

The service of the sheriff under consideration is accordingly set aside.

THE LIZZIE CRAWFORD.

THE WHITE SEAL.

(District Court, E. D. Pennsylvania. October 15, 1907.)

No. 44 of 1904.

SALVAGE—RESCUE OF STRANDED LAUNCH—AMOUNT OF COMPENSATION.

A naphtha launch, 60 feet long and worth $6,500, became stranded on a jetty in the Delaware river; the rocks piercing holes in her bottom under the engine, where they could not be reached. All of her apparel and the other property aboard was taken off, and she was left alone with her anchors out. On the next day she was found by the tug Crawford, apparently abandoned and in danger of further injury, and the tug undertook her rescue. She was hauled off the rocks to the mud flats near by, and an effort made to pump her out and repair her, so she could be towed without sinking. This was found impossible, and another tug was procured, and she was towed to port between the two. After commencing the work the tug was warned by persons in a boat not to touch the launch, but had no reason to suppose from their language that such persons had any interest in her. The tug devoted eight days to the work. *Held*, that it was a salvage service, and under the evidence was performed with reasonable skill and care, and that the tug was not liable for injuries resulting to the launch, but that, in view of the fact that there was no danger connected with the work, an award of $750 therefor was sufficient, with a further allowance of $100 for the helping tug.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Salvage, §§ 17, 72–74.

Awards in federal courts, see note to The Lamington, 30 C. C. A. 280.]

In Admiralty. Suit for salvage. On final hearing.

Edward F. Pugh, for libelant.
Joseph Hill Brinton, for respondent.

HOLLAND, District Judge. The White Seal is a naphtha launch, with a 40 horse power engine, 60 feet in length, 12 feet beam, which cost the owners $8,000 to build in 1903. Her value was about $6,500 at the time she was stranded upon the rocks from which she was rescued by the tug Lizzie Crawford. On Sunday, June 16, 1904, at about 3 o'clock p. m., this launch, in proceeding up the Delaware river, went aground on a jetty extending from the lower end of Reedy Island, known as "Lower Reedy Island Jetty." She was at the time under the control of one of the owners, James McMasters. William H. Lear was the engineer in charge. At the time the tide was low, and the vessel rested nearly on even keel, being slightly listed to starboard. An examination showed that the rocks had pierced the timbers under her engine and fly wheel, so that they could not get at the leak to stop it. Two anchors were thrown out to prevent her from working, and a light placed upon her. Every movable article was taken off, and the vessel was entirely stripped of everything that could be removed, and no one remained on board. About noon the next day, June 27th, the master of the tug Lizzie Crawford, bound down the river, heard of the condition of the yacht and went to her assistance. When he arrived he found the yacht with no one on board, and stripped of all her apparel and movable property, and

apparently abandoned. She was resting upon the jagged rocks of the jetty, well under water, and was in danger of receiving further injury. The master of the tug immediately determined to save the launch and proceeded at once to take her off the rocks. About the time he began the work of saving her a party in a rowboat told him not to touch the launch, but did not inform him as to their interest in her. From what they said to the master of the tug and the way in which they acted toward him, he could well conclude that they were parties who had no connection with the boat and were simply interfering without authority. The master of the tug Lizzie Crawford took up the anchors of the launch and proceeded to pull her off the jetty for the purpose of towing her to a place of safety. In order to tow her without sinking, he found it necessary to make fast to her bits with a very short hawser to enable him to hold her up out of water. In this manner he towed her to the mud flats near by, where he attempted to stop the leaks, pump her out, and put her in condition to tow her to Camden.

The owners of the launch object to salvage, or the payment of any expense to which the tug was put, for the reasons, first, that the tug was notified not to move the launch, as the owners had arranged for her protection; and, further, that the tug had pulled the launch off the jetty and so negligently towed her to the mud flats, where she was further injured by the mud leaking in through the holes in her bottom; and, further, that the tug negligently twisted and sprained the launch in pulling her over the mud in such a way as to make her almost worthless. For these reasons it is claimed a recovery should not be permitted, but, upon the other hand, the owners of the tug should pay a large amount of damages for the negligent manner in which they attempted to save the launch.

A libel was filed by the White Seal for this damage thus alleged to have been caused to her, and the case was argued at the same time as the one at bar.

We, however, find that the master of the tug Lizzie Crawford was not informed as to the character of the men in the rowboat at the time the tug pulled the White Seal off the jetty, nor had he any information as to their authority over the launch. He did no more than his duty in proceeding to save her from destruction, and we are not convinced that he could have done anything better than to tow her to a place, with soft bottom, upon which she could rest until he could stop the leaks which she received upon the rocks. The master of the tug, however, discovered that the holes in the bottom of the vessel were under the engine and he was unable to get at them. He found it necessary to secure the service of another tug to tow the launch to Camden, where she was docked by her owners and repaired. The work of saving her was not at all dangerous, although it required continuous labor for about eight days. Because of the location of the injury to the launch, it was necessary to employ the tug Sewell to do some pumping, and to aid the libelant in towing the launch to Camden. It was necessary to tow the launch between the tugs Sewell and Crawford, in order that she might be kept afloat.

It is claimed that the libelant should be allowed an amount suffi-

cient to compensate the Sewell for the aid it gave in saving the launch, which amount is fixed at $160. The tug Sewell was engaged 24 hours, 10 hours of which time she was using her pumps and siphon. Her charges are $50 for 12 hours' work and extra for pumps and siphon; but we conclude in this case the Sewell is fairly compensated with an award of $100.

The value of the launch is about $6,500, and the libelant claims that he should be allowed one-half of her value; but we do not think this is a case where such a large amount should be allowed, and we are of the opinion that under the circumstances an allowance of $750 is ample compensation for the work done by the tug Lizzie Crawford in saving the launch. In addition, the sum of $100 is allowed the libelant to compensate the tug Sewell for the assistance rendered, and a judgment is entered in favor of the libelant, the tug Lizzie Crawford, and against the yacht White Seal, for the sum of $850, together with costs of suit.

THE WHITE SEAL.

THE LIZZIE CRAWFORD.

(District Court, E. D. Pennsylvania. October 15, 1907.)

No. 37 of 1904.

In Admiralty. On final hearing.

Joseph Hill Brinton, for libelant.

Edward F. Pugh, for respondent.

HOLLAND, District Judge. In this case the petition and libel are dismissed, at the cost of the libelant, for the reasons given in the decision this day rendered in No. 44 of 1904. 156 Fed. 201.

WARREN et ux. v. OREGON & WASHINGTON REALTY CO. et al.

(Circuit Court, W. D. Washington, W. D. September 21, 1907.)

No. 1,220.

QUIETING TITLE—JURISDICTION OF FEDERAL COURT—STATUTORY RIGHT OF ACTION.

Under Ballinger's Ann. Codes & St. § 5500, which gives any person having the title to and right of possession of real estate, though out of possession, the right to sue to recover the same against an adverse claimant, and to obtain a decree quieting his title, the legal owner of unoccupied land may sue in equity in a federal court having jurisdiction to quiet his title against an adverse claim, though under the code procedure of the state the action would be one at law; there being no adequate remedy at law available to him in the federal court.

In Equity. Suit to quiet title to unoccupied real estate. Heard on demurrer to an amended bill of complaint. Overruled.

Flaskett & McMenamin, for plaintiffs.

Titlow & Huffer, for Oregon & Washington Realty Company.

HANFORD, District Judge. In the original bill of complaint it was averred that the complainants are in possession of the real estate, which is the subject of this suit, but under a stipulation allowing an amendment they have changed their position, and now claim that they have a good title to the property, and a right to the possession thereof, and that it is unoccupied. To the bill as amended the defendants have demurred, on the ground that the facts stated are insufficient to entitle the complainants to any relief in equity.

Without the enlargement of the rights of owners of real estate to protection from mere slander of title, by modern legislation, a bill to quiet title could not be maintained by a complainant out of possession. This suit, however, is authorized by a statute of this state, which reads as follows:

"Any person having a valid subsisting interest in real property, and a right to the possession thereof, may recover the same by action in the superior court of the proper county, to be brought against the tenant in possession; if there is no such tenant, then against the person claiming the title or some interest therein, and may have judgment in such action quieting or removing a cloud from plaintiff's title; and in all actions, under this section, to quiet or remove a cloud from the title to real property, if the defendant be absent or a nonresident of this state, or cannot, after due diligence, be found within the state, or conceals himself to avoid the service of summons, service may be made upon such defendant by publication of summons as provided by law; and the court may appoint a trustee for such absent or nonresident defendant, to make or cancel any deed or conveyance of whatsoever nature, or do any other act to carry into effect the judgment or the decree of the court." Section 5500, Ballinger's Ann. Codes & St.; section 1142, Pierce's Code.

The averments of the amended bill bring the case fairly within the letter and intent of this statute. The argument supporting the demurrer is that the chapter of the Code governing actions to recover real estate, including this section, was construed by the Supreme Court of Washington Territory, in the case of Smith v. Wingard, 3 Wash. T. 291, 13 Pac. 717, so as to restrict its application to actions of ejectment. Special stress is laid upon the following paragraph in the opinion in that case:

"While the primary object of the law as we find it in this chapter is to determine the question of title to the land, that question is to arise, we think, in litigation about the possession of the land. The action therein contemplated is the common-law action of ejectment, with the added incident of determining in the action the paramount, legal, or equitable title, and with the departure of permitting the action to be brought against one not in possession, but who claims title to or interest in the land."

A close examination of that decision, however, shows that the Supreme Court of Washington Territory was not required to express its opinion upon any question affecting the right of an owner of real property not in possession, to maintain a suit in equity against a party asserting an adverse claim to the same property, nor to construe the chapter of the Code above referred to. The case had been tried as an action at law in the District Court upon issues joined, and resulted in a verdict and judgment for the plaintiff. His victory was won on technical defects in a quitclaim deed which was the elder of two deeds from the same grantor, there being no proof of superior equitable rights on either side. The decision of the trial court holding

Smith's deed to be a void instrument was not reviewed by the Supreme Court, as the case was submitted without a record of the trial, and the only point presented was on an exception to the ruling of the lower court upon a demurrer to the complaint. In his complaint the plaintiff alleged that he was in possession of the property, and it was decided by the Supreme Court that his allegations were sufficient to entitle him to equitable relief. That decision was based entirely upon a statute different from the chapter of the Code referred to in the above excerpt from the opinion. While the case was being heard in the Supreme Court, indulgence of the judicial habit of interrupting arguments by propounding questions to counsel elicited the information that the attorneys on both sides believed that, as only legal rights were contested, the case had been properly tried as an action at law, and it seems that the court was unable to resist the temptation to make a facetious comment on what in the opinion is styled "the pleasing concord of the parties." This bit of levity led to the deliverance of the extraordinary dictum, construing a statute, which did not have any bearing upon the question decided. The Legislature appears to have been dissatisfied with the statute, as it was construed in the case of Smith v. Wingard, and therefore, by an amendment, amplified its provisions so as to leave no room for a possible doubt as to the right to maintain a suit in equity to quiet title to unoccupied land. The chapter of the Code including the section quoted is comprehensive. To qualify a plaintiff to sue, it is only necessary for him to show that he has a valid subsisting interest in real property and a right to the possession thereof. A party asserting an adverse claim to real property may be sued whether there is a tenant in possession or not, even though he may be a nonresident, and without a representative upon whom a summons can be served within the jurisdiction, and in the action every question affecting the legal or equitable rights of the parties may be adjudicated, and ample power is conferred upon the courts to enforce judgments and decrees by every instrumentality used in chancery, as well as in courts of law. There is no restriction of the right to litigate on account of the possession or lack of possession of either party.

In the federal courts equitable remedies cannot be applied in an action at law, and litigants are excluded from the equity courts if they have an adequate remedy at law. Therefore, for the maintenance of a suit in equity in a United States Circuit Court, to establish a title to real estate against adverse claimants, it is necessary to show a right that is menaced, and that adequate protection of the right cannot be afforded by the same court in any proceeding on its law side. I hold this to be an accurate statement of the rule applicable to this case, and that it would be an unwarranted deprivation of the right to submit a controversy to a federal court for adjudication, to deny that right merely because the same case would be cognizable in a court of the state having concurrent jurisdiction where it would be classed as an action at law. Having in view the procedure in this forum, I hold that there is no adequate remedy at law for an owner of property who is hampered in the use thereof by unfounded claims creating doubts and uncertainty as to the validity of his title, when there is no actual

adverse possession. The legal possession is incidental to the legal title. Therefore the holder of the legal title, having a present right to possession of unoccupied real estate, is presumed to have legal possession, which is equivalent to actual possession, for the purpose of maintaining a suit to protect his rights as owner. Having no cause to complain of deprivation of possession as a fact, an action at law to recover possession would necessarily have no other basis than a transparent fiction, a thing intended to be abolished by the code procedure. Courts of equity can deal with the real facts when there is a controversy affecting the title to unoccupied real estate, since the statutes have removed the arbitrary rules which formerly curtailed their powers. Holland v. Challen, 110 U. S. 15, 3 Sup. Ct. 495, 28 L. Ed. 52.

Demurrer overruled.

In re W. J. FLOYD & CO.

(District Court, E. D. North Carolina. September 6, 1907.)

1. BANKRUPTCY—PARTNERSHIP—MORTGAGE TO SECURE DEBT OF PARTNER.
A mortgage executed by an insolvent partnership on its property, within four months prior to its bankruptcy, to secure the individual debt of a partner, is voidable as against partnership creditors.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 282.]

2. SAME—PROVABLE DEBTS—CLAIM OF PARTNER.
The amount contributed by a partner to the capital of a partnership cannot on the bankruptcy of the firm be proved as a debt entitled to share ratably with general creditors.

In Bankruptcy. On review of decision of referee.

For former opinion, see 154 Fed. 757.

J. C. Meekins and A. D. MacLean, for creditors.

Junius D. Grimes, for bankrupt Wayner D. Floyd.

PURNELL, District Judge. The present appeal, the third in this case, from a ruling of the referee, disallowing the alleged claim of B. F. Floyd, the brother, as a preference, and subjecting the same to the rights of the general creditors, and refusing to allow the alleged claim of Wayner D. Floyd, the son, to share pro rata with the creditors, although the referee allowed both claims to be filed, but properly held that they were secondary or subject to the claims of the creditors in the distribution of assets. W. J. Floyd claims to have executed a mortgage to his brother, B. F. Floyd, on the stock of goods for $2,500 to purchase the interest of W. D. Floyd, the father. This mortgage was not filed until a few days before the assignment and within four months of the institution of this proceeding, so that the same is void as a preference. That this was the individual debt of W. J. Floyd was admitted by W. J. Floyd himself upon his examination before the referee. The ruling of the referee is therefore entirely correct and is supported by authority.

It is now attempted to prove the $2,500 alleged to have been contributed by Wayner D. Floyd to the firm as a partnership debt, so that the same may share pro rata with the creditors in the assets which

have been realized. This claim, as filed, contains in itself the reason which prompted and justified the referee in refusing to allow it to share equally with the creditors in the distribution of assets. In the first place, it recites with considerable formality the formation of a copartnership by W. D. Floyd, father, W. J. Floyd, son, and Wayner D. Floyd, grandson, and the contribution of $2,500 to the capital thereof by Wayner D. Floyd; and further recites that W. J. Floyd later purchased the interest of W. D. Floyd, his father, for $2,500. It is a new and novel proposition that the amount contributed by one partner to the business as capital upon the formation of the copartnership should be provable as a debt, entitled to share with the general creditors upon its dissolution, especially when the contributing member is a minor, without the capacity to contract. This proposition is seriously contended for in order, it seems, to carry out the promise originally made to the creditors when the assignment was made that bankruptcy would yield them practically nothing in the way of dividends, and the apparent purpose is to carry out this promise by diminution of the assets, if possible, so as to deter other creditors who might have the temerity to resist the ex parte terms of a voluntary assignment. The only justification for such a contention is the ruling of the referee refusing the allotment of exemptions to Wayner D. Floyd, affirmed by this court, and the statement therein by the referee: "And he is permitted, through his next friend or guardian, to file his claim as a general creditor." But this last sentence was never considered by this court. This much of the ruling is obiter, as it did not arise upon the question then presented of the right of Wayner D. Floyd to his exemptions out of the stock, which was refused upon the ground that his separate and individual estate had not been taken over nor administered in this bankruptcy, nor had he been held personally liable for the debts—a liberal ruling for him—and upon the further ground that his relation to the firm as a partner had never before been disclosed to the creditors, or any one else, either in the assignment or otherwise.

But notwithstanding the ruling that Wayner D. Floyd's separate and individual estate could not be touched by the creditors nor administered in this proceeding, and that he was not personally liable for the debts, being a minor, he and his attorney took the position and alleged in this court that he was a partner, although that fact had never before been disclosed, and claimed that he had contributed $2,500 to the capital of the firm, not as a creditor, but as a partner, and they not only took that position in argument, but swore to it in the examination and even in the claim now filed, so that they are estopped to deny their own contention, whether it be right or wrong. In other words, having taken a position and sworn to it, they will not be permitted to deny their own oath nor repudiate their solemn assertion in this court. They might have said before the referee, in the first instance, on their former appeal, "if you will not permit Wayner D. Floyd, as an undisclosed partner, to take half of the stock or claim exemptions out of it, then permit him to file his claim as a creditor"; but because of its inconsistency, or some other motive, they did or would not adopt this attitude, and, having taken the position of partner or nothing, they

must stand or fall by it. This doctrine of estoppel is the law of the case.

But while this is the law of the case, the right and equity of it is that B. F. Floyd and Wayner D. Floyd cannot now be permitted to come in and file claims aggregating $5,000, thereby reducing the dividend of the creditors to a mere bagatelle and making good their assurance that the terms of the assignment should have been accepted, and even in this assignment no claim was scheduled for Wayner D. Floyd, although his attorney prepared the assignment and was named as assignee.

If Wayner D. Floyd, or any one for him, ever contributed $2,500 to this business, then his father, and not the creditors, squandered it, who, according to the testimony, boasted of having saved up $8,000 just before the assignment. Perhaps another reason for their objection to bankruptcy and to the jurisdiction of this court was that it offered an opportunity for looking into the transaction, which seems to have been suspicious of fraud, and their efforts to consume the assets left to the creditors will not be tolerated in a court of bankruptcy, governed, as it is, by the rules in equity.

It is therefore considered and adjudged that the decision of the referee disallowing the claims of W. D. Floyd, the father, and Wayner D. Floyd, the son of W. J. Floyd, be, and the same is hereby, affirmed.

In re PARAMORE & RICKS.

(District Court, E. D. North Carolina. June 26, 1907.)

BANKRUPTCY—HOMESTEAD EXEMPTION—MANNER OF ALLOTMENT.

Where all the land of a bankrupt was incumbered by mortgages under which the mortgagees had the right to sell the same, including the homestead estate of the bankrupt, the court of bankruptcy may, instead of allotting the homestead from the land, sell the same and make the allotment out of the proceeds.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 675.]

In Bankruptcy. On review of decision of referee.

Moore & Long, for bankrupts.

Skinner & Whedbee and F. G. James, for creditors.

PURNELL, District Judge. Paramore & Ricks were adjudged bankrupts on petition filed January 14, 1907, and the cause referred. Bankrupts filed a schedule as required. In such schedule so filed, it was shown both H. A. Paramore and J. A. Ricks were seised and possessed of real estate and personal property, in which both claimed a homestead and personal property exemption. A trustee was appointed, accepted the trust, and gave bond, and the bankrupts each demanded of said trustee that he lay off and assign to them their homestead. Thereafter bankrupts prayed the referee that their homestead and exemptions be assigned to them. The real estate was all mortgaged, the Taft land for $6,600, the Sam Smith land for $1,550, and the house and lot

for $1,070, total $9,220; and sold for $14,770, as follows: Taft land, $12,000; Sam Smith land, $1,570; and the house and lot, $1,200. In addition to the three mortgages before mentioned, there was a mortgage called in the record Campbell's mortgage for $12,000, making a total mortgage indebtedness of $21,000.

It is stated in the record:

"The referee, being of opinion that, if the bankrupts were entitled to homestead in excess over $9,220, it would accrue to the Campbell mortgage, refuses the prayer [of the bankrupt] to instruct the trustee to allot the homestead to the bankrupts, confirmed the sales, and instructed the trustee to hold the sum of $2,000 in lieu of homestead to be applied to the Campbell mortgage or not as the court may hereafter decree, and the excess over the $2,000, and the mortgages, $9,220, would be applied to the debts of the unsecured creditors."

The referee reports as a fact "that the mortgage creditors other than N. W. Campbell came into the court voluntarily, and asked that their mortgages herein be administered through and by the court of bankruptcy." From the ruling of the referee in confirming said sales without the allotment to them of a homestead by metes and bounds the bankrupts appealed.

The creditor holding a lien or mortgage need not prove his claim. Loveland, Bankr. 744; In re Goldsmith (D. C.) 118 Fed. 763; In re Oconee Milling Co., 109 Fed. 866, 48 C. C. A. 703. The mortgage creditors seem to have elected to rely on their security, and have it administered by and through the court of bankruptcy. In re Eagles (D. C.) 99 Fed. 695. This they had a right to do. A sale if attempted to be made by any other court might have been enjoined, as an interference with property in the custody of the court of bankruptcy. In re Utt, 105 Fed. 754, 45 C. C. A. 32; In re Matthews (D. C.) 109 Fed. 603; Loveland, Bankr. 746, note. It is stated in the record as to the mortgages, except the Campbell mortgage, "there is no dispute. All parties admit their validity and the amounts due thereon." As to the Campbell mortgage, it appears that there is to be a contest on the ground or allegation that it was given within four months of the adjudication, November 7, 1906, to secure Campbell as indorser and surety on pre-existing debts; hence a preference. But we are not dealing with this question now; "sufficient unto the day is the evil thereof." That the other mortgages are valid is admitted. Attempts to have property sold and the exemption allotted in cash are not unknown, but of frequent occurrence. Now, we have the reverse of this proposition, a debtor asking that his homestead be allotted to him in kind. Ordinarily this he would be entitled to under section 2, art. 10, of the Constitution of North Carolina, which provides:

"Every homestead, and the dwellings and buildings used therewith, not exceeding in value one thousand dollars, to be selected by the owner thereof, or in lieu thereof, at the option of the owner, any lot in a city, town or village, with the dwelling and buildings used thereon, owned and occupied by any resident of this state, and not exceeding the value of one thousand dollars, shall be exempt from sale under execution, or other final process obtained on any debt. But no property shall be exempt from sale for taxes, or for payment of obligations contracted for the purchase of said premises."

As said by Justice Walker in delivering the able opinion of the Supreme Court of North Carolina in Joyner v. Sugg, 132 N. C. 580, 44 S. E. 122:

"This article of the Constitution creates no new estate. It only exempts from sale for debt property for the benefit of the debtor and his family. The framers of the Constitution mean exactly what they said, and ordained that a certain part of the real property of the debtor should be set apart for his use and occupation, where he might dwell with his family in peace and contentment without any creditors to molest or make him afraid, so long as he might live, and to extend the benefit of the exemption to the wife during her life, etc. * * * The leading idea, if not the only one, was to create an exemption, and not an estate, and an exemption, too, for a limited period, leaving the estate, which the debtor already had in the land, unimpaired."

The homestead may be sold or mortgaged.

The bankrupts demanded their homestead, but it does not appear which tract—there are three—they occupied, which, as said by Chief Justice Clark, in Thomas v. Fulford, 117 N. C. 681, 28 S. E. 635, is as necessary as that they should own the land. Did they own the land? They, each of them, had conveyed all their homestead interest in the land to secure debts, and held only an equity of redemption, although it was said by Chief Justice Pearson of the Supreme Court of North Carolina, in one case, this was a mere incumbrance, it was an appropriation of the property to the payment of the particular debt, and, upon default, became more than a mere incumbrance, and the bankrupts do not now propose to redeem. The mortgagees would have had the right to sell and convey the title in fee discharged of any exemption. It is not proposed or intended to deprive the bankrupts of their $1,000, real estate exemption, but the trustee has been ordered to hold a sufficient sum to pay them this amount in cash. Unless bankrupts expect by some means to get more, what can be the objection? The fund remains real estate in contemplation of law. The claims being submitted to the bankrupt court by the mortgagees, the powers under the mortgage, delegated to the officer of the court, the trustee in bankruptcy, the court can order him to sell, which in the case here he has done. There is no allegation the sale was not conducted in a manner altogether fair and proper, nor that the price bid was not a fair price, nor that any other injustice or wrong has been done the bankrupts, except that they are deprived of their homestead exemption which they had conveyed in having it laid off and allotted by metes and bounds in land. For the reasons stated, the decision of the referee is in all respects affirmed.

The counsel for creditors did not appear on the day set for hearing them or favor or serve the court with a brief, as did the counsel for bankrupts afterwards. The authorities filed are mostly under the act of 1867, in which it will be noted the provisions as to exemptions are essentially different from the act of 1898, the present act, which adopts the state laws on this subject. In re Richardson, 104 Fed. 873, 44 C. C. A. 235.

In re PARAMORE & RICKS.

(District Court, E. D. North Carolina. August 27, 1907.)

BANKRUPTCY—EXEMPTIONS—DISPOSITION OF FUND.

Where the homestead exemption of a bankrupt has been allotted to him from the proceeds of land sold by the trustee, the court of bankruptcy, having no power to administer the fund, cannot order it paid over to a mortgagee, though the mortgage is valid as between the parties as an assignment of the homestead interest, and can only direct its payment to the bankrupt.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 677.]

In Bankruptcy. On review of decision of referee.

Moore & Long, for bankrupts.
Skinner & Whedbee and F. G. James, for creditors.
T. J. Jarvis, for N. W. Campbell and the bankrupts.

PURNELL, District Judge. The question involved in the appeal from the referee is novel and perplexing. The referee finds as a fact that within four months of the adjudication the bankrupts executed a mortgage with which the creditors in bankruptcy really have no concern, except that there is in the hands of the court or its officer $2,000 which the court must get rid of, pay to the party entitled thereto. The creditors are not interested in the disposition of the fund, except, if the homestead had been regularly laid off or allotted in land, a small amount might have been realized from a sale of the reversionary interest. But this was not practical under the peculiar circumstances, and it is said that creditors have been benefited several thousand dollars by the sale of the land as made under the order of this court. It is the homestead of the bankrupts, the proceeds of the sale by the trustee of real estate, and under a fiction of the law remains real estate. This fiction cannot be sold. Within four months of the adjudication Paramore & Ricks executed a mortgage to N. W. Campbell, a copy of which is in the record, to secure the payment of $12,000, dated November 7, 1906, which recites as a preamble:

"Whereas H. A. Paramore and J. A. Ricks are justly indebted to N. W. Campbell in the sum of twelve thousand dollars as evidenced by their twelve bonds, due and payable, three thousand dollars in sixty days from date," etc.

And this is all the evidence as to the debt to secure which the mortgage was given. This mortgage was put in evidence by counsel for the creditors. There were other mortgages executed prior to the Campbell mortgage, under which the land was sold, but no other liens, by judgment or otherwise, appear in the record. It may be Campbell knew of the insolvency of the firm, and it may from the instrument itself be inferred, from the preamble, the mortgage was given to secure a pre-existing debt, but as to whether Campbell knew of the insolvency of the firm or not, and the mortgage was given to hinder and delay creditors, all important in bankrupt proceedings, the court has no means of knowing. Counsel may know, the court does not; and, no questions of this nature being raised, the court will not interpret them ex mero motu.

Paramore & Ricks, the firm, was much involved, had executed several mortgages under which the property was sold, and $2,000 reserved as the bankrupt's homestead exemptions allowed by the Constitution and laws of the state. The bankrupts ask that this sum be paid to them, and Campbell insists he is entitled to it under his mortgage; $3,000 being now due. The court is anxious to get rid of this fund according to law, to do equity between the parties. It cannot wash its hands and thus get rid of the matter, but is charged with the administration of the estate, even as to exemptions. Before the referee a motion was made that this money be paid over to the bankrupts. "This motion is overruled, the referee holding that this money is real estate, to be administered as real estate under the laws of the state of North Carolina; that the reversion in the same should be sold by the trustee as if it was actually real estate; that the same should be paid to the clerk of the superior court of Pitt county, the domicile of both bankrupts, or elsewhere as may be ordered by the judge of the District Court, to await the determination of the homestead estate. From this ruling of the referee the bankrupts appealed to the judge of the District Court. Counsel for N. W. Campbell, holding the mortgage referred to, moved the court to order that the said sum of $2,000 be paid to the said N. W. Campbell as assignee of the bankrupts under said mortgage. This motion is overruled, the referee holding that said mortgage is void as to creditors, and the said Campbell can claim nothing under it in this court, for that the same was executed within four months prior to the filing of the petition in bankruptcy, and if the said mortgage is valid between the bankrupts and the said Campbell, the state court is the proper tribunal to determine this question." Possibly the conclusions reached by the referee are the wisest, and this court would be glad to refer this whole matter to the state court, where it properly belongs, but the court is not inadvertent to that line of decisions which hold the trustee is vested with no title to the exemptions. Lockwood v. Exchange Bank, 190 U. S. 294, 23 Sup. Ct. 751, 47 L. Ed. 1061. Touching exemptions, the bankrupt act of July 1, 1898 (30 Stat. 548, c. 541 [U. S. Comp. St. 1901, p. 3424]), adopts the state laws of the domicile of the bankrupt. Section 6. Richardson v. Woodard, 104 Fed. 873, 44 C. C. A. 235; Steele v. Buel, 104 Fed. 968, 44 C. C. A. 287. The homestead has been allotted. Campbell, mortgagee, claims it has been assigned to him. The bankrupts claim it should be paid to them.

Following the decisions of the state Supreme Court and applying the provisions of the act of Congress requiring the trustee to reduce the estate of the bankrupt to money, this court held in Re Woodard (D. C.) 2 Am. Bankr. Rep. 339, 95 Fed. 260, that the reversionary interest of the homestead must be sold. It was this decision the referee was seeking to comply with, and there is no reason to doubt the correctness of the conclusion rendered in Re Woodard, supra. But the Supreme Court of North Carolina has departed somewhat from the former decisions of that court touching the homestead estate, and hold the homesteader can sell and convey the homestead and purchase another. From this decision and others on the subject which this court follows as the law of the domicile, the debtor has an estate, not in

fee, but such an interest in land as must, as held in the Woodard Case, be sold under the bankruptcy act. The debtor is entitled to his homestead, which he can convey, the creditor is entitled to his debt, which debt according to the terms of the contract is due. To invest the amount as intimated by the referee would soon entangle this court with trusts for which no authority can be found. The assignment or conveyance in the mortgage of the homestead is conditional, but the condition has been violated (the debt not paid at maturity), default has been made and the power of sale become absolute, the sale has already been made, by order of court, after due consideration. To pay the fund over to the bankrupts would probably be to dissipate it. It would or could be spent and the creditor left with nothing. The mortgage is valid interparte, and is only made invalid under certain conditions as to creditors by the bankruptcy act. To do as near equity as possible, this court would be disposed to order the fund paid to Campbell as a credit on the debt secured thereby, but the Supreme Court of the United States has decided in Lockwood v. Exchange Bank, 190 U. S. 294, 23 Sup. Ct. 751, 47 L. Ed. 1061, the court of bankruptcy cannot administer this fund but it belongs to, and, upon being set aside, rests in the bankrupts.

The following is the syllabus of the case referred to, and seems to settle the question involved.

"Under the bankruptcy act of 1898, the title to property of a bankrupt which is generally exempted by the law of the state in which the bankrupt resides remains in the bankrupt, and does not pass to the trustee, and the bankrupt court has no power to administer such property even if the bankrupt has, under a law of the state, waived his exemption in favor of certain of his creditors.

"The fact that the act confers upon the bankruptcy court authority to control exempt property in order to set it aside does not mean that the court can administer and distribute it as an asset of the estate. The two provisions of the statute must be construed together and both be given effect.

"The discharge of the bankrupt, however, can be withheld until a reasonable time has elapsed to enable creditors to assert in a state court their rights to subject exempt property in satisfaction of their claims under waivers given as security therefor by the bankrupt."

The fund therefore must be paid to the bankrupts as their homesteads. This court has no other jurisdiction or control thereof under the law as settled by the Supreme Court of the United States.

DOWAGIAC MFG. CO. v. BRENNAN & CO. et al.

(Circuit Court, W. D. Kentucky. October 5, 1907.)

APPEAL AND ERROR—RECORD—AUTHORIZING USE OF ORIGINAL PAPERS.

Clause 4 of rule 14 of the Circuit Courts of Appeals (150 Fed. xxix, 79 C. C. A. xxix), which provides that "whenever it shall be necessary or proper in the opinion of the presiding judge in any Circuit or District Court that original papers of any kind should be inspected in this court upon writ of error or appeal, such presiding judge may make such rule or order for the safe-keeping, transporting and return of such original papers as to him may seem proper," fixes the limit within which the presiding judge may act in such matter and he is not authorized to make an order for incorporating original papers introduced in evidence in the record on

appeal, instead of copies, merely for the purpose of saving expense to the parties, nor unless in his opinion an inspection of the originals by the appellate court, as distinguished from authenticated copies, is either necessary or would be useful or aidful in the determination of the appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 2639.]

Fred L. Chappell, for complainant.
Staley & Bowman, for defendants.

EVANS, District Judge. A stipulation of counsel has been filed in this case to the effect that a large—doubtless very much the larger—part of the papers which constitute the files of the record and upon which the court acted in determining the controversy shall, without being copied, be sent up to the Circuit Court of Appeals to be considered by that court as part of the record before it on the hearing of the two separate appeals which have been taken by the parties, respectively, from the judgment rendered by this court, and a motion has been made for an order accordingly. The counsel who presented the matter stated that the motion was based upon what it was supposed would be a proper or (we infer) an admissible construction of rule 14 of the Circuit Court of Appeals of this Circuit. 150 Fed. xxviii; 79 C. C. A. xxviii.

In passing upon the motion, we shall assume that this rule fixes the limit to which the Circuit Court of Appeals was willing to go or to permit another court or judge having no control over the appellate proceedings to go in such cases. Ordinarily under the statute there is annexed to the writ of error or to the order allowing an appeal a complete transcript of the entire record, including not only the record proper as fixed by section 750 of the Revised Statutes [U. S. Comp. St. 1901, p. 591], but all of the evidence considered at the hearing. Clause 4 of rule 14 provides for an exception, if it can be called such, in this language:

"Whenever it shall be necessary or proper, in the opinion of the presiding judge in any circuit or district court, that original papers of any kind should be inspected in this court upon writ of error or appeal, such presiding judge may make such rule or order for the safe-keeping, transporting and return of such original papers as to him may seem proper, and this court will receive and consider such original papers in connection with the transcript of the proceedings."

The writer, the presiding judge in this case, is now called upon to decide whether it is "necessary" or "proper" that the original papers shall be "inspected" by the Circuit Court of Appeals in lieu of copies in order to a proper understanding of the questions involved on the respective appeals. It may be presumed that this power was delegated to the presiding judge upon the idea that he had acquired pretty full if not accurate ideas and information about the case so as to enable him, after final judgment, to see whether an inspection of the original papers, instead of duly authenticated copies, would be necessary or proper in enabling the appellate court to fully understand the case. That such "inspection" of the original papers in this case would be "necessary" to that end is out of the question. The originals would not show a single thing essential to any decision which accurate copies

would not equally show. It is therefore impossible to conclude that it is "necessary" for the appellate court to "inspect" the originals as distinguished from authenticated copies.

Whether such an inspection would be "proper" is a matter of some delicacy for the presiding judge, inasmuch as it is inconceivable that there would be any impropriety in the inspection by the Circuit Court of Appeals of anything in the record, but we suppose the word meant something equivalent to the word "useful" or the word "aidful," if there be anything more than the idea of necessity involved in its meaning. Assuming that the rule intends to use the word "proper" in the sense of useful or aidful, we must again say that it seems to the presiding judge, with a perfect recollection of the matter, that the inspection of the originals, instead of copies, could not by any possibility aid the court in reaching a conclusion upon any question involved in the case. The inspection of the copies and the inspection of the originals would be exactly as useful, the one with the other. So that we conclude, also, that within the proper interpretation of the rule the inspection of the originals as distinguished from the copies would not be "proper" because neither "useful" nor "aidful." Besides, it must have been the policy of Congress, as well as the appellate court, not to require original papers and records to be taken out of the custody of the courts of original jurisdiction and of their clerks, and sent to distant points with all the attendant risks of loss and destruction, unless there were some useful or necessary purpose to be subserved, in which event, of course, other considerations ought to give way. Familiar instances suggest themselves in this connection, namely, where there might be a conflict over handwriting or authenticity of documents or their age. Also, there may have been exhibited machines or models or other things, but these are provided for by the thirty-fourth rule of the Circuit Court of Appeals, and refer to "material" exhibits. The least attention to that rule would show that it had no reference whatever to written evidence. In appeals it has always been intended that copies should be transmitted, and, as the record is usually printed for the appellate court, the judges of that court need not otherwise, and most probably would not otherwise, see the originals, and the danger of losing or mutilating important papers if they are sent to the printer in the originals would be very considerable.

These are the general views we entertain; but, in the case before us, there was no reason for the motion given at the hearing except that copies would be expensive, which meant that the clerk would not get his legitimate fees for making them. This does not seem to be a good reason here, as the parties neither sue nor defend in forma pauperis. And it may not be amiss to remark that in his opinion in this very case the presiding judge felt called upon to remark upon the extravagance and recklessness of at least one of the parties in the filing of papers as parts of the testimony. What was thus done was not the fault of the clerk, and, if matter was put in which it would be expensive to copy, the doing of that was the work of the parties to the litigation. Upon the whole case, and as at present advised, we do not think it would be a wise or useful precedent, nor a thing in itself nec-

essary or proper, to do as the parties desire. The motion is accordingly overruled.

Since writing as above, our attention has been directed to the opinion of the Supreme Court in the case of Craig v. Smith, 100 U. S. 226, 25 L. Ed. 277, which fully supports all we have said. Among other things it was there held that papers belonging to the files of the court should not be removed therefrom except in cases of positive necessity, and therefore, when an appeal is taken no order for transmitting such papers ought to be made, unless the actual inspection of them as originals is required to enable the appellate court to give them their just and full effect in the determination of the suit.

Though in this matter acting for the Circuit Court of Appeals under rule 14, we have not overlooked sections 698 and 750 of the Revised Statutes (under which we may say that our ruling would have been precisely the same), but we have preferred to be guided entirely by the rule of the court where the appeals are pending, particularly as it has fixed the limits within which the presiding judge may act for it after the case has passed from his court.

In re J. M. MONROE & CO.

(District Court, E. D. North Carolina. August 24, 1907.)

BANKRUPTCY—EXEMPTIONS—ALLOWANCE OUT OF PARTNERSHIP PROPERTY.

Members of a bankrupt partnership are not entitled to the allowance of exemptions out of the partnership property under the law of North Carolina, which requires the consent of all the partners to such allowance where at the proper time for claiming the exemptions, and when they were claimed, other members objected, though an attempt was subsequently made to withdraw the objections, and where also it was not shown that the claimants did not have individual property which was exempt.

In Bankruptcy. On review of decision of referee denying exemptions.

W. B. Jones, for bankrupts.

D. E. McIver, for trustee.

PURNELL, District Judge. The referee certifies the following findings of fact and conclusions of law:

"That on June 1, 1906, the partnership was composed of J. M. Monroe, A. C. Thomas, J. D. Walker, and H. G. McIntosh, doing business at Swann Station, N. C., under the firm name of J. M. Monroe & Co., and were insolvent. On June 1, 1906, H. G. McIntosh sold his interest in said copartnership to A. C. Thomas, and gave no notice to creditors, practically all the indebtedness existing at that time. On June 28, 1906, J. M. Monroe, A. C. Thomas, and J. D. Walker, as J. M. Monroe & Co., executed a deed of assignment for the benefit of creditors to John S. McIver. On the 11th day of July, 1906, certain creditors filed a petition asking that J. M. Monroe, H. G. McIntosh, A. C. Thomas, and J. D. Walker, copartners doing business as J. M. Monroe & Co., be adjudicated bankrupts. On the ——— day of July, 1906, John S. McIver undertook to allot to J. M. Monroe and J. D. Walker, without any process of law or authority from any court, personal property exemptions from the stock of goods, wares, and merchandise, the partnership property;

but the exemptions were never delivered to Monroe and Walker. On the 23d day of July, 1906, the said copartners were adjudicated bankrupt in accordance with the petition, including H. G. McIntosh as one of the partners. August 6, 1906, two of said partners, H. G. McIntosh and A. C. Thomas, filed with the court a protest in writing, refusing assent to the allotment of personal property exemptions to J. D. Walker and J. M. Monroe from the partnership property. That on the 13th day of August, 1906, A. C. Thomas and H. G. McIntosh were examined by attorneys for creditors, and each for himself, under oath, expressed his dissent to the allotment of the said personal property exemptions from the partnership property. That on the 29th day of August, 1906, J. M. Monroe and J. D. Walker filed a petition praying that their exemptions, allowed by law, be allotted to them from the partnership property of J. M. Monroe & Co. On the 17th day of September, 1906, A. C. Thomas filed with this court a petition, asking to be allowed to withdraw his dissent filed August 6, 1906. On November 16, 1906, A. C. Thomas filed a petition asking to withdraw his petition filed September 17, 1906, and reaffirming his dissent to the allotment of personal property exemptions to Monroe and Walker from partnership property, and that on November 22, 1906, by petition filed, he withdrew his dissent. That H. G. McIntosh has never consented to allotment of the exemptions of Monroe and Walker from the partnership property. On the 14th day of January, 1906, J. M. Monroe, one of the petitioners, moved to the state of Mississippi with his family. That it was his intention to return to North Carolina when he had accumulated sufficient funds to buy out his copartners in the firm of J. M. Monroe & Co., which time was indefinite and uncertain.

"Conclusions of Law.

"That the attempted allotment of the personal property exemptions of J. M. Monroe and J. D. Walker, by John S. McIver, assignee, is invalid and void. That J. M. Monroe, J. D. Walker, A. C. Thomas, and H. G. McIntosh are not entitled to personal property exemptions from the partnership assets, because of the failure of all the parties to consent. That the time, place, and opportunity contemplated by the bankrupt act, and provided therein for bankrupts to claim their exemptions under sections 2, 6, 7, Act July 1, 1898, c. 541, 30 Stat. 545, 548 [U. S. Comp. St. 1901, pp. 3420, 3424], was given to A. C. Thomas and H. G. McIntosh, and that at such time and place they filed in writing their dissent to exemptions being allowed J. M. Monroe and J. D. Walker, and also under oath expressed this as their intention under the opportunity given them by the act. It is the opinion of the referee that A. C. Thomas cannot now play shuttle-cock with this proceeding in bankruptcy, by filing to-day a dissent and to-morrow an assent subsequent to his first declared intention in the premises.

The bankrupt act provides that the exemptions provided for under the several state Constitutions shall be allowed to the bankrupts in the amounts provided by such Constitution; but the manner and form in which these shall be allotted to the bankrupt, and the time and place where he shall claim or disclaim the same, is provided in the act itself, and does not follow the state procedure, as provided in the Revisal of 1905. In the case of McKeithen v. Blue, 142 N. C. 360, 55 S. E. 285, Mr. Justice Connor in a very able opinion explains clearly the procedure under Const. art. 10, §§ 1, 2, and sections 693–697, Revisal 1905. The bankrupt act, it seems, anticipating the difficulties in allotting to bankrupts their exemptions under state Constitutions, provided in the act the time and place and the manner and form in which allotments should be made. Section 7 of the act provides that bankrupts shall attend the first meeting of creditors, and, in subsection 8, that bankrupts shall prepare within 10 days, unless further time is granted, a claim to such exemptions as he may be entitled to. Under the provisions of this section, A. C. Thomas and H. G. McIntosh appeared at the first meeting of creditors, the time and place provided for them to claim their exemptions, and within the 10 days allowed filed their dissent, and under oath swore that the dissents so filed in writing was their intention at the time. A trustee had been elected at this time, and was ready to allot such exemptions. J. D. Walker and J. M. Mon-

roe at this first meeting of creditors claimed their exemptions; but one of the partners, at least A. C. Thomas, having dissented, the said Walker and Monroe were not entitled to have allotted to them the exemptions claimed.

It is the opinion of the referee that, for the purpose of this proceeding, H. G. McIntosh's dissent, which is still in force, would bar the said Monroe and Walker of their exemptions without considering that of A. C. Thomas. But leaving McIntosh's dissent, for the sake of argument, out of the determination of this question, it is the opinion of the referee that the dissent of A. C. Thomas filed at the first meeting of creditors as mentioned above is sufficient to prevent Monroe and Walker from taking their exemptions from the partnership assets, and that the dissent having been filed in the manner and form prescribed by the act under sections 2, 3, 6, 7, and general order 17, which corresponds to an allotment under the Constitution, and the provisions of the Revisal of 1905, that his subsequent dissent cannot be considered, as he had a time and place and opportunity to claim the same, and disclaimed it; and that he cannot afterwards come in and claim that he is entitled to file a dissent and a consent as his pleasure or purpose may dictate. The procedure had under the act corresponds to an allotment, and, this having happened, he must be held to his election made at the time in the premises. The similarity of proceedings of allotment under the act to that of the allotment under the Constitution and Revisal is not adverted to in the briefs of counsel.

In the evidence given at the examinations held on August 13th, A. C. Thomas states that he is worth the sum of $300 or $400 in personal property. And in the District Court decisions under the bankruptcy act in Re Wilson, 101 Fed. 571, In re Duguid & Son, 100 Fed. 274, In re Woodard, In re Grimes, 94 Fed. 800, In re Steed & Curtis, 107 Fed. 682, it is decided as follows: That in allowing a personal property exemption out of firm assets, even if the partners consent, that it must appear clearly that the members of the firm have no individual property exemption exclusive of the firm assets. If they have such property, then the exemptions cannot be allowed from the firm assets.

For the reasons set forth, the referee is of the opinion that the dissents filed by A. C. Thomas cannot be considered and should be overruled, and that no exemptions can be allowed to J. D. Walker and J. M. Monroe from the assets belonging to the copartnership of J. M. Monroe & Co. That J. M. Monroe was a resident of the state of North Carolina at the time of the adjudication in bankruptcy."

Bankrupts appealed from the ruling of the referee refusing to allow them their personal property exemptions out of partnership property on the ground of dissent thereto by two of the partners. Three dissents and three consents were filed. This looks like trifling with the court, and the order of the referee refusing to allow a personal property exemption out of firm assets is affirmed. That officer has seen and heard the witnesses testify, hence knows more about the real facts in the case than a judge on appeal can know from written testimony. The trustee and creditors object to the allotment.

This case was set down for hearing, but neither the parties nor their counsel appeared. Personal property exemptions are favored as provided for in the state law, but are not handed to parties as on a silver waiter. Certain duties and burdens rest on the party claiming an exemption. He must show affirmatively that he is entitled thereto, and, when it is asked out of firm assets, that he had no personal property exemption independent of the firm property, and the other members of the firm consent that he shall have it out of the assets.

It is therefore ordered that as to findings of fact and conclusions of law the report be, and the same is hereby, affirmed.

UNITED STATES v. LIQUOR DEALERS' SUPPLY CO.

(District Court, E. D. Illinois. September 12, 1907.)

1. INTERNAL REVENUE—SHIPMENT OF LIQUORS—FALSE DESIGNATION.

When spirituous liquors contained in bottles are packed in barrels and shipped and the barrels are marked "Groceries," such shipment is a violation of section 3449, Rev. St. U. S. [U. S. Comp. St. 1901, p. 2277].

2. SAME—INTENT.

In a prosecution for the violation of section 3449, Rev. St. U. S. [U. S. Comp. St. 1901, p. 2277], no question of fraud or of fraudulent intent is involved.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Internal Revenue, §§ 100, 110, 118.]

(Syllabus by the Court.)

Violation of Revenue Law.

The defendant, a corporation, was indicted by the grand jury of the United States for the Eastern District of Illinois, on three counts, charging that it did on three different occasions "ship, transport, and remove, and did cause to be shipped, transported, and removed, a certain quantity of spirituous liquors, to wit, fifteen (15) gallons of whisky in a certain package under another name and brand than that known to the trade as designating the kind and quality of the contents of said package so containing the same; that is to say, said the Liquor Dealers' Supply Company did then and there ship, transport and remove, and did cause to be shipped, transported, and removed the said whisky under the name and brand of 'Groceries.'" Upon the trial the government proved that the defendant shipped whisky from Chicago to Goreville, Ill., by freight in lots of five dozen quart bottles, each shipment being contained in a barrel and the word "Groceries" written with a marking brush on the barrel. On the trial it was contended by the defendant that there could be no conviction because it was not shown that the shipments were made with a fraudulent intent, and, further, that the statute was leveled only against the shipment of one kind or brand of spiritous liquors under the name of another kind or brand.

W. E. Trautmann, U. S. Atty., and George A. Crow, Asst. U. S. Atty.

Alphonse Lefkow, for defendant.

WRIGHT, District Judge, after stating the facts as above, charged the jury as follows: The defendant in this case has been indicted by the grand jury for violation of section 3449 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 2277], which provides as follows:

"Whenever any person ships, transports or removes any spirituous or fermented liquors or wines under any other than the proper name or brand known to the trade as designating the kind and quality of the contents of the casks or packages containing the same, or causes such act to be done, he shall forfeit said liquors or wines, and casks or packages, and be subject to pay a fine of five hundred dollars."

There are several counts in this indictment. The government has abandoned all of the counts except the first, third, and fifth, and you will therefore disregard all the counts of the indictment except the first, third, and fifth. The first count charges that the defendant on the 14th day of February, 1906, in this district, did unlawfully ship, transport, and remove, and did unlawfully cause to be shipped, transported, and removed, a certain quantity of spirituous liquors, to wit,

15 gallons of whisky in a certain package under another name and brand than that known to the trade as designating the kind and quality of the contents of said package so containing the same; that is to say, said the Liquor Dealers' Supply Company did then and there ship, transport, and remove, and did then and there cause to be shipped, transported, and removed, the said whisky under the name and brand of "Groceries." The third count is like it, except the date is charged the 23d day of April, 1906. The fifth the same, except as to the date which is the 22d day of August, 1906.

The exact date of these shipments as alleged in the indictment is immaterial. If they show any shipments within the period of limitations corresponding to the shipment described in the indictment, minus the date, that would be sufficient. Certain documents have been introduced in evidence before you which are alleged to refer to these shipments. It will be for you to determine from all the evidence in the case whether they do or not.

If you believe from all the evidence in the case beyond a reasonable doubt that the defendant did ship, transport, and remove any spirituous or fermented liquors or wines under any other name than the proper name or brand as known to the trade as designating the kind and quality of the contents of the packages containing the same, or caused the same to be done, then it will be your duty to find the defendant guilty on as many counts as the shipments of that kind so made, not exceeding the three counts to which I have alluded.

It is possible for you, gentlemen, if you believe from the evidence that you are warranted in so doing, to find the defendant guilty on a less number of counts than three. You may find it guilty on one, or two, or three, as you may from the evidence determine. You are the judges of the credibility of all the witnesses; so that if you believe from all the evidence in this case that the defendant did ship, transport, and remove liquors as charged in the indictment, and that the packages were marked "Groceries," and that groceries was not the name known to the trade for such liquors, then the defendant will be guilty under this section of the statute. Before you can find the defendant guilty on any of the counts, you must find that the packages containing the liquor were marked "Groceries," because that is the charge in the indictment, and that groceries was not the proper name for the liquors inclosed in the packages.

There is no provision in the statute that it should be fraudulently done, or done with any particular intent. The meaning of the statute is a prohibition against shipping this character of liquors under any other designation than the proper designation. It might be, although that question is not before you, that they could ship the liquors without any designation at all. They were not required to put any marks upon the barrels, but, if they did, they should put the true designation.

It goes without saying that, before you can find this defendant guilty, you must be satisfied beyond a reasonable doubt that it is guilty as charged in the indictment. That does not mean that you should indulge in any fanciful or chimerical doubts not arising from a fair and impartial consideration of the evidence. You have no right to disregard the evidence, but, if after giving the evidence a fair and im-

partial consideration you are satisfied beyond a reasonable doubt that the defendant is guilty as charged in the indictment, then it is your duty to find it guilty.

On the other hand, if you have a reasonable doubt that these shipments were made, if you have a reasonable doubt upon the facts in the case, then it will be your duty to find it not guilty.

NOTE.—The jury returned a verdict of guilty as charged in the first, third, and fifth counts of the indictment, and afterward, on the 30th day of September, after overruling motion for a new trial and in arrest of judgment, the court imposed a fine of $500 upon each count.

In re POLLMANN.

(District Court, S. D. New York. October 3, 1907.)

BANKRUPTCY—PROVABLE DEBTS—SURRENDER OF PREFERENCE.

A lien obtained by a foreign creditor of a bankrupt within four months prior to the bankruptcy, and while the bankrupt was solvent, on property of the debtor in a foreign country through judicial proceedings in the nature of an attachment, which were not opposed, is one sought and permitted in fraud of the provisions of the act within the meaning of Bankr. Act July 1, 1898, c. 541, § 67c(3) 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449], and, where the creditor realizes therefrom payment of a portion of his debt, he is not entitled to prove the remainder as a claim against the estate in bankruptcy in this country without surrendering the amount so received so as to place him on equitable equality with other creditors.

In Bankruptcy. On petition for review of order made by Dexter, referee, disallowing in part the claim of Bruno Klemm.

The bankrupt was adjudicated in July, 1905, pursuant to an involuntary petition filed on the preceding January 20th. On November 3, 1904, Klemm, a creditor residing in Germany, obtained a lien against certain German real estate belonging to Pollmann. The exact nature of the lien in terms of American law does not clearly appear; but it is plain that said lien was not a mortgage or hypothecation existing prior to November 3, 1904, nor was it created on that date by any act of the bankrupt; but then originated in judicial process, and may be fairly described as of the general nature of an attachment. Subsequent to November 3, 1904, Klemm, through judicial proceedings, realized a considerable sum of money out of the attached realty. In October, 1906, the trustee herein began a suit in Germany to set aside said lien and reduce the real estate in question to his own possession. This effort was defeated by the German courts, for reasons not clearly ascertainable from the evidence. On November 3, 1904, Pollmann was solvent, so far as the evidence herein is concerned. After getting what he could from the German realty Klemm filed a claim in this court for the whole amount of his debt less the amount recovered in Germany. This claim has been denied unless he surrenders to the trustee the net proceeds of his German legal proceeding.

Dr. Paul C. Schnitzler, for creditor.
Julius Henry Cohen, for trustee.

HOUGH, District Judge. Inasmuch as there is no evidence of insolvency on Pollmann's part in November, 1904, the referee has based his finding entirely on section 67c(3), Act July 1, 1898, c. 541, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449], holding that the German proce-

dure was of the nature of "an attachment upon mesne process," that it was begun "within four months before the filing of a petition in bankruptcy" against Pollmann, and that such lien (i. e., attachment) "was sought and permitted in fraud of the provisions of this act."

In the able opinion filed by the referee I concur. If the procedure above outlined had taken place, as it well might, in the United States, it cannot be doubted that the successful attaching creditor would have been obliged to refund the proceeds of his attachment. The phrase "in fraud of the provisions of this act" is identical with that in the act of 1867, and refers to any proceedings disturbing the equitable distribution of the debtor's estate (Toof v. Martin, 13 Wall. 40, 20 L. Ed. 481); and the word "permit" does not require any active participation in the process of transfer through legal proceedings. Mere passivity on the part of the debtor is sufficient. The same word ("permitted") is used in section 3a(3), and has been frequently so construed. It is enough that the creditor is active and the debtor permits that activity to be unopposed. In re Thomas, 4 Am. Bankr. Rep. 573, 103 Fed. 272; Wilson v. Nelson, 183 U. S. 191, 22 Sup. Ct. 74, 46 L. Ed. 147. The fact that the lien was obtained in a foreign country can make no difference in the meaning of the phrase "in the fraud of the provisions of this act." That expression does not necessarily mean active fraud or illegality, but intent to prevent equitable distribution of the debtor's property, and where that intent obtains is immaterial.

But, further, the decision is in my opinion right upon broad equitable grounds. It may well have been that the trustee acquired no title whatever to the German realty. Oakey v. Bennett, 11 How. 33, 13 L. Ed. 593. But this proves no more than that Klemm was entitled to enjoy in Germany the fruits of his German legal proceeding. The bankruptcy act (section 65e) declares that no claimant shall be entitled "to collect from a bankrupt estate any greater amount than shall accrue, pursuant to the provisions of this act." This section does not relate merely to dividends. A claimant who comes into the bankruptcy court must get what he gets pursuant to the provisions of the bankruptcy statute, and, if he be permitted in any way to "collect" any where, or any how, more than the statute regards as equitable, this section is useless.

Again, the court in bankruptcy is by elementary rule a court of equity, possessed of full equitable powers within the limitations of the statute, and bound to exercise them in furtherance of the statutory object. In this way the English statutes have been construed from early times. In Selkrig v. Davis, 2 Rose, 291, a Scottish creditor had exercised upon the Scotch property of an English bankrupt much the same legal remedies as Klemm invoked in Germany, and Lord Eldon held that, if he chose to come into an English court, he should be treated as an English debtor who had obtained a preferential advantage, and dealt with as such. In Banco de Portugal v. Waddell, 5 App. Cas. 161, the claimant had reaped some advantage from a Portuguese proceeding of the nature of a general assignment (cessio bonorum) before propounding his unpaid balance as a provable claim in an English court. He was treated in much the same way as has been this petitioner, and the case decided on the ground that he who seeks equity

must do equity. In Re Somes, 3 Manson, 131, it is held for settled law that "one who by legal proceedings in a foreign country obtains part of his claim cannot come into an English court of bankruptcy and prove for the balance without bringing into hotch pot what he obtained abroad," unless he have a lien antedating the date fixed by the bankruptcy statute for the equalization of claims. These decisions are applicable to our procedure; and, in the present condition of international business, every reason exists for their full application. If Klemm, a resident of Germany, may enjoy in the United States the advantages of legal proceedings valid in Germany, such advantage cannot logically be confined to foreigners; for the advantage asserted does not depend upon the person of the creditor, but upon the law of the situs of the property, and American creditors of American bankrupts might be actuated by early suspicion to attach their debtors' foreign estates, and enjoy the proceeds of such legal proceedings, to the destruction of equality.

I think the form of the referee's order would more properly have been that Klemm be denied any dividend until what time all other creditors had received the same proportion of their claims as Klemm has obtained in Germany; but the result is the same, and the order under review is affirmed.

THE TRIPOLI.

(District Court, E. D. Pennsylvania. October 15, 1907.)

No. 14 of 1905.

SHIPPING—INJURY OF STEVEDORE—LIABILITY OF VESSEL.

Libelant, with other stevedores, was engaged in unloading ore from a vessel, when the winch which was being operated by them became defective. They continued to use it for a time, however, when the foreman came and called upon the ship's engineer, who undertook to remedy the defect and then said the winch was all right. It was then tried again; the foreman calling to those below to "look out." The winch failed to work properly, however, and some of the ore was spilled from the bucket while being hoisted, and fell upon libelant and caused his injury. *Held*, that having knowledge of the defective condition of the winch, and having been warned, libelant was negligent in not keeping out of the way, and that the vessel was not liable for the injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, §§ 349-351.]

In Admiralty. Suit by stevedore for personal injuries. On final hearing.

William J. Conlen and Jasper Yeates Brinton, for libelant.

Henry R. Edmunds and Convers & Kirlin, for respondent.

HOLLAND, District Judge. The libelant, Patrick Joyce, with other stevedores, was working upon the Tripoli on April 29, 1905, about 20 minutes of 11 at night, loading iron ore in buckets, which was being hoisted out at the time. He was working, together with other stevedores, for Morris Boney & Son, who were master stevedores employed to discharge the cargo of ore. The winchman, the

hatch tender, and the others employed about hatch No. 4, where the accident happened, were co-employés of the libelant. It was discovered by the hatch tender and winchman that the winch used to hoist the buckets at No. 4 was out of order; but the men concluded to run it slowly, notwithstanding its defective condition, in order that they might make at least a half day. It was worked in this condition until 20 minutes past 11 at night, when the foreman of the stevedores, Mr. Taylor, came aboard and noticed the defect. He sent for the ship's engineer, who did some fixing at it, and then said it was all right, to go ahead with the work. The foreman of the stevedores notified all in hatch No. 4, where Joyce was working, to "look out," and then directed the winchman to try the winch in hoisting a bucket of ore; but in the attempt to hoist the bucket after the repairs had been made it was discovered that the repairs had not prevented the defective working of the winch, and in raising the bucket some of the ore was thrown out and fell upon the plaintiff's head, as a result of which he sustained some injury, and was taken to the hospital, where he remained five days. The winch was then used no further, and it took the ship's officers about 1½ days to repair it.

The libelant seeks to hold the vessel responsible for this injury upon the ground that a defective winch was supplied for use in unloading the cargo. It is true the winch was defective; but it was discovered by the stevedores themselves, and they deliberately attempted to use it in its defective condition for the purpose of avoiding the loss of time, and took the risk of injury in thus using it. The ship's engineer, when called upon, made such repairs as appeared to him to be necessary, and a trial was then had, of which the libelant, with others in hatch No. 4, had notice, and he could easily have avoided any danger by observing such care as the circumstances, with which he was acquainted, required. He knew of the defective condition of the winch, as he had been working with it in that condition before the foreman attempted to have it repaired, and when he was notified to "look out" it was his duty to keep from under the bucket until the condition of the winch was ascertained.

The petition of libelant is dismissed.

LYDIA COTTON MILLS v. PRAIRIE COTTON CO.

(Circuit Court of Appeals, Fourth Circuit. September 11, 1907.)

No. 685.

1. CONTRACTS—CONSTRUCTION—QUESTIONS FOR COURT AND JURY.

As a general proposition, where the issue is one of fact as to the performance of a contract, it is the province of the jury to pass upon it; but, before the question of compliance or noncompliance arises, there must be a determination of the terms of the contract itself, and where it is in writing showing the whole of the agreement, and its terms are capable of intelligent interpretation, its construction is for the court, and not for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 767.]

2. SALES—CONSTRUCTION OF CONTRACT.

In accepting an offer made by plaintiff to furnish a quantity of cotton, defendant wrote as follows: "We understand this cotton is to be full 1⅛ inch staple, same as the staple in the 25 bale sample lot you shipped to us. the grade to be average strict middling, nothing middling. We desire that you be particular in the selection of this cotton as nothing less than full 1⅛ inch, same type as the sample lot will be suitable to us." *Held*, that the contract so made required the cotton sold to be of the same grade as the sample lot of 25 bales, and that, where plaintiff admitted that the cotton shipped thereunder was not of such grade, it could not recover for breach of the contract by defendant in refusing to accept the same.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 188.]

3. WRIT OF ERROR—GROUNDS OF REVIEW—PRESERVATION—MOTION FOR DISMISSAL.

A defendant may assign for error the overruling of a motion to dismiss, made at the close of plaintiff's evidence, on the ground that there was no issue of fact for submission to the jury, although such motion was not renewed at the conclusion of all the evidence, where the only question in issue under the evidence was the proper construction of a written contract plain in its terms, upon which defendant's evidence had, and could have, no bearing.

McDowell, District Judge, dissenting.

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

W. R. Richey and Wm. G. Sirrine, for plaintiff in error.

Howard B. Carlisle (Carlisle & Carlisle, on the brief), for defendant in error.

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

BOYD, District Judge. The Prairie Cotton Company, the plaintiff below in this case, which will be denominated plaintiff hereafter, is a Mississippi corporation, doing business in that state as a dealer in raw cotton. The Lydia Cotton Mills, the defendant below, which will hereafter be referred to as the defendant, is a South Carolina corporation, located in that state, carrying on the business of a manufacturer of cotton. The present suit was brought by the Prairie Cotton Company to recover the sum of $2,500, alleged to be due the plaintiff on a

contract for the sale and delivery of cotton to defendant. The allegations of plaintiff are, in substance: That on the 11th of October, 1904, the defendant contracted to purchase from plaintiff 200 bales of cotton at the price of 10½ cents per pound, the staple to be 1⅛" long, according to the custom of the cotton trade and of strict middling, nothing below middling; that 50 bales of this cotton were shipped to the defendant and were received and accepted; and that 150 bales were shortly thereafter shipped, which were refused. Thereupon the plaintiff, upon the refusal of the defendant to accept the last shipment of 150 bales, sold the same, and the basis of claim in the suit is the alleged loss by reason of the difference in the price received at the sale and the price agreed upon, together with the costs incident to the sale, et cetera, making in all the sum of $2,500.

The defendant answers and says: That on the 13th of October, 1904, it agreed to take from the plaintiff 200 bales of cotton at the price of 10½ cents per pound, but that the cotton contracted for was to be of the same quality and character as the 25 bales which had been theretofore purchased by the defendant from plaintiff as a sample lot; that the cotton was to be full 1⅛" in length of staple and was to average strict middling, nothing middling; that the 50 bales of the first shipment were sent with bill of lading attached; that defendant, without opportunity to examine the cotton, paid for it and received it from the railroad by which it had been shipped, but, after receiving it, upon examination, it was found that the cotton was of an inferior grade and was not the kind and quality of cotton, especially in length of staple, as the sample which had been furnished by the plaintiff and as had been contracted for by the defendant; that, when the last shipment of 150 bales arrived, defendant declined to accept that, it being of the same length of staple, quality, and grade as the 50 bales theretofore received, and not such cotton as had been contracted for.

The cause was tried by jury and a verdict rendered in favor of the plaintiff for $2,255.66. The court, however, under a practice which prevails in South Carolina, reduced the verdict to $1,127.83, and for the latter amount a judgment was rendered, to which the defendant's counsel duly excepted. At the close of the plaintiff's testimony the defendant's counsel moved the court to nonsuit the plaintiff on the ground that upon the undisputed evidence the plaintiff was not entitled to recover, and especially upon the exhibition of the communications, by letter and telegraph, between the parties, which were the evidences of the contract of purchase, together with the admissions of plaintiff through its agent, examined as a witness. The court refused to grant the motion, to which the defendant duly excepted. There were several exceptions taken by defendant during the trial; one particularly relied upon relating to the question as to whether or not there was a rescission of the contract by the plaintiff. But we do not deem it necessary to consider this nor any other question involved in the case, except that of a proper construction of the contract of purchase. In order to arrive at a full understanding of the contract, we deem it necessary to give the correspondence between the plaintiff and the defendant in relation thereto in full. The transaction was in 1904, and

on the 13th of August of that year the defendant addressed the plaintiff as follows:

"Aug. 13th.

"We will purchase a contract of cotton 1⅛ inch staple running from Sept. 1, 1904, to Sept. 1, 1905, the cotton to be paid for as delivered and to be delivered 150 bales per month f. o. b. our mills. This cotton has to average full 1⅛ inch staple, bender, nothing less than full will be accepted. If you are interested in such a contract we will be pleased to have your quotations and views from time to time until the contract is closed."

Plaintiff to defendant:

"Aug. 18th.

"Yours 13th to hand. Contents noted. We feel satisfied we can supply your wants as to the character of cotton wanted if we can agree on price. Such cotton as you mention will always command a pretty good premium over short cotton, say 1 to 1-16 staple. Will however, keep your company posted and will do my best to supply your wants."

Defendant to plaintiff:

"Aug. 17th.

"We desire to have you forward us at once a sample of cotton regardless of the grade that measures full 1⅛ inch staple, the length in staple being the point in question. Please let us have this sample at once with all expense charges to us."

Prairie Cotton Company wrote on bottom of this:

"Gentlemen: At present there is nothing in this market that will represent the cotton as required by you. In fact there is no cotton here at all. Will send type as soon as it can be obtained."

Plaintiff to defendant:

"Aug. 31, 1904.

"We sent you a few days ago types showing what we call very full 1⅛ inch cotton, in fact it is 1⅛ inch to 1 3-16 inch. Would be glad to know what you consider it. Kindly let us hear from you."

Defendant to plaintiff:

"Sept. 1, 1904.

"We are in receipt of your favor of the 28th ult. and are to-day in receipt of the sample of 1⅛ inch staple cotton. We have gone over this cotton carefully and find that it will just about average 1⅛ inch staple. So we will retain this sample as your type of full 1⅛ inch staple cotton for future reference. We are now in the market for 100 bales of this cotton. Let us have your price—landed Clinton, shipment at once. We are also in the market for 150 to 200 bales cotton per month for each month until Sept. 1, 1905. See our letter of August 13th. Will such deliveries be satisfactory with you? Please let us know. We are now ready for your quotations from time to time. We desire the following grade: Strict middling. We purchase by Carolina mill rules."

Plaintiff to defendant:

"Sept. 3, 1904.

"Yours 2d to hand; contents noted. The sample sent you is very full 1⅛ inch; in fact it is what we sell for ⅛ to 3-16 cotton. We sold this cotton few days ago 12¾ landed; it is worth 11¾ here. We can land you 100 to 200 bales Sept. shipment say for 12¼, probably 12 cts. This character of cotton commands good premium. Can sell you commercial 1⅛ inch or full 1 1-8 to 1⅛ at much less price. Cheap cotton is a thing of the past; the crop is not made. Let us hear from you."

Telegram:

"Sept. 12.

"Let us ship you 25 bales to show you the style and character of the cotton. Eleven quarter. This quarter less than we are getting, but want make start with you as we are satisfied it will lead to business. Answer."

Defendant to plaintiff:

"Sept. 12.

"In reply to your esteemed favor of to-day by wire we replied as enclosed confirmation that we could not use the cotton at 11½ cts. We are looking for 10½¢ cotton to-day and lower during the week. We thank you for your offers and hope to have them continually."

Plaintiff to defendant (telegram):

"Sept. 13.

"We want answer ours last night. Important. You will be pleased with the cotton. Can sell cotton elsewhere if you cannot use."

Defendant to plaintiff (telegram):

"Sept. 13.

"Will take 25 bales 11 cts. if immediate shipment. Answer."

Plaintiff to defendant:

"Sept. 13.

"Telegram received. Will ship 25 bales eleven. This complimentary shipment as we are anxious you try cotton, believing same will result to our mutual benefit; cotton goes forward to-morrow."

"Sept. 13.

"Your telegram accepting 25 bales 1⅛ inch St. middling, to hand. We replied would ship you the cotton more as a compliment than as a monetary basis. Now you gentlemen will find this lot to be full up, in fact the cotton will pull 1⅛ to barely 3-16. We shipped it full in order that you could judge what the cotton is. You must, however, bear in mind that this is green cotton and will not hold up in weight like old cotton. We make a specialty of staple cotton from 1⅛ to 1⅜, and if you can pay the price we can furnish you with some satisfactory business. Now if you can use 1-16 to 1⅛, or what is known as commercial 1⅛, can cut the price, but if you expect to buy good first class stuff you must expect to pay first class prices. Hope this little 25 bales will lead to further business."

"Sept. 14.

"Yours to hand; contents noted. Not disputing your word, but can't buy 1⅛ cotton such as we expect to ship you or call 1⅛, at 10⅞. You might buy what you and your friends call 1⅛, and what suits your trade fully as well as if you were getting the actual 1⅛. We want your business and if the 25 bales now going to you not better and worth more money than the 1⅛ you speak of having bought at 10⅞ we will give you the cotton. We would like to see what you call 1⅛, or what suits your trade for 1⅛; there are a good many different ideas of 1⅛ cotton, but only one of the actual stuff itself. We sold you the 25 bales ½ ct. less than we could have gotten East."

Defendant to plaintiff:

"Sept. 17.

"We forward telegrams as enclosed confirmation to-day. Please rush this 25 bales of cotton with all despatch; we wish for it to reach Clinton next week without fail as we desire to use it along with other cotton we have. We are in receipt of your favor of the 14th instant and note what you have to say and are interested."

Telegram:

"Sept. 17.

"On what day was 25 bales cotton shipped? Answer."

Plaintiff to defendant (telegram):

"Sept. 17.

"Telegrams received. Bill lading and documents taken out fourteenth. Cotton went via Birmingham and Southern Railway."

Defendant to plaintiff:

"Sept. 21.

"Up to this time we have never received the 25 bales of cotton nor B. L. through bank to show shipment. We are unable to trace and we desire that you institute a telegraphic tracer after the lot and see that we get the cotton this week without fail."

Plaintiff to defendant (telegram):

"Sept. 28.

"Offer one hundred strict to good middling full inch eighth eleven quarter, handsome lot, can not do better. Answer early to-morrow."

Defendant to plaintiff:

"Sept. 28.

"Your telegram received offering 100 bales 1⅛ inch strict to good middling full 11¼ cts. We have not yet received the 25 bales of sample cotton shipped by you; we would like to see this cotton before purchasing further. We do not wish to buy at 11¼ cts. as we are confident there will be a great decline in cotton within the next 30 or 40 days."

"Oct. 4.

"We are just to-day in receipt of your sample lot of 25 bales. We supposed that it had been lost in transit. The lot lost 270 lbs.; according to Carolina mill rules you are entitled to 3 lbs loss per bale. You will please remit for amount per bill enclosed less your 3 lbs. Please quote us immediately on receipt of this letter your closest price for 1,800 bales of this cotton, 1⅛ inch staple exactly as your type shown in this 25 bales. Delivery of this 1,800 bales to be made to the mill 200 bales each month until the contract is exhausted. You must give your closest figures to interest us."

Plaintiff to defendant (telegram):

"Oct. 7.

"Offer one hundred or two hundred shipment this month equal the 25 bale lot in staple, eleven cents. It requires time and care to select this character of cotton, which is not very abundant, probably shade this price quarter if answer early to-morrow."

Defendant to plaintiff:

"Oct. 7.

"We are in receipt of your wire offering 100 or 200 bales this month at 11 cts. same as sample lot of 25 bales. We have just purchased some of this cotton at 10¼ cts. and with this before us we consider your price too high. If on receipt of this letter you desire to sell us from 200 to 500 bales of this cotton landed Clinton 10¼ cts. to be delivered 100 bales Oct., 200 Nov. and 200 Dec., please wire us for acceptance."

Plaintiff to defendant (telegrams):

"Oct. 9.

"Would advise you taking on more from same parties at price named, 10¼, can not supply your wants at such price."

"Oct. 10.

"Quote 1⅛ average st. middling, nothing below middling, eleven, if limit impracticable answer the best you can do, will execute order if possible for 100, answer early to-morrow."

Defendant to plaintiff (telegram):

"Oct. 10.

"Offer ten fifty hundred bales like sample lot. Answer."

Plaintiff to defendant (telegrams):

"Oct. 10.

"Telegram received. Your limit impracticable for us. We sold to-day same cotton eleven cents; will sell you hundred this price; we can not do better, market firm, if accepted answer at once."

"Oct. 11.

"Will ship you one hundred or two hundred ten three-quarters; we are giving you full inch eighth cotton; if you care to shade staple a little can do the business for less; we make this offer to keep business going with you; answer early to-morrow sure, cannot do better."

Defendant to plaintiff (telegram):

"Oct. 11.

"Offer ten fifty hundred bales full inch eighth. Answer."

Plaintiff to defendant (telegrams):

"Oct. 12.

"Telegram received all right. Will ship you one to two hundred bales inch eighth, ten half, average. Strict middling, nothing below middling. You have bought some cheap cotton. Confirm."

"Oct. 13.

"Do you confirm one or two hundred on sale made you to-day? Either amount satisfactory to us. If you want the two hundred will ship. Answer."

Defendant to plaintiff:

"Oct. 13.

"We are in receipt of your telegram offering us the 100 to 200 bales full 1⅛ inch cotton 10½ cts. We have wired you as enclosed confirmation that we would take 200 bales. We will be pleased to have you ship 100 bales of this cotton now and if agreeable we would like to have the other 100 bales shipped any time between Nov. 1st and 10th. We understand this cotton is to be full 1⅛ inch staple, same as the staple in the 25 bale sample lot you shipped to us, the grade to be average strict middling, nothing middling. We desire that you be particular in the selection of this cotton as nothing less than full 1⅛ inch, same type as the sample lot, will be suitable to us. Please route via Birmingham, or Atlanta, and S. A. L. R. R. to Clinton, S. C., as this routing will give us a much quicker shipment."

The principal witness examined for the plaintiff in the trial was a man by the name of Fowler, the owner and general manager of the business of the plaintiff, who conducted the correspondence with defendant. Fowler admitted that the 150 bales which defendant declined to accept was of the same grade and the same character of cotton as the 50 bales which had been sent before with bill of lading attached; and he further admitted that none of the 200 bales, composed, as stated, of the 50 bales first sent under the contract of purchase and the 150 bales which were refused, was of as high grade of cotton as the 25 sample bales; and it was also shown, by the undisputed evidence, that the 25 sample bales was not only a better grade of cotton than the 200 bales, but also commanded a higher price in the market.

The prime question, therefore, is what the contract between the plaintiff and the defendant was. The counsel for the plaintiff contends that the question as to whether the plaintiff complied with the terms of the contract or not was for the jury to determine. It is true,

as a general proposition, that where the issue is one of fact as to the performance of the terms of a contract, it is the province of the jury to pass upon it. But before the question of compliance or noncompliance arises, there must be a determination of the terms of the contract itself. In case of an oral contract, where the parties disagree as to its terms, or an ambiguous written contract, in which testimony aliunde is offered to explain its meaning, the intervention of a jury is often necessary. But in that of a written contract showing the whole of the agreement, couched in terms such as to render it capable of intelligent interpretation, its construction is for the court, and not for the jury. In our opinion, the contract between the parties to this controversy is of the latter kind. It is all contained in the correspondence above set forth, and we think that the intention of the parties to the contract at the time of the correspondence is readily gathered. To our minds there is no uncertainty or ambiguity about it, and a proper construction of it is that the defendant contracted to buy 200 bales of cotton from the plaintiff of the character, grade, and quality of the 25 bales which had been theretofore sent as a sample. There is no contention that the cotton shipped under the contract fulfilled these requirements.

On the other hand, plaintiff admits that it did not. It is a well-settled rule that courts will ascertain what parties to a contract have agreed to by what they have said and by the meaning of the words used to express their intention. This doctrine is elementary.

In this case it appears from the record that defendant's motion for verdict or nonsuit was made at the conclusion of plaintiff's testimony, and that upon the refusal of the court to grant the motion the defendant introduced a witness by the name of Bailey, who testified as follows:

"Mr. Sirrine: Q. State to the jury plainly what you and Mr. Dougherty said that day. A. Mr. Dougherty came into my office the day of the arrival, and I sent over to the warehouse where we had this cotton, this 50 bales of cotton, and had him to go through it, and he came back to my office, and I carried him into my private office with Mr. Smart, and we asked him what he considered the cotton, and he said that he called it 1⅛". We brought out the samples of the 25 bales and laid them beside the desk in which we had the cotton that we had received, and we said to him: 'Do you consider this cotton the same as the 25 bales?' He said: 'I do not.' And he said: 'Well, I would like to make some settlement of this matter.' And we told him we were very anxious to settle it, that we were needing cotton, and were in a straight right now. We asked him what he wished to do, and he said he did not know. I said: 'Well, Mr. Dougherty, we will state our position in this matter, and we will tell you what we will do. If you will have your people to authorize the bank to release the drafts so the railroad people can deliver this cotton to us, you can have our warehouse at your disposal, and you can draw the samples from this cotton, and you can arbitrate according to the Carolina Mill Rules, and if that is not satisfactory you can send them to New York and have them classified, and if, after the cotton has returned, you lose in the case, we will charge you not a cent for the storage of this cotton in our hands.'

"Q. What did he say to that? A. He said he would not do it.

"Q. Did he say anything about his authority to do or not to do that? A. Well, the impression was that he had the full authority.

"Q. You spoke of the Carolina Mill Rules, are these the rules, July 1, 1904

(handing witness book entitled 'Rules Known as the Carolina Mill Rules and Governing Sale of Cotton to Domestic Mills')? * * * A. Yes, sir."

The defendant did not renew the motion at the conclusion of all the testimony. Plaintiff's counsel have made no point, either in the brief or in the oral argument, because of the omission of defendant's counsel to renew the motion for nonsuit at the close of all the testimony. Under these circumstances we think the court may well assume that plaintiff's counsel waived objection, if such there might be, to this failure, and did not intend to take advantage of the omission of defendant's counsel in this respect. We are led, however, to consider this point because of the fact that in the conference of the judges and upon an examination of the record it is called to our attention, and the question has arisen, as to whether or not by this omission the defendant has not forfeited its right to be heard.

In Accident Insurance Company v. Crandal, 120 U. S. 527, 7 Sup. Ct. 685, 30 L. Ed. 740, the Supreme Court lays down the rule that the refusal of the court to instruct the jury at the close of plaintiff's evidence that she was not entitled to recover cannot be assigned for error, because the defendant, at the time of requesting such instructions, had not rested its case, but afterwards went on and introduced evidence in its own behalf. In support of this decision, the Supreme Court cites Grand Trunk Railway Company v. Cummings, 106 U. S. 700, 1 Sup. Ct. 493, 27 L. Ed. 266, in which it was held that the refusal to direct a verdict on motion of defendant at the close of plaintiff's testimony could not be reversed, if the defendant, after such refusal, offers testimony which does not appear in the record. The reason for the principle laid down in the case last cited is readily apparent: That although the testimony offered by plaintiff may not, in itself, have been sufficient to warrant a verdict, yet the court was entitled to see what effect the testimony of defendant, subsequently offered, may have had upon the issues involved, for it frequently occurs in the trial of causes that the testimony of the defendant, upon cross-examination of witnesses or disclosures otherwise made, has the tendency to strengthen rather than weaken plaintiff's case. It was therefore important that the defendant's testimony should be set out in the record, that the court might see and determine, upon all of the testimony, as to whether or not the case should have gone to the jury. This view seems to be strengthened by the opinion in Northern Pacific Railroad Company v. Mares, 123 U. S. 710, 8 Sup. Ct. 321, 31 L. Ed. 296. When all of the evidence had been submitted, the defendant demurred to the evidence and moved the court to dismiss the action, which the court refused to do. Thereupon the defendant requested the court to direct a verdict, which was also refused and exception taken. The Supreme Court, in the opinion, says that:

"The question raised by the ruling and the exceptions thereto is whether there was sufficient evidence to justify the court in submitting the case to the jury."

Then the court proceeds to state the fact which the evidence tends to establish and decides that there was enough to go to the jury on the question involved in the case, viz.:

"That the defendant, by the negligence of an engineer in its employment, caused the injury to the plaintiff."

The testimony of the witnesses offered by the defendant in the case now under consideration in no way affects that offered by the plaintiff. It corroborates, substantially, the testimony of the agent of plaintiff, to the effect that the 150 bales of cotton which the defendant refused to accept was not of the same character or grade as the 25 bales which were sent to the defendant by the plaintiff as a sample. This is all the testimony of defendant's witness which we deem material; the remainder of it pertaining to negotiations between the parties after the refusal to accept the 150 bales looking to an amicable adjustment of the controversy. We do not think that the rule of practice laid down in Grand Trunk Railway Company v. Cummings and in Insurance Company v. Crandal, above cited, applies in the case before us. The principle in our case is that there was no issue of fact for the jury at all, upon any of the evidence or upon all of the evidence. The question was one solely for the court—the construction of a written contract, plain in its terms. There was no contradiction as to the telegrams and letters which contain the terms of the contract; these being capable of intelligent construction, setting out the agreement of the parties in unmistakable terms that plaintiff agreed to deliver to the defendant a certain grade of cotton like a sample lot of 25 bales shipped by the plaintiff to the defendant in the outset. The plaintiff admitted that the cotton in controversy was not of that grade, but contended that the contract did not call for it. The defendant's witness simply corroborated the fact that the cotton shipped was not of the quality and grade of the sample lot. The construction of the contract, as set forth above in this opinion, being for the court, there was no issue of fact for the jury. In all of the cases we have examined on the point we are now discussing, there was some evidence relating to the fact at issue, and the rule was laid down that if a defendant failed, after introducing testimony, to renew the motion to direct a verdict made at the close of plaintiff's case, the refusal of the trial court to grant the motion could not be assigned as error.

We regard Insurance Company v. Crandal and Railroad Company v. Mares, supra, as the leading authorities upon the point in question, and it will be observed that in both of these cases, the motion was that the court instruct the jury to return a verdict for the defendant. A motion of this character invoked the power of the court, after considering the testimony and all of it in its various aspects, and giving to it and every part of it its due weight, with all legal and reasonable inferences to be drawn therefrom, to determine whether or not it was sufficient to warrant a verdict for the plaintiff. But such is not the situation in the case here. The motion of defendant's counsel was not to direct a verdict, but nonsuit the plaintiff on the ground that the contract required of it the delivery of a certain grade of cotton, according to a sample which had theretofore been furnished, and, if such were the contract, plaintiff admitted the nonperformance, and therefore could not maintain its action against the defendant for an alleged breach. The motion of defendant was based solely upon a prop-

osition of law, and no issue or question of fact was involved. We do not think therefore that any question in regard to the rule of practice referred to arises. We construe the contract as we have before stated in this opinion, and, such being our construction, with plaintiff's admission of nonperformance, there was not even a scintilla of evidence to go to the jury to support a finding for the plaintiff. We think the learned judge on the trial court should have entered a nonsuit, as requested by defendant, and the refusal to do so was error.

There is error, for which the judgment of the Circuit Court is reversed.

Reversed.

McDOWELL, District Judge, dissents.

ST. LOUIS, K. C. & C. R. CO. v. CONWAY.

(Circuit Court of Appeals, Eighth Circuit. September 2, 1907.)

No. 2,546.

1. MASTER AND SERVANT—INJURY OF RAILROAD EMPLOYÉ—FAILURE OF COMPANY TO PRESCRIBE RULES.

The failure of a railroad company to prescribe signals and rules for the movement of two engines when coupled together does not constitute negligence which will give an employé injured during such a movement a right of recovery therefor, where it did not appear that any occasion had ever arisen showing the necessity or importance of any such rules, and where, moreover, the employé when injured was in a place where he had no right to be and no right to rules for his protection there.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 283.]

2. SAME—ACTIONABLE NEGLIGENCE.

An act, which caused an injury to another not foreseen, and which could not reasonably have been anticipated, does not give a right of recovery for such injury on the ground of negligence; and a railroad company cannot be held liable for an injury to a brakeman who was riding on the pilot of the first of two engines coupled together, where he had no right to be, conceding, as claimed, that it was caused by the act of the engineer of the rear engine in starting his engine suddenly and causing it to jar the one in front; such engineer having no knowledge of the brakeman's position on the pilot.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 163.]

3. SAME—CONTRIBUTORY NEGLIGENCE—ASSUMPTION OF DANGEROUS POSITION.

Plaintiff, an experienced brakeman, who was directed by the conductor of a train to take charge of two engines coupled together, which were to proceed to a siding for switching purposes, at about the time the engines were given the signal to start, ran by them and jumped upon the pilot of the front engine, from which he fell, or was thrown, receiving an injury. The pilot was provided with no place for a person to stand or where he could stand safely, and was not intended to be used for that purpose, but the engines were provided with steps with handholds, on which plaintiff could have safely stood, or by means of which he could have entered the cab, and he passed by such steps in going to the pilot. *Held*, that the railroad company was not chargeable with negligence in not equipping the pilot with a footboard and grab irons to render it a safe place for plain-

tiff to ride, nor was it liable for his injury, which was caused, or at least contributed to, by his own negligence in unnecessarily assuming a dangerous position.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 706–709.

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 District of Missouri.

W. F. Evans, for plaintiff in error.

Jesse H. Schaper (George W. Lubke and George W. Lubke, Jr., on the brief), for defendant in error.

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

PHILIPS, District Judge. The defendant in error recoverd judgment in the sum of $6,000 against the plaintiff in error, a railroad corporation. As the chief insistence of the plaintiff in error is that the trial court erred in refusing its request for a directed verdict, a review of the case as presented by the evidence is necessary.

At the time of the injury, the defendant in error was employed as head brakeman on a construction train used in building a railroad for the plaintiff in error between St. Louis and Kansas City, Mo. He had been so employed for several months prior to the injury hereafter described, and was a brakeman of long experience, familiar with the duties incident to his employment. On the morning he received his injury, the construction train was at Bowen, three miles west of the town of Windsor, in Henry county, Mo., a station on said road. The train consisted of a large number of freight cars and two engines coupled together. The front engine is known in the evidence as No. 623; the rear engine as No. 462. From Bowen to Windsor the train was pushed by said engines. The ground was very wet and muddy, and, as the track was new and unsettled, the upward and downward motion of the cars caused them to jump out of the knuckle of the automatic couplers, whereby the cars would become detached. This became so annoying, occasioning frequent stops, that the conductor in charge sent to the caboose for links and pins, used on the drawheads, and substituted them in place of the automatic couplers, which change remedied the trouble. The defendant in error was present when this substitution of the link and pin couplings was made, and was fully cognizant thereof. When the train arrived at Windsor, the defendant in error detached the locomotives and tenders from the train of cars, for the purpose of running the engines about 300 feet to a siding for the purpose of shifting cars. The direction and control of this movement of the engines were, as customary, by the conductor committed to the charge of the defendant in error, as the head brakeman. He undertook to ride on the pilot to the point of destination, from which he fell. His left foot was so crushed by being run over by the pony wheel of the engine as, in the judgment of the surgeon, to render its amputation necessary.

The negligence imputed by the petition to the plaintiff in error as grounds for recovery of damages is: (1) The failure of the plaintiff in error to promulgate rules "for the accomplishment of the work of coupling said engine No. 623 onto said cars and switching the latter from the main track to and upon said side track by means of said two engines coupled together by means of said link and pin and adjusted in the manner aforesaid, by which system of signals and rules said various servants and employés of defendant should be governed, and by the use of which one employé could protect and guard himself against the action of another." (2) That the act of connecting engine 462 with 623 by means of said link and pin, and in causing said engine 462 to suddenly move forward and violently strike engine 623 "while the same was also moving forward, while the defendant in error was so situated upon the pilot." And further was the plaintiff in error guilty of negligence "in causing said engines, while so connected to suddenly move forward," while the defendant in error was so situated on said pilot. (3) In failing to provide and furnish the defendant in error at the time and place with reasonably safe appliances at and about said engine No. 623, such as grab iron and footboard, for the defendant in error to do his work.

The answer tendered the general issue of nonliability, and pleaded contributory negligence. One of the defenses made under the general issue was that the train of cars and engines in question, at the time of the accident, were being used by an independent contractor doing the construction work of said road, and that the defendant in error was at said time in the employ of said contractor, and not that of the railroad company. And error is assigned of the action of the trial court in refusing to submit to the jury the question of fact as to whether or not the defendant in error was so in the employ of said contractor; the contention being that there was sufficient evidence to carry the question to the jury. In view, however, of the conclusion reached by us on the merits of the claim for damages, it is not deemed essential to consider this assignment of error.

Turning to the acts of imputed negligence, we are unable to perceive the legal basis for the claim that the railroad company failed of its duty to this employé in not prescribing signals and rules for the movement, at the time and place, of the engines when their movement was turned over to him. He knew that no such rule had been promulgated, and the evidence fails to disclose that any occasion had ever arisen to render such prescription important, much less necessary. As the company was using in its regular operation of its trains the required automatic coupler, it could not be expected that it should anticipate the emergency which required, for the instant, the substitution of the link and pin. From the very necessities of the case, when such unusual and unexpected emergency arises out on the road, there must be left to the best judgment of experienced operatives the method of overcoming the obstacle. Rules and regulations of a railroad company are the offspring of experience, formulated as new conditions dictate their expediency or necessity. If, as the testimony of the defendant in error himself shows, it was customary for the front engi-

neer, when two engines coupled together were to make the movement in question, to apply the motive power, why was it necessary for the railroad management to prescribe a rule to that effect? And if, perchance, the two engineers receiving the signal for a forward movement, the rear engineer should on a particular occasion let on steam to put his engine in motion, why should the company make a rule about it to protect an employé like the defendant perched upon the pilot, where he had no right to be, and where the company in constructing it did not intend or contemplate he should be? What this complainant stood in need of to support his action was that there should have been such a rule which he could claim to have been violated, the absence of which leaves him without a cause of action.

The second ground of recovery is equally meritless. Yielding to the action of the jury in discrediting the positive testimony of both engineers and the fireman that the automatic coupler between the two engines was not changed by the substitution of the link and pin, and accepting the testimony of the interested suitor, there are several sufficient answers to his claim based thereon: (1) Under the circumstances of the change, made to obviate the constant separation of the train because the knuckle of the automatic coupler by reason of the up and down motion of the cars on the soft, uneven roadbed would not hold them together, was not a negligent act of the conductor. On the contrary, it was commendable judgment. (2) The defendant was present when the change was made, and, according to his testimony, he knew the two engines were coupled together in that manner when he undertook to ride on the pilot. (3) He testified as an expert that the slack between the engines was greater when coupled with the link and pin than when coupled with the automatic appliance. He also knew when he unnecessarily undertook to ride on the pilot that by reason of that very slack the liability to jarring while the engines were in motion on such a roadbed were increased, and yet he voluntarily exposed himself to such hazard.

The engineer of the rear engine testified that he only gave steam sufficient to put his engine in motion in connection with its fellow engine, and that there was no impact with No. 623. The engineer and fireman of the front engine testified that there was no jar to their engine from such impact. The jury, however, must have been unwilling to credit the testimony of any number of witnesses who were employés of the railroad, except the one who was suing the company, for he alone asserted such violent jar. But if it be conceded that the rear engine did strike the front one with force sufficient to jar it, how does the fact give a cause of action for damages to this defendant in error? An injury which was not foreseen, and could not be reasonably anticipated as the probable result of an act of imputed negligence is not actionable. Hoag v. Railroad Company, 85 Pa. 299, 27 Am. Rep. 653; Railway Company v. Kellogg, 94 U. S. 475, 24 L. Ed. 256; Chicago, St. P., M. & O. Ry. Co. v. Elliott, 55 Fed. 949, 5 C. C. A. 347, 20 L. R. A. 582. The engineer of No. 462 did not know at the time that the defendant in error was perched on the pilot. In so far as the other employés of the company, who were at their proper places of duty, were concerned, the action of the rear engineer did not affect them.

They felt no jar. And if the defendant in error had been either in the cab, or on the steps leading thereto, where, as will hereafter appear, he could have stood, he would have escaped injury. Before he has any right in law to complain of having been wrongfully jarred from where he stood, it must first appear that he had a right to occupy such position at the time. It is like the instance of a man walking on a railroad track, where he has no right to be, and is run down by an approaching engine. Being where he had no right to be found, the railroad company is under no obligation to look out for him in such position. Only after the engineer, in the exercise of ordinary care, discovers the presence on the track of the trespasser, and that he is unheedful of danger, does the law hold him and the master liable for the injury; and then only if, after discovering the peril, the engineer should fail to exert every means reasonably in his power to avert the injury. The evidence fails to show that the engineer of No. 462 had any knowledge of the position of the defendant in error on the pilot. More than that, the conductor, introduced as a witness on behalf of the defendant in error, who thereby vouched for his veracity and credibility, testified that when he gave directions to the defendant in error to take charge of the movement of the engines he stood opposite to or near engine 462, and gave the signal, meaning "Let her go." That while the defendant in error was going toward the front engine, both engines were in motion. As the conductor immediately turned his back to walk away, he did not see the accident. The rear engineer testified that, when the defendant in error passed by his engine going to the front, he was running, and both engines were then in motion. The engineer of No. 623 also testified that after he got the signal to start, and while both engines were moving, the defendant in error passed his engine in a run and jumped on the pilot, when his foot slipped, and he fell with his left foot under the pony wheel of his engine. But, as all these witnesses testified favorably to the railroad company, they were disbelieved by the jury; and they accepted the unsupported statement of the employé suing the company that he got on the pilot while the engine was standing still, and gave the signal to start before there was any movement of the engines. If jurors, against such overwhelming weight of evidence, may arbitrarily render a verdict, without the interference of the presiding judge, it tends to destroy intelligent and honest confidence in trials by jury.

The most remarkable contention advanced in support of this action is the charge of negligence on the part of the railroad company in not so equipping the pilot with a sufficient footboard and grab irons for the hands so as to make the pilot a safe place for him to ride. This would almost excite admiration for its audacious presumption, if it were not as ridiculous as absurd. He knew when he undertook to ride there that it was not prepared for the carriage of an employé; that it was necessarily dangerous without such safety appliances. With as much common sense and right might he have undertaken to ride on the drawhead between the engines, and after falling therefrom charge the railroad company with negligence in not erecting a footboard and grab irons there to make the place safe, protecting him against his foolhardy act. The pilot in question, commonly known as the "cow

catcher," was constructed and intended only to remove obstacles, such as cattle or other animate or inanimate objects, which might be encountered on the track. It is held in place by means of an iron rod extended from the bottom of the baseboard, inside the slats, upwards, where it is secured by bolt at the top. The only room for the support of a man's feet was between that iron bar and what is called the "heel" of the baseboard, not over three inches in dimension. It was on this narrow space the defendant undertook to stand, when, as his testimony showed, the sole of his shoe was four inches broad. As he thus stood on his left foot, immediately in front of said pony wheel of the engine, the only other support he had was the flag staff, about one and a half feet in length and about one inch in diameter. It was a little above and to the left of him, so that he had to extend his left hand somewhat backward to grasp it. He testified that when the jar of the engine came the flag staff turned in its socket, and he fell. This revolving of the flag staff was not caused by the impact of the rear engine, as the conductor testified it so revolved a short time prior to this accident when he had taken hold of it. The flag staff was not intended for any such use. Its sole purpose was to support a small signal flag.

Moreover, the evidence showed that the master had furnished a reasonably safe place for this employé to have ridden to the point of his destination. Just back of each of said engines, at the front of the tenders, on each side of them, were steps made for the purpose of entering the cabs of the engines. These steps were broad and long enough to safely stand upon with grab irons for the hands to hold to, so that the defendant in error with perfect ease could have gone into the cab, or stood on the step, supporting himself by the grab irons. He passed by and in full view of those steps in going to the pilot. He knew they were there, and that he could ride on them if he desired. To save walking 25 feet, when he should arrive at the point where he should dismount to throw the switch, he passed by the safe place furnished by the master and elected to take the hazard of standing on the narrow, insecure perch of the heel of the pilot.

Under such circumstances, the law is that the servant cannot hold the master responsible for the misfortune of an injury received while making use of machinery or appliances for a purpose neither designed nor contemplated by the master. Wood's M. & S. § 402; Bailey's Mas. Liab. 22; Shear. & R. Neg. 346; Jayne v. Sebewaing Coal Company, 108 Mich. 242, 65 N. W. 971; Galvin v. Old Col. Co., 162 Mass. 533, 39 N. E. 186; Kauffman v. Maier et al., 94 Cal. 269, 29 Pac. 481, 18 L. R. A. 124; Hamilton v. Railroad Company, 83 Ga. 346, 9 S. E. 670; Elgin, J. & E. Ry. Co. v. Docherty, 66 Ill. App. 17; Wilson v. Michigan C. R. Co., 94 Mich. 20, 53 N. W. 797.

With such reiteration that the necessity of repeating it almost excites impatience, the courts have asserted, and consistently held, that when the servant, of his own volition and for his own convenience, assumes a dangerous position, not intended by the master, in which to perform his work, he is without just complaint against the master if injury thus come to him. Railroad Company v. Jones, 95 U. S. 439, 24 L. Ed. 506; Burns v. Chronister Lumber Company (Tex. Civ. App.) 87 S. W. 163; Rucker v. Railway Co., 61 Tex. 499; Kresanowski v.

Railway Company (C. C.) 18 Fed. 229; Tower Lumber Company v. Brandvold, 141 Fed. 919, 73 C. C. A. 153.

In the latter case the servant unnecessarily sat on the end of the bunker, with his feet hanging down over the end, with nothing to support him except his hands pressed against the side of the bunker. Commenting on this, Judge Adams said:

"The evidence in our opinion conclusively shows that he voluntarily and needlessly exposed himself to danger; that he took a position upon the logging car full of obvious peril. Any unusual jolt or mishap, in the nature of things and according to common experience of mankind, would have dislodged him from his perilous position and subjected him to injury."

This principle of law has been again asserted and applied under circumstances of comparative recklessness on the part of the servant in the more recent case of Crookston Lumber Company v. Boutin, 149 Fed. 680, 687, 79 C. C. A. 368.

Where, as in the case at bar, there was a reasonably safe place, on the steps leading to the cab of the engine, where the defendant in error could have ridden, quite accessible to him and convenient enough to his work, his selection of the pilot was positively reckless, and at his own risk. Chicago & N. W. Ry. Co. v. Davis, 53 Fed. 61, 63, 3 C. C. A. 420; Morris v. Duluth, etc., Railway Company, 108 Fed. 747, 749, 47 C. C. A. 661.

In Gilbert v. Burlington, C. R. & N. Ry. Co., 128 Fed. 536, 63 C. C. A. 27, 34, with pungent applicability to this case, the court said:

"Where there is a comparatively safe and a more dangerous way known to a servant by means of which he may discharge his duty, it is a want of ordinary care for him to select and use the more dangerous method. * * * He cannot recover, because his negligence contributed to the injury. * * * A brakeman carelessly jumps onto the brake beam of a moving car and seizes a handhold * * * when there are other handholds for the purpose of enabling him to climb upon the cars, which he ought to have used. * * * He cannot recover because his negligence directly contributed to his injury."

This ruling is recognized and enforced by the state court. Montgomery v. Chicago Great Western Railway Company, 109 Mo. App. 88–94, 83 S. W. 66; Moore v. Kansas City, Ft. Scott & Memphis Railway Co., 146 Mo. 572, 48 S. W. 487.

The defendant in error undertook to justify his selection of the pilot on which to ride by testifying that employés had been in the habit of so riding under similar circumstances. This excuse the law does not recognize. In Dawson v. Chicago, R. I. & P. Railway Company, 114 Fed. 870, loc. cit. 872, 52 C. C. A. 286, Judge Thayer, speaking for this court, said:

"Conceding it to be true that brakemen sometimes take such risks without any sufficient cause or excuse, yet such acts should nevertheless be pronounced negligent. Such conduct on the part of brakemen and others ought, also, to be discouraged. If a man exposes himself to great risk unnecessarily, he is guilty of negligence, although it be shown that other persons have done the same thing and escaped unhurt. The inherent quality of an act is not changed, whether it is done by one or many."

Mr. Justice Swayne, in Railroad Company v. Jones, supra, speaking to the recklessness of undertaking to ride in a less perilous situation than did this defendant in error, said:

"He could have gone into the box car in as little, if not less, time than it took to climb to the pilot. The knowledge, assent, or direction of the company's agents as to what he did is immaterial. * * * As well might he have obeyed a suggestion to ride on the cow catcher, or put himself on the track before the advancing wheels of the locomotive. * * * He was not an infant nor non compos. * * * He was himself the author of his misfortune."

So, in Montgomery v. Railroad Company, supra, the court, speaking to a like contention made by the plaintiff, said:

"The evidence shows that switchmen as a rule frequently incur risks which seem almost incredible, but may be accounted for from the well-known fact that constant exposure to danger dulls the sense of caution and engenders recklessness. It seems to have been a theory of plaintiff that this recklessness upon the part of switchmen would relieve him from the imputation of negligence. But the courts cannot approve a custom so fraught with peril as an excuse for want of proper care. Such a rule would impose upon the master practically insurance and indemnity of his servant against his own wrongs."

It almost daily falls under the observation of those living in cities that impatient persons, rather than wait three or four seconds, will rush in front of approaching street cars, and cast the die upon the chance of clearing the front of the car, when a slip of the foot, or the striking of the toe against the rail, invite instant death. Such foolhardiness affords no justification either in law or common sense for its repetition.

Sound public policy, predicated of the interest the commonwealth has in the lives and limbs of its subjects, demands that the courts should reject such a claim for damages as this record presents.

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

THE POKANOKET.

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

No. 727.

MASTER AND SERVANT—CONTRACT OF EMPLOYMENT—DURATION OF EMPLOYMENT.

A verbal contract between the owner of a vessel and a marine engineer for the services of the latter, in which his wages were fixed at a stated sum per month, but without any specified term of employment, constituted a hiring at will, and not by the month, and, in the absence of any established usage to the contrary, either party had the right to terminate the employment at any time without notice, and, upon the employé's discharge, he was entitled to wages only to the time of such discharge.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 19.]

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk.

John W. Oast, Jr., for appellant.

Henry Bowden, for appellee.

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

BOYD, District Judge. This is an appeal from a decree in admiralty entered by the District Court of the United States for the Eastern District of Virginia, at Norfolk. The appellee, Leslie B. Colgin, a marine engineer, for some time anterior to the making of the contract, which is the basis of this proceeding, was employed as chief engineer on a steamer called "The Aurora," which belonged originally to the James River Navigation Company. Subsequently this steamer was bought by the Newport News & Norfolk Steamboat Line, a corporation under the laws of Virginia, which corporation was also the owner of the steamer named "Pokanoket," the latter vessel being, at the time of the contract of employment, at St. Johns, Newfoundland. The contract of employment, as stated by the libelant in his testimony, was as follows:

"It was a verbal contract between Mr. Davis and me at Petersburg on the steamer Aurora, the steamer I was running on at that time, and he asked me if I would go to St. John and help him look at a boat, and if I would come down with her, and that my wages—he asked me what I would want a month and I gave him my price, $80 per month, to go chief, and I said I will go down and come with the boat, and he said the wages would be the same as when working on the Aurora, but the day she gets to Norfolk my pay would be $80 per month and start at that time. I was getting $70 per month on the Aurora."

The libelant went to St. Johns and brought the Pokanoket to Norfolk, arriving at the latter place on the 16th of May, 1906, and from the time of employment to that date he was paid at the rate of $70 per month. From the 16th of May, 1906, to the 1st of June following, he was paid at the rate of $80 per month and for the month of June he was paid $80, the last payment, to wit, for the month of June, having been made between the 1st and 5th of July, 1906. The libelant continued in the employment of the steamer Pokanoket, as chief engineer, until July 17, 1906, when he was discharged at Norfolk, Va., by George B. Townsend, the agent of the owner. The cause of the discharge, as claimed by the owner of the steamer, was inefficiency and incapacity on the part of libelant to properly manage and operate the machinery which he had in charge. At the time of the discharge the steamboat company proposed to pay the libelant the sum of $46.99, the amount of his wages for the 17 days in July at the rate of $80 per month. But libelant refused to accept it. The libelant states that he immediately sought work, but did not succeed in finding employment until August 1, 1906. A libel was filed by Colgin against the steamer Pokanoket, her tackle, apparel, etc., in the District Court for the Eastern District of Virginia, at Norfolk, Va., on the 1st day of August, 1906, the claim being for $80 wages for the month of July, 1906, and costs. The attachment and monition were served on the 2d day of August, 1906. In the due course of proceeding, the respondent filed its answer on the 10th day of September, 1906, denying the libelant's right to the sum of $80 wages for the month of July, 1906, and costs, but admitting that there was due him the sum of $46.99 for 17 days' work in July, 1906, at the rate of $80 per month. Respondent then and there tendered to the libelant the said sum of $46.99, with interest thereon from July 17, 1906, which he refused to

accept; whereupon respondent deposited the said sum, together with the interest, in the court, to be held subject to its orders.

There was some testimony, pro and con, upon the hearing as to Colgin's qualifications as a marine engineer—on his part that he was well-skilled and proficient as such, whilst respondent, on the other hand, offered testimony tending to show that he was not capable and well qualified. But, in our view of the case, this controversy is not material. The chief point presented is the construction of the contract under which the libelant was employed. He insists that it was by the month, and that it was a violation of its terms to discharge him except upon a month's notice. The District Court took this view and entered a decree for the libelant for $80, the full month's wages for July, 1906, and for costs. In this we think there was error. The contract, which is fully set out in the testimony of the libelant as given above, has, in our opinion, the effect to determine the measure of compensation, but does not fix a definite period of employment. In other words, the contract constitutes nothing more, in law, than what is known as a hiring at will, which could be ended at any time, by either party, without notice. There was no evidence of any settled usage or custom of the port which would take the contract in this case out of the rule which governs such contracts generally. There is nothing in the contract of employment which can be construed to mean that the libelant was required to serve the employer for any specified time; nor is there anything to indicate that the employer was bound to retain him in service for a definite period. The continuance of the term of service was left discretionary with both parties, and either had a right to put an end to it at any time.

In the case of The Pacific (D. C.) 18 Fed. 703, an engineer was employed on a steam tug used about a harbor at a certain rate per month, but without any agreement as to the duration of his service. Held, in the absence of proof of any settled usage, that he could be discharged at any time without previous notice, and could recover only for the time actually served. The learned judge (Morris), in delivering the opinion in this case, said:

"Unless the verbal contract proved is controlled by usage or custom, or some presumption of law or fact, it must be held to be a general or indefinite hiring, and, I take it, the law as to such a contract is correctly stated in Wood, Master & Servant, 272."

The quotation from Wood is as follows:

"With us the rule (different from the English rule) is inflexible that a general or indefinite hiring is prima facie a hiring at will, and, if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. A hiring at so much a day, week, or year, no time being specified, is an indefinite hiring and no presumption attaches that it was for a day even, but only at the fixed rate for whatever time the party may serve. It is competent for either party to show what the mutual understanding of the parties was in reference to the matter, but, unless their understanding was mutual that the service was to extend for a certain fixed and definite period, it is an indefinite hiring and is determinable at the will of either party. * * * Thus it will be seen that the fact that compensation is measured at so much a day, month, or year does not necessarily make such hiring a hiring for a day, month, or year, but in all such cases the contract may be put an end to

by either party at any time, unless the time is fixed and a recovery had at the rate fixed for the services actually rendered."

Following in the same line is the case of The Rescue (D. C.) 116 Fed. 380, in which Judge McPherson, of the Eastern District of Pennsylvania, holds that:

"In the absence of proof of any settled usage or custom of the port, an engineer employed for a vessel at a certain rate of wages per month, without any specified term of service, may be discharged at any time, either during or at the end of a month, without previous notice, and can recover wages only for the time actually served."

The conditions of employment and the terms of the contracts in these two cases were substantially the same as in the case here.

In Edwards v. Seaboard & Roanoke Railroad Co. et al., 121 N. C. 490, 28 S. E. 137, the Supreme Court of the state (Chief Justice Faircloth delivering the opinion) upholds the same doctrine, and declares the law to be that:

"Where a letter from an employer stated, 'You have been appointed general storekeeper of the System, to take effect July 15th. Your salary will be $1.800 a year'; and the appointee entered upon his duties and received $150 per month until he was discharged—*held*, that the contract was not an employment by the year, the reasonable construction of the contract being that the parties intended that the service should be performed for the price that should aggregate the gross sum annually, leaving the parties to sever their relations at will."

We might cite, almost without number, decisions in the American jurisdictions to the same effect, but we do not deem it necessary. We conclude, therefore, that the libelant is only entitled under the contract to recover of the respondent compensation at the rate of $80 per month for the 17 days actually served in July, 1906, and that the decree of the District Court should be modified to that extent. The decree is reversed and the case remanded to the District Court of the Eastern District of Virginia, to the end that a decree in harmony with the views herein expressed may be entered.

Reversed.

UNITED CIGARETTE MACH. CO., Limited, v. WRIGHT.

(Circuit Court, E. D. North Carolina. August 24, 1907.)

INJUNCTION—RESTRAINING FOREIGN SUIT—COURT FIRST OBTAINING JURISDICTION.

Where the parties to a suit and the greater part of the property which is the subject of the litigation are within the jurisdiction of a court, it has power to enjoin the maintenance of a suit in a foreign country between the same parties and involving the same subject-matter, and will do so where it first obtained jurisdiction and all matters between the parties are being fully litigated before it. It is not a ground for the institution of a foreign suit by a defendant, involving the same issues in whole or in part, that complainant's witnesses refused to answer certain questions on their examination, since the court had full power to compel answers, if proper.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 38.]

In Equity. On motion to vacate restraining order.
See 132 Fed. 195.

Jas. H. Pou, for complainant.
F. H. Busbee and W. P. Bynum, for defendant.

PURNELL, District Judge. Defendant on notice moved to vacate the restraining order heretofore entered, and principally on the ground that certain officers of complainant corporation declined to answer certain questions or give information touching the agency and settlement set out, and involved in the original bill about transactions in North Africa, Asia, Malta, and adjacent islands. As the court reads the pleadings, these matters are involved in the original suit, and the mere fact that witnesses for complainant declined to answer certain questions cannot eliminate them therefrom. On proper complaint the witnesses would have been compelled to answer proper questions relating to the litigation.

The right of courts of equity to restrain litigants in other states or foreign countries is discussed very fully in High on Injunctions, vol. 1, §§ 103–107, inclusive. In the case at bar the jurisdiction and power of this court is admitted. Both plaintiff and defendant are within the reach and power of this court; the defendant residing within the jurisdiction of the court and within the territorial limits of this district. The suit here and the suit in England admittedly arose out of the contract between the complainant and defendant. Both suits involve matters growing out of Wright's agency. The suit here was instituted nearly three years before defendant attempted to institute a suit growing out of the same matter in England. Testimony had been taken. Accounts between the parties had been stated. The case was ready for argument before the master. Both complainant and defendant in their bills and cross-bills asked for a full and complete accounting, and complainant in a supplemental and amended bill asked for the termination of Wright's agency and a final settlement of all matters growing out of the agency. Very little of the property of either of the parties appears to be in the foreign country. The great bulk of complainant's property is at Lynchburg, Va., and of balance much more is situated at Dresden, in Saxony, than within the jurisdiction of the English court; complainant only maintaining an office and one director in England, with a sufficient deposit of money to comply with the laws of that country.

The parties are here; the property is here; the convenience of obtaining evidence is here. This suit was instituted first, and all matters possibly arising out of the contract were put in issue by the various pleadings filed in this court. The reason the defendant gives for instituting the suit in England is that certain witnesses for the complainant declined to answer questions. If the questions were material and relevant, this court had the power to require the answers, and on a proper showing would, as before said, require the witnesses to answer, and would require the complainant to furnish defendant any and all evidence material to enable this court to administer full justice. If defendant desired discovery from complainant, he had the power to file a cross-bill, with suitable interrogatories, and the court in a

proper case would have required the same to have been answered. From the authorities it appears to be well established that courts of equity can, and in a proper case ought to and will, restrain litigants in a foreign court. The instances are numerous, and the equity is clear and well established. There is one instance where the authorities lay it down as a duty of a court of equity to restrain litigants in a foreign state or country, and that is where the matter is being fully litigated in the court to which the application for injunctive relief is made. No court allows another court to take possession of a controversy of which the first court has assumed full jurisdiction.

The motion to modify or vacate is overruled.

SOUTHERN LAND & TIMBER CO. v. JOHNSON et al.

(Circuit Court, E. D. North Carolina. June 21, 1907.)

COURTS—JURISDICTION OF FEDERAL COURT—AMOUNT IN DISPUTE.

Under the rule that the jurisdiction of a federal court must affirmatively appear from the record, a bill for the partition of lands does not state a case within the jurisdiction where it shows the value of complainant's interest therein to be less than $2,000.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 890.]

In Equity. On motion to dismiss.

H. McClammy, for plaintiff.
Davis & Davis, for defendants.

PURNELL, District Judge. This is a petition for partition of certain lands valued at $6,000, in Bladen county, alleged to be held by petitioner and J. R. Johnson and others as tenants in common. It is also alleged that a proceeding of similar import was commenced in Bladen county in the superior court, and is still pending. A similar bill in equity was dismissed on motion at the late term of court at Wilmington. Defendant J. R. Johnson now enters a special appearance and moves to dismiss for want of jurisdiction; the amount involved according to the bill being six-thirtieths or one-fifth of $6,000 or $1,200, because of improper service; the subpœna being served on J. R. Johnson in Norfolk, Va., by a deputy marshal of the Eastern District of Virginia, and because the Christian names of some of defendants do not appear in this bill for subpœna.

It will be noted this is the return day, the first on which defendants could properly be heard, and they or J. R. Johnson enters a special appearance and moves to dismiss. There are no affidavits filed by complainant, and no other record than the bill as far as complainant has made the record. The proceeding is to some extent in rem, but does not involve the title to the whole property, the title to both parties being admitted, and it is further shown a copy of the record filed that there is in the superior court of Bladen county a proceeding having for its object a partition of these lands. And unless it affirmatively appears the court is without jurisdiction. Grace v. American Central Insurance Company, 109 U. S. 278, 3 Sup. Ct. 207, 27 L. Ed. 932;

Pepper v. Fordyce, 119 U. S. 469, 7 Sup. Ct. 287, 30 L. Ed. 435. This must appear in the record.

Admitting, for the sake of argument, that other jurisdictional allegations appear in the bill, which is earnestly controverted by defendant, is the amount in controversy sufficient to give this court jurisdiction—what is involved in the controversy? Not the title to the whole tract. Title is admitted or may be taken as admitted. The value of the whole tract would, if involved, undoubtedly give the court jurisdiction, at least in so far as the amount involved in the controversy goes. But the title to the whole tract is not involved. Even the title of complainant to its six-thirtieths is not involved or denied, except the right of complainant to hold its interest separate and apart from the other tenants in common.

It is therefore the duty of the court under the statute to dismiss the bill. The jurisdictional facts do not affirmatively appear.

It is therefore ordered that the bill herein be, and the same is, dismissed.

UNITED STATES v. HOY WAY. SAME v. YUNG KONG. SAME v. CHU BOK QUAI.

(District Court, E. D. Pennsylvania. September 30, 1907.)

Nos. 47, 15, 16.

ALIENS—PROCEEDINGS FOR DEPORTATION OF CHINESE—BURDEN OF PROOF.

Section 3, Act May 5, 1892, c. 60, 27 Stat. 25 [U. S. Comp. St. 1901, p. 1320], providing that any Chinese person or person of Chinese descent arrested for deportation thereunder "shall be adjudged to be unlawfully within the United States, unless such person shall establish by affirmative proof * * * his lawful right to remain in the United States," applies to, and imposes the burden of proof on, a defendant who is of the Chinese race, although he claims to be a citizen of the United States by birth.

[Ed. Note.—Citizenship of the Chinese, see notes to In re Gee Fook Sing, 1 C. C. A. 212; Lee Sing Far v. United States, 35 C. C. A. 332.]

Appeals from Orders of Deportation.

Jasper Yeates Brinton, for the United States.
Ernest L. Tustin and Charles S. Wesley, for defendants.

J. B. McPHERSON, District Judge. I have read and considered all the evidence in each of these cases, and am of opinion that the orders of deportation should be affirmed. The appellant in each case, who was conceded to have been a Chinese laborer during several years before his arrest, averred that he had been born a citizen of the United States; that is, to use the definition given by the Supreme Court in United States v. Wong Kim Ark, 169 U. S. 649, 18 Sup. Ct. 456, 42 L. Ed. 890, that he was "a child born in the United States of parents of Chinese descent, who, at the time of his birth, were subjects of the Emperor of China, but had a permanent domicile and residence in the United States and were there carrying on business, and were not employed in any diplomatic or official capacity under the Emperor of China"—and therefore, that he became "at the time of his birth a citizen

of the United States." In other words, appellant asserted his lawful right to be, and to remain, in this country, in spite of the fact that he had no certificate of residence, and was therefore prima facie unlawfully within the United States and was subject to arrest and deportation. Upon the inquiry concerning his right to be here as a citizen, he was required by section 3 of the act of May 5, 1892 (27 Stat. 25, c. 60 [U. S. Comp. St. 1901, p. 1320]), to assume the burden of proving the fact of citizenship by birth, both before the commissioner and afterwards on appeal before a federal judge. The section reads as follows:

"That any Chinese person or person of Chinese descent, arrested under the provisions of this act or the acts hereby extended, shall be adjudged to be unlawfully within the United States unless such person shall establish, by affirmative proof to the satisfaction of such justice, judge or commissioner, his lawful right to remain in the United States."

This requirement concerning the burden of proof has been adjudged to be valid by the Supreme Court in Chin Bak Kan v. United States, 186 U. S. 193, 22 Sup. Ct. 891, 46 L. Ed. 1121. Upon page 200 of 186 U. S., and page 894 of 22 Sup. Ct. [46 L. Ed. 1121], it is said:

"By the law the Chinese person must be adjudged unlawfully within the United States unless he 'shall establish by affirmative proof, to the satisfaction of such justice, judge, or commissioner, his lawful right to remain in the United States.' As applied to aliens, there is no question of the validity of that provision; and the treaty, the legislation, and the circumstances considered, compliance with its requirements cannot be avoided by the mere assertion of citizenship. The facts on which such a claim is rested must be made to appear. And the inestimable heritage of citizenship is not to be conceded to those who seek to avail themselves of it under pressure of a particular exigency, without being able to show that it was ever possessed."

Trying by this test, therefore, the quantity and quality of the evidence laid before me, I agree with the contention of the government that none of the appellants has established by affirmative proof his lawful right to remain in the United States as a citizen by birth. The subject of the burden of proof has been elaborately considered by Judge Ray in United States v. Lee Huen (D. C.) 118 Fed. 442.

Each order of deportation is accordingly affirmed.

UNITED STATES v. CONRAD.

(District Court, E. D. Pennsylvania. October 15, 1907.)

No. 15.

POST OFFICE—PROSECUTION FOR USING MAILS TO DEFRAUD—SUFFICIENCY OF EVIDENCE.

The evidence, on the trial of a prosecution for using the mails for carrying out a scheme to defraud, while conflicting, *held* sufficient to sustain a verdict of guilty and such as not to justify the court in awarding a new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Post Office, § 86. Nonmailable matter, see note to Timmons v. United States, 30 C. C. A. 79.]

On Motion for a New Trial.

J. Whitaker Thompson and John C. Swartley, for the United States.
Fred J. Shoyer, for defendant.

J. B. McPHERSON, District Judge. I have carefully considered the reasons and the argument offered by the defendant's counsel in support of the motion for a new trial, but without being convinced that any wrong was done to the defendant, either by the rulings of the court, or by the verdict of the jury. The case turned wholly upon a question of fact: Did the defendant intend to defraud at the time he devised the scheme under consideration, and carried it out by the use of the mails? And upon this question there was conflicting evidence, sufficient to convict as well as sufficient to acquit. Of its weight the jury was the sole judge, and I should not be justified in granting a new trial upon the ground that the jury was mistaken, unless a verdict of guilty should in no event be allowed to stand. This extreme view of the evidence, however, was not urged, and I do not understand it to be taken, by the defendant's counsel.

The court's rulings upon the admissibility of certain evidence have also been reviewed, but I still believe them to be correct. Some of the evidence, which I thought to be inadmissible, if the strict rules of law were applied, did nevertheless get before the jury—indeed, the defendant (who elected to try his own case) was given the widest latitude, and was permitted to introduce much that would have been excluded if a member of the bar had been conducting the defense—and I cannot see any legal, or any other, ground upon which the course of the trial can be successfully attacked. Moreover, I do not think that the defendant suffered any disadvantage because he had no attorney. He is a man of marked intelligence, with an unusual gift of clear speech, and he put before the court and jury, both in the examination of the witnesses and in his final argument, a well-defined defense, which I am sure no one who heard the trial could have failed to understand; and, because of the exceptional consideration with which he was treated by the government, he was able to support this theory by a good deal of evidence that must have been excluded if objection had been taken by the prosecuting officer.

On the whole case, it seems to me that to grant a new trial would be to yield to a sentiment, rather than to exercise judicial discretion.

The motion is therefore refused.

UNITED STATES v. NEW YORK CENT. & H. R. R. CO.

(Circuit Court, W. D. New York. October 3, 1907.)

Nos. 174, 175, Law.

CARRIERS—INTERSTATE COMMERCE—STATUTE REGULATING CARRIAGE OF LIVE STOCK.

Act June 29, 1906, c. 3594, 34 Stat. 607, prohibiting railroad companies transporting live stock on interstate shipments from keeping the same confined in cars continuously for more than 28 hours without unloading the same for feed, water, and rest, is to be strictly construed, and a railroad company, which receives live stock from a connecting carrier

after it has already been continuously confined in cars for more than 28 hours and allows several more hours to pass before unloading the same, is prima facie guilty of a violation of the statute.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 926–928.]

On Demurrer to Complaint.

Lyman M. Bass, U. S. Atty.

Hoyt & Spratt and Maurice C. Spratt, for defendant.

HAZEL, District Judge. These actions were brought by the United States against the New York Central & Hudson River Railroad Company to recover penalties incurred under the provisions of chapter 3594 of 34 Stat. 607, passed June 29, 1906, to prevent cruelty to animals while in transit by common carriers from one state to a point in another state. Section 1 provides:

"That no railroad * * * whose road forms any part of a line of road over which cattle, sheep, swine, or other animals shall be conveyed from one state * * * into or through another state * * * shall confine the same in cars, boats or vessels of any description for a period longer than twenty-eight consecutive hours without unloading the same in a humane manner into properly equipped pens for rest, water and feeding, for a period of at least five consecutive hours, unless prevented by storm or by other accidental or unavoidable causes which can not be anticipated or avoided by the exercise of due diligence and foresight: Provided, that upon the written request of the owner or person in custody of that particular shipment, which written request shall be separate and apart from any printed bill of lading, or other railroad form, the time of confinement may be extended to thirty-six hours. In estimating such confinement, the time consumed in loading and unloading shall not be considered, but the time during which the animals have been confined without such rest or water on connecting roads shall be included, it being the intent of this act to prohibit their continuous confinement beyond the period of twenty-eight hours, except upon the contingencies hereinbefore stated."

Section 2 in effect provides for feeding and watering of animals being conveyed by the owner or person having custody thereof by the railroad company in case the former omits so to do. That the statute comes within the constitutional right of Congress is authoritatively settled, and such right is unquestioned.

The defendant has demurred to the complaint, claiming that the facts alleged do not constitute a cause of action. The complaint substantially alleges that the Wabash Railroad Company conveyed certain horses from Peru, Ind., through the states of Ohio and Michigan, and thence through the province of Ontario, Canada, to the city of Buffalo, state of New York, where they were delivered to the defendant on the 4th day of Feburary, 1907, at about 2 o'clock in the early morning. The defendant, a connecting carrier, then transported the animals on its line of railroad to its pens at East Buffalo for rest, watering, and feeding, where they arrived about four hours after they had been accepted by the defendant. The animals admittedly were kept confined en route to East Buffalo without rest, food, and water for a period of 43 hours. The defendant contends that when the period of 28 hours specified in the statute elapsed the first carrier had the manual possession of the horses, and therefore, upon the authori-

ty of United States v. Louisville & N. R. Co. (D. C.) 18 Fed. 480, such offending carrier only can be held liable for an infraction of the law. The United States attorney rejoins that, as the defendant accepted the shipment after the 28 hours had expired, and even though it forwarded the animals to its pens, it is nevertheless prima facie guilty of a violation of the statute under consideration. I am cited no authority by either side, and I have found none bearing upon the precise question involved, but I think that, as the horses were kept on cars by the defendant railroad company about three or four hours after the expiration of 28 consecutive hours before they were rested and fed, it is liable for negligence per se. The statute must be strictly construed. I think that the complaint sufficiently alleges a cause of action, and whether the defendant knowingly or willfully failed to meet the requirements of the statute is a question for submission to the jury.

The demurrer is overruled.

NATIONAL BANK OF COMMERCE v. CLEVELAND et al.

(District Court, D. North Dakota. October 5, 1907.)

1. STATUTES—CONSTRUCTION—PROVISOS IN APPROPRIATION ACTS.

Provisos in the nature of general legislation attached to appropriation acts passed by Congress must be construed and treated the same as though they were separate and independent enactments, and not confined in their application to the subject-matter generally dealt with by the appropriation act.

[Ed. Note.—Construction and operation of provisos, exceptions and saving clauses, see note to United States v. R. F. Downing & Co., 76 C. C. A. 381.]

2. UNITED STATES MARSHALS—FEES—MILEAGE FOR SERVICE OF PROCESS.

The provision of the appropriation act (Act Aug. 18, 1894, c. 301, § 1, 28 Stat. 416 [U. S. Comp. St. 1901, p. 639]), that "hereafter no marshal or deputy marshal be allowed more than one mileage for each mile actually and necessarily traveled, irrespective of the number of writs he may execute in making such travel," is not limited in its application to criminal cases, but limits the fees of the marshal in all cases.

In the Matter of Fees for Marshal's Services.

Le Seur & Bradford, for plaintiffs.

P. H. Rovoke, U. S. Dist. Atty., for defendants.

AMIDON, District Judge. In serving the summons in the above-entitled cause, and a companion cause of John Crosby et al. v. Wilfred Riendeau et al., the marshal was obliged to travel 259 miles. Both writs were served at the same place and time, and only one journey was required to be traveled by the marshal in making the service. The plaintiffs in both causes are represented by the firm of Le Seur & Bradford, and the marshal has presented to them his bill covering a charge of 12 cents per mile for the 259 miles, in each case, or $31.08, making a total of $62.16. Counsel contend that this charge is unau-

thorized by law, and the matter has been brought before the court for adjustment on an order to show cause.

By Act Aug. 18, 1894, c. 301, § 1, 28 Stat. 416 [U. S. Comp. St. 1901, p. 639], it was provided as follows:

"That hereafter no marshal or deputy marshal be allowed more than one mileage for each mile actually and necessarily traveled, irrespective of the number of writs he may execute in making such travel."

By section 342 of the instructions of the department of justice to United States marshals, such marshals are instructed that the above statute does not apply to the service of process in civil cases, and in such cases they are directed to charge full mileage upon each writ served.

In my judgment these instructions are in direct conflict with the statute above quoted. The language of the statute is plain, and covers the precise question involved. The only ground for limiting the language that has been suggested is that the statutory provision is embodied in the general appropriation act providing for the expenses of United States marshals and deputies during the year 1904. The practice, however, of embodying general laws in appropriation bills has become so common that to adopt a narrow and restrictive construction confining their language to the subject-matter generally dealt with by the appropriation act would go far to nullify a good deal of the legislation of Congress. These provisos that are attached to appropriation acts for the purpose of procuring what is believed to be needed legislation, but which could not be accomplished by an independent statute by reason of the press of business before Congress must be treated the same as if they were separate and independent enactments. Giving to the statute that construction, the marshal in the cases here involved was entitled to but "one mileage for each mile actually and necessarily traveled." Making that allowance limits his charge to $31.08, which should be equally divided between the two cases, making the fee in each case $15.54.

THE OLYMPIA.

(District Court, D. Oregon. October 7, 1907.)

No. 4,798.

1. SHIPPING—CONTRACT FOR CARRIAGE OF HORSES—LIABILITY FOR BREACH.

A shipment of a number of horses from Nome to Seattle *held* to have been made under a contract made by the parties partly by correspondence and partly by oral conversations, all of which must be taken into account to ascertain its terms, and, as so construed, to have required the shipowner to construct stalls for the horses between decks, and slings for use in rough weather, the failure to provide which rendered the vessel liable for injury to the horses during the voyage.

2. SAME.

Where the terms and conditions upon which horses were to be carried on a vessel had been fully agreed upon by the shipper and vessel owner, a subsequent contract signed when the horses were loaded, at the instance of the carrier, by the shipper's head teamster without authority from the shipper, and differing materially in its terms from the previous agreement, was void.

8. SAME—MEASURE OF DAMAGES.

A shipper *held* entitled to recover for property lost during the voyage through the fault of the carrier the value of such property at the place of shipment, together with the freight paid thereon.

In Admiralty.

Wm. C. Bristol, for libelant.

John P. Hartman and Williams, Wood & Linthicum, for respondent.

WOLVERTON, District Judge. This is a libel to recover for loss alleged to have been sustained by reason of failure on the part of the respondent to carry and deliver in good order 15 head of horses from Nome, Alaska, to Seattle, Wash. It is asserted by libelant that the respondent agreed with it to carry the horses between decks, for the consideration of $45 per head, but that, in violation of such agreement, said respondent carelessly and negligently exposed the horses to the weather and storms upon the upper deck, by reason whereof 4 of them died, and the remaining 11 were rendered sick and badly bruised and damaged. The respondent relies upon a contract alleged to have been entered into between the Northwestern Steamship Company, the claimant, and one O'Hara, who, it is alleged, was the authorized agent of the libelant. Libelant first contemplated shipping the horses from Teller, a point situated many miles north of Nome, and entered into a correspondence with the representatives of the Northwestern Steamship Company concerning the matter. On September 10, 1904, F. P. Kendall wrote Mr. Perkins, of the Northwestern Commercial Company, an allied company with the Northwestern Steamship Company:

"Mr. Bernard tells me the 'Tacoma' will sail from Teller for Seattle about Sept. 15th. If such be the case, I would be willing to ship some ore by her, and probably also my horses, but I must know positively regarding the matter. I can get freight rates of $5.00 per ton on the ore and $35.00 each on the horses from Nome. If the 'Tacoma' is to sail about the date mentioned above and you will take the freight at rate specified, please send me word by return of 'Augusta' or by messenger to York if possible, and I will arrange accordingly."

Perkins answered on the 12th, saying:

"Yours of September 10th at hand. Mr. Ogilvie has covered the main points necessary in reply to the same. We are making you a ship's tackle rate of $4 on the ore. Such as is to be landed at the wharf and relightered to either the Tacoma or Olympia, we shall have to add to this a lighterage charge. We cannot take any ore at York or Lost river unless you have a guarantee of at least 50 tons, as Mr. Williams has already written you. The rate on horses is $45.00 either from here or from Teller. The Tacoma will not leave as early as you state in your letter."

On September 15th the North Coast Lighterage Company, another concern allied with the Northwestern Steamship Company, wrote the Northwestern Commercial Company as follows:

"Should a representative of the American Tin Mining Co. bring their horses to the entrance of Grantley Harbor across from Teller to be shipped on the S. S. Tacoma this fall you will please furnish them our large lighter and give them any assistance you can to get these horses to Teller, and assist them in finding some accommodations to take care of them while waiting for the steamer. We expect to ship these horses on the Tacoma on her return from Siberia."

And on the same day wrote the American Tin Mining Company at York:

"We beg to state that our steamship Tacoma should arrive at Teller, Alaska, about September 25th. After discharging cargo there she will proceed to Siberia, and return about September 30th or October 1st. We will take your horses at the rate of $45 per head, you to furnish your own feed and man to take care of horses. I would suggest that you have your horses at Teller by the 28th, and wait there until the arrival of the Tacoma, but should anything happen to the Tacoma that she should not come back to Teller, I would suggest that you do not wait longer than the 8th of October. After that drive your horses to Nome and we will take them out on either the S. S. Olympia or Victoria. I believe you can find stable accommodations at Teller, and this will be much better than attempting to keep your horses at the Reindeer Station. We have a large lighter at Teller, and you can have the use of this lighter to transfer your horses from one spit to the other at the entrance of Grantley Harbor. We will have the stalls built in the lower between decks of the Tacoma as soon as some part of her hold is empty. By putting the horses down below they will be much more protected from the cold and wind."

On September 24th the North Coast Lighterage Company, by George T. Williams, its president, again wrote F. P. Kendall, the manager of the American Tin Mining Company:

"I beg to quote you a rate of $45.00 per head for horses from Nome to Seattle on the S. S. 'Olympia,' we to furnish 25 pounds of feed per day while en route; this is based on ten pounds of oats and fifteen pounds of hay which is the same as the U. S. government allowance in transporting army horses. We will also have the N. W. C. Co. furnish such feed to your men who have charge of your horses while they are at Nome waiting for the steamer, at the regular market rates at the time of furnishing same. The bill for this feed and the freight on the horses will be sent to our Seattle office for collection, it being our understanding that you will be in Seattle at the time of their arrival. It is understood that you furnish your own men for taking care of the horses while on board the steamer. Trusting that we may have the pleasure of your business, we are."

This letter bears an indorsement at the left-hand corner near the bottom of the sheet in form as follows:

"Accepted. American Tin Mining Co., F. P. Kendall, Gen. Mgr."

On the previous day, to wit, September 23d, the American Tin Mining Company, through F. P. Kendall, its vice president, gave the Northwestern Commercial Company a letter introducing Mr. Neil O'Hara, who is described as "our head teamster," and "who," it is said, "will have charge of our horses from Nome to Seattle, as per arrangements perfected with Mr. Williams today. Please furnish what feed Mr. O'Hara requires for the horses in Nome, and also give him whatever other assistance you can, and greatly oblige."

In connection with these letters, Kendall testifies that he met Williams in Nome some where about the 15th to the 18th of September, and arranged with him for the transportation of the horses. Prior to that he relates that he had written to Williams in August touching such an arrangement. He says further:

"It was a proposition on my part for a freight rate on horses and ore, and an agreement on the part of Mr. Williams to take the horses and ore at certain rates. * * * Concerning the horses particularly, I stipulated that the horses should be taken between decks; that they should be provided with suitable stalls, and slings to be used in case of rough weather. * * * This was

agreed to by Mr. Williams; but he stipulated that the freight rate on the horses should be $45, if he was to furnish stalls and slings. It was also understood that the ship should furnish necessary feed for the horses during the voyage, which should be included in this freight rate of $45 each, but that we were to furnish the men to feed the horses * * * on the voyage from Nome to Seattle. * * * The original understanding was made that the horses should be shipped on the Tacoma, because she was the first vessel going on. * * * There was a question, as there always is in that country, about sailing dates. Vessels are delayed on account of rough weather. * * * Mr. Williams said it was possible that the Tacoma might be late, and in such case he could take the horses on the Olympia, which would be the next vessel sailing. The Olympia, however, was not going north of Nome. Consequently, if we decided to ship on the Olympia, we would have to take the horses to Nome. And when we left camp at York, O'Hara, who was our head teamster, had charge of the horses with the idea of taking them to Teller, which he did. But we learned that the Tacoma had not yet arrived at Nome. Consequently, O'Hara took the horses through to Nome to await the arrival of the Olympia, which would undoubtedly discharge and leave for Seattle before the Tacoma made her Siberian trip and returned to Nome."

After having this conversation and understanding with Williams, the witness returned to York, and a little later came back to Nome. It was while in Nome on this last trip that the letter of September 24th was written, and the acceptance noted thereon. Kendall claims that the contract was thus completed by the receipt of the letter of the 24th, but that the entire contract comprehended the prior letters exchanged between the parties and this understanding with Williams, as related by the witness.

Williams testified at the trial, in effect, that there was some conversation in regard to the between decks for the stock on the Tacoma, by reason of the fact, as he asserts, that that was the only place they could carry stock on that boat, leaving the inference or impression that the discussion did not extend to the Olympia or other boat, and therefore that there was no understanding that the horses were to be carried between decks on the Olympia. In a deposition taken some time before the trial, he states:

"I also suggested, in case the steamship Tacoma should not arrive at Teller by the 8th of October, that he best drive his horses overland to Nome, and we would carry them on the steamship Olympia or Victoria. I also stated that we would erect the horse stalls in the upper 'tween decks. About the middle of September Mr. Kendall arrived in Nome and stated his horses were on the way overland from Teller to Nome, and he was going out before they arrived, and asked me to give him freight rates in writing, which I did on the 24th day of September. After his horses arrived, in care of Mr. O'Hara, we shipped them to Seattle at the rates quoted Mr. Kendall, on the conditions of our regular stock contracts. While I agreed to place the horse stalls in the 'tween decks of the Tacoma, I did not agree to place any horse stalls on the 'tween decks of the steamship Olympia, for the reason this steamer has plenty of deck space, and the horse stalls were already erected, and the same was satisfactory and accepted by Mr. O'Hara."

O'Hara testifies that the letter of the 24th of September was handed him by Williams; that Kendall had left the same with Williams to be given him, with other instructions relating to the shipment of the horses; that when he inspected the ship Olympia he was informed that the horses were to be carried on deck (meaning the upper deck); that he protested that was not the understanding, with both the captain and

Mr. Williams; that the captain assured him the stock would be carried safely there, but that Williams informed him that it would cost too much to arrange stalls between decks, and they could not do it, and, further assured him that the captain would fix the stalls so that the horses would be perfectly safe. While the stock was being put aboard, O'Hara signed, with the Northwestern Steamship Company, what is termed a "Stock Contract," at the instance of a clerk of the company, but without reading the same. This instrument purports to be an agreement between the Northwestern Steamship Company of the first part and the American Tin Mining Company of the second part, whereby the steamship company agrees to furnish the second party standing room for 15 head of horses on its steamer Olympia. It is further stipulated that the horses shall be carried at the sole risk of the owner or shipper, unless damage or loss occur through the willful misconduct of the officers or employés of the steamer; that such owner or shipper shall, at his own cost and charge, provide and supply suitable and sufficient food for use of the said live stock while on board the steamer; and that the value of said live stock fixed by the shipper or owner is the sum of $100 each. In this relation Williams testifies in his deposition that, after O'Hara had been aboard the boat and returned, he stated to him (witness) that "the horse stalls on the upper deck would be all right, and he would ship his horses in accordance with our regular stock contracts." But on his examination at the trial he was asked:

"Did you have a talk with him at the time he came back as to the place on the ship where the horses were to be carried?"

To which he answered:

"No, sir; I only mentioned where they were to be carried before he went out. That is why I wanted him to look at them."

Stalls were eventually constructed on the deck of the Olympia, upon the port side, near the bow, and the horses when taken aboard were confined for carriage therein. The manner in which these stalls were constructed is gone into with much detail under the testimony, but it is not essential to elaborate it here. Capt. O'Brien, who was in charge of the ship on her voyage, relates that about six hours out of Unimak Pass he encountered a southerly wind, which increased in violence until in 48 hours it was blowing a living gale. In further description he says the storm was unusual for that time of the year, but that worse storms occur later in the season, and, when asked whether it was a dangerous storm, he answered:

"No particular danger, not to lives or the ship itself. * * * It is a good smart gale of wind; caused people to feel uneasy, those that aren't familiar with the ocean."

It is otherwise related that the boat listed and rolled to an angle of from 25 to 30 degrees, which caused the stock to become frantic, and that during the storm some of the stalls went down, and the horses had to be secured again and the stalls repaired. O'Hara asserts that all of the stalls came down at one time. Johnson says that six or eight of the horses were down in a heap; but Capt. O'Brien denies that more

than two or three were down at any one time. Thus it appears that the stalls were insecurely constructed, and, although they were covered with boards, the horses were much exposed to the weather, and contracted colds, and, by reason of the faulty construction of the stalls and their collapse, the horses, or a number of them, were hurt and bruised to such an extent that pus accumulated, and the parts affected were required to be lanced. A veterinary surgeon was employed to attend the animals that survived the voyage, for the space of about three months, when they were taken to Portland. This statement comprises the most pertinent and salient features attending the arrangement for and shipment of the horses in question, together with a brief outline of the injuries sustained.

The primary question for consideration relates to the controlling agreement between the parties for the carriage of the horses. From a careful review of the entire evidence, I am impelled to the conclusion that an agreement was reached through the correspondence alluded to and the verbal negotiations of the representatives of the companies concerned, substantially as related by Kendall, which was, in effect, in its final acceptance: That the Northwestern Steamship Company would carry the horses on the steamship Olympia between decks from Nome to Seattle, for the consideration of $45 per head, and deliver them at the latter point in good order and condition; the steamship company to furnish 25 pounds of feed per day each for the horses while in transit. This arrangement was not concluded fully until the letter of September 24th, with its acceptance by the American Tin Mining Company, was left with Williams to be delivered to O'Hara with other instructions for shipping the horses. Nor am I of the opinion that this letter constituted the entire contract. It was but one of the elements going to make up the agreement of the parties, and was intended, and is to be read, in connection with the other parts of the correspondence between the parties, and their verbal understanding in the meanwhile. There was no apparent purpose, or any attempt of the parties, to reduce their entire negotiations to a simple written agreement, and hence it cannot be said that the last letter written comprises the entire agreement so as to bring it within the rule that the final writing excludes all former statements concerning the terms of the contract. I am also as firmly impressed that the alleged live stock contract is without validity, for the reason that O'Hara was without authority from the libelant to execute it. He was but the American Tin Mining Company's teamster, with instructions to ship the stock in accordance with the directions which Kendall had left for him. It is manifest it was not within the purpose of Williams and Kendall that such a contract should be entered into, for it is palpably inconsistent in a very material particular with the statement contained in Williams' letter of the 24th. I refer to the stipulation to furnish 25 pounds of feed each day per horse shipped, while the alleged O'Hara contract required the shipper to supply the feed necessary for such purpose. There cannot be two valid contracts with incongruous provisions concerning the same matter, and so I am induced to hold that the agreement, as alleged and relied upon by the libelant, is valid and binding, and that the alleged O'Hara live stock contract is a nullity.

It may be further remarked that the live stock contract was not a technical bill of lading. Such an instrument is usually issued by the carrier after the goods have been taken aboard, and it often recites particular conditions, which are binding upon both the shipper and carrier. The Delaware, 14 Wall. 579, 20 L. Ed. 779. But the contract in question purports to be one of special agreement for the carriage of a particular commodity, and is such a one as a person acting in the relation of O'Hara to the American Tin Mining Company would not ordinarily be authorized to make or execute for and in behalf of the company. This being so, it follows that the steamship company, not having shipped as per agreement, is liable for the loss and damages arising on account of the injury sustained by the horses.

It is insisted, however, that, because O'Hara shipped the horses notwithstanding he was advised that they would be carried on the upper deck, it was tantamount to an agreement that they should be so carried. I am not convinced that such is the case. O'Hara was helpless to do otherwise; and the Olympia was the last boat going out that season for Seattle. But, if it be so conceded, it must then be held that the boat was at fault in failing to provide staunch and suitable stalls and appliances for carrying the horses upon the voyage safely and without injury. That a portion, if not all, of the stalls went down during the stress of weather, has been shown. This was in large measure the cause of exposure and injury to the horses. Beyond this, the testimony tends to show that the stalls were not so constructed at the outset, and provided with slings and cushions, as to prevent bruising and chafing through the tossing and pitching of the boat. But three slings were provided when the ship went out. Later, when the stress of weather was encountered, other slings and supports were improvised, and cushions were attached, to relieve the situation so far as possible; but, notwithstanding, there was great exposure and injury. The wind and storm, if it may be called such, were characterized as unusual for that season of the year, but accompanied by "no particular danger." "A good smart gale of wind," as described by the captain. While the boat pitched and tossed considerably, it was not more than might have been expected, and the plight was one that should have been provided against. The stress of weather and the sea encountered were not such therefore, considering the voyage and the course thereof, and the conditions of the elements usual or that might be expected while en route, as may be denominated "perils of the sea," and the ship is not relievable against the damages sustained by libelant by reason thereof.

This leaves the question of the amount of damages to be considered. One item is the value of the four horses that were lost. The only testimony on the subject of value is that of Kendall and another witness. The horses were purchased in Seattle some time prior to June, 1904, for shipment to Alaska, at the rate of $450 to $575 per team. There does not appear to have been any market value of horses in and about Nome at the time they were shipped. Kendall testified that horses were worth $300 per head, and referred to an instance of a sale at that figure. But he was not acquainted with the market value, and for the very good reason that there was no subsisting market in that locality. I take it, however, that the horses were worth as much in Nome as in Seattle, if

not more. They could not be had in Nome, and it was necessary to secure them abroad and take them in, so that the value was at least what they cost abroad. No specific value was placed upon the four horses lost, and I cannot say that it was above the minimum paid for any of the whole number.

Hence I will assess the damages at $225 per head for the horses lost, or an aggregate of $900. To this should be added the freight charges paid thereon, namely, $45 for each horse, or $180. The Hugo (D. C.) 61 Fed. 860; The Lillie Hamilton (D. C.) 18 Fed. 327. I allow also $300 for injury and damages to the remaining 11 head.

ADLER v. GALBRAITH, BACON & CO.

(District Court, W. D. Washington. September 7, 1907.)

No. 2,785.

1. ADMIRALTY—JURISDICTION—MARITIME CONTRACT.

While a suit to collect brokerage and money expended in negotiating a charter party is not a case of admiralty and maritime jurisdiction, nor cognizable in a court of admiralty, a libel which alleges that libelant as agent for respondent, executed a charter party in his own name, by which respondent became obligated as his principal, and that by reason of respondent's breach of the contract libelant was compelled, as the nominal party, to pay damages which he seeks to recover by subrogation to the rights of the other party, is one founded on the charter party and within the admiralty jurisdiction.

[Ed. Note.—Jurisdiction as to matters of contract, see notes to Norton v. The Richard Winslow, 18 C. C. A. 347; Bontin v. Rudd, 27 C. C. A. 530.]

2. SHIPPING—CHARTER PARTY—AUTHORITY OF AGENT TO BIND PRINCIPAL.

The rule which casts upon the charterer the risk of unavoidable delay of a ship in reaching her loading port has a reasonable limitation, and a charterer is not obligated to accept the ship if by excessive delay the object he had in view has been frustrated, and he has been deprived of all beneficial use of her. Therefore a charterer is not bound by a charter in which his agent without his authority fixed an absolute date until which the vessel might be delivered.

3. SAME.

Libelant, as a subagent, in December chartered for respondent a vessel to carry a cargo from Hamburg, Germany, to Seattle, and also as such agent or broker purchased the cargo in Hamburg. The negotiations were conducted in Seattle between respondent and the German consul at Vancouver, B. C., who was connected with libelant in the brokerage business at Hamburg. It was understood that early sailing was important and should be in January or February, if possible; but respondent authorized the charter of the vessel, which it was advised was "expected to load in March," and it was also contemplated that the usual Hamburg-Californian charter party should be used. Without respondent's knowledge, libelant agreed to a clause in the charter party giving the owners until May 31st to deliver the vessel, and on receiving a copy respondent at once rejected it and so notified the other party to the negotiations and refused to accept the vessel. *Held*, that respondent's contract was governed by the laws of this country, where it was made, and under which respondent was not bound to accept the charter, and especially where the claim for damages for breach of the contract was made by libelant as having been subrogated to the rights of the vessel owner; his own negligence or want of good faith toward his principal having been the sole cause of his loss.

In Admiralty. Suit in personam to recover damages from the charterer of a ship for refusal to accept the vessel, or to pay the amount demanded for canceling the charter party. Hearing on the merits. Decree for respondent.

Kerr & McCord, for libelant.

Roberts & Leehey and J. M. Ashton, for respondent.

HANFORD, District Judge. The following is a condensation of the charging part of the libel: In the month of December, 1903, the respondent (a corporation) purchased a ship load of cement and salt to be shipped from Hamburg to Seattle. The purchase was consummated through brokers; the libelant at Hamburg and his correspondent, Baron Johann Wulffsohn, who resided at Vancouver, B. C., acting in that capacity. To provide a carrier to bring the merchandise so purchased to Seattle, the respondent authorized Wulffsohn to charter the ship Muskoka, on terms and conditions specified. Wulffsohn authorized the libelant to charter the ship in his own name. The libelant under authority from the respondent, through Wulffsohn as intermediary, entered into a contract with her owners for the hire of that vessel to carry a cargo of cement and salt from Hamburg to Seattle. At the time of the transaction the ship was supposed to be at sea, bound from a South American port to Hamburg, and due to arrive about the 15th of March, 1904, but being disabled in a storm she was compelled to deviate from her course, going to Valparaiso for repairs, and as a consequence of that mishap, notwithstanding due diligence in making necessary repairs, her arrival at Hamburg was delayed until May 5th. The respondent refused to accept the charter party when tendered and refused to load the ship and refused to pay the amount demanded by the owners for cancellation of the charter party. The ship was chartered to other parties at a rate very much lower than the rate which the libelant agreed to pay. The libelant and Wulffsohn expended considerable money for telegrams, traveling expenses, brokerage fees, and legal expenses incidental to the business of chartering the vessel, and compromising with the owners. Being advised that he was leaglly obligated by the charter party, the libelant settled with the owners on the best terms which he could make with them, and to be released paid £700 sterling, and the respondent has refused to reimburse him.

By exceptions to the libel and in the argument on the final hearing, the respondent disputes the jurisdiction of the court, maintaining that the libel sets forth a demand by an agent against his principal for compensation for services rendered and reimbursement for expenses incurred, all incidental to a proposed hiring of a ship; that the services rendered were not maritime services, and that whatever contract, express or implied, may have existed, was not a maritime contract, and the controversy to be decided is not cognizable in a court of admiralty jurisdiction.

It must be conceded that a suit to collect brokerage and money expended in negotiating a charter party is not a case of admiralty and maritime jurisdiction, and not cognizable in a court of admiralty of this country. The Tribune, Fed. Cas No. 14,171; The Humboldt (D. C.)

86 Fed. 351; The Retriever (D. C.) 93 Fed. 480; Taylor v. Weir (D. C.) 110 Fed. 1005.

Nevertheless, this court overruled the exceptions to the libel, and now maintains that it has jurisdiction of the cause, for the reason that the libelant's pleading must be interpreted to mean that the libelant pursuant to authorization from the respondent executed the charter party as a represenative of the respondent, so that the respondent, being the beneficiary of the contract, became obligated as a principal contracting party, and by breach of the contract became legally obligated to the owners for the amount of damages recoverable, and that the libelant, being also obligated by reason of having executed the contract in his own name, was compelled to satisfy the demand of the owners, and, having done so, became, by the principles of equity, subrogated to their rights as against the real charterer of the ship; therefore the suit is founded upon a charter party, which is a maritime contract. The libelant, having invoked the jurisdiction of this court, must win or lose upon this theory, because any different theory, consistent with the allegations of the libel, must lead to the conclusion that the controversy is determinable by application of the common law, and that the respondent is entitled to have it submitted to a jury for decision. That is to say, the case must be dismissed for lack of jurisdiction. By the respondent's answer, evidence, and arguments it is admitted that it authorized Wulffsohn to charter the Muskoka, and I find that the ground of the controversy between the parties comprehends only the particular terms and conditions of the contract, and that the question to be decided is whether the respondent by an authorized agent assented to certain clauses in the contract on which the suit is founded. The case is similar to Starr & Co. v. Galgate Ship Co., 68 Fed. 234, 15 C. C. A. 366, which was a suit in admiralty, in which the main question was whether a charter party executed in a foreign country, by an agent in behalf of the charterer, one of the terms of which varied from the charterer's instructions given to a correspondent of the signer, constituted a valid contract, and, although no question as to the jurisdiction appears to have been litigated in that case, it is a precedent for maintenance of jurisdiction to decide a similar question in this case.

The respondent repudiated the charter party because of two objectionable clauses therein, which read as follows:

"The vessel to proceed with all safe speed direct to port of discharge, and deliver the cargo at two wharves, if required, *the cost of towage from one wharf to the other being for merchants account.* * * * Lay days not to commence to count before 25 March, 1904, unless vessel and cargo both ready sooner, and charterers to have the option of canceling this charter party if vessel not arrived and ready to commence loading by 31 May, 1904."

It is necessary to a proper understanding of the respondent's objections to explain that a printed blank was used, that a period after the word "required" was converted into a comma, and that the words underscored were written, making an addition to the clause, and that the canceling date was written in a blank space.

The respondent asserts that it did not authorize either Wulffsohn or the libelant to make or accept a charter party making its option to have the cargo discharged upon two wharves dependent upon payment

of the cost of towage, and limiting its option to cancel the charter party for delay, so as to allow the ship until May 31st to get ready to commence loading at Hamburg.

On the libelant's part, the item as to cost of towage is treated as being too trivial to constitute a defense; but, as the owners of the ship deemed it to be of enough importance to insist upon making it one of the terms of the contract, it is material, and they could not prevail in a suit against the respondent, without proving that the minds of the contracting parties met and assented to each and every one of the terms and conditions stipulated in the charter party. Compania Bilbaina, etc., v. Spanish-American, etc., Co., 146 U. S. 483, 13 Sup. Ct. 142, 36 L. Ed. 1054; Starr & Co. v. Galgate Ship Co., 68 Fed. 234, 15 C. C. A. 366.

With regard to the canceling date, the argument made in behalf of the libelant is: That, as both parties knew that the ship was enroute from a distant port to Hamburg, the respondent assumed the risk of her detention by unavoidable causes; that the voyage to the loading port was prosecuted with diligence, and the owner took no unfair advantage by withholding the ship, but she was delayed by unavoidable causes; that the necessary repairs were made with due diligence, and she did arrive and was promptly tendered to the libelant for loading, so that the respondent was not in any wise prejudiced by reason of the canceling date written in the charter party; therefore it is unimportant.

This argument circulates around, but does not touch, the vital point raised by the pleadings. The question to be decided is: Did the charter party, when it was signed by the libelant, have force, and virtue to bind the respondent? All acts of the owners of the ship subsequent to the signing and all possible excuses for nonperformance of a valid contract by the respondent are irrelevant to this issue, for the validity of the charter party must be determined by its contents and the circumstances under which it was executed. The rule of law which casts upon the charterer the risk of unavoidable delay of a ship in arriving at the loading port is not so rigid that it may not yield to circumstances. In the case of Fearing v. Cheeseman, Fed. Cas. No. 4,710, Mr. Justice Clifford stated the rule in the following words:

"The implied obligation of reasonable despatch in proceeding to the place of loading must be considered in connection with the express exception of the perils of the seas and navigation. Such an implied covenant in a charter party is not a condition precedent, which if broken will justify the charterer in disregarding all his covenants and promises, unless the delay is so great that it deprives the charterer of the whole benefit of the contract, or entirely frustrates the object he had in view in chartering the vessel."

As recited in this excerpt, the rule has a reasonable limitation, and a charterer would not be obligated to accept the ship if, by excessive delay, the object which he had in view had been frustrated, so that he would be deprived of all beneficial use of her. This is substantially different from the stipulation contained in the charter party which the libelant executed, for by its terms, regardless of the object which the respondent had in chartering the Muskoka, the canceling date fixed absolutely the period of grace which the owners might take advantage of. This is an important feature of the contract, and, if the libelant

exceeded his authority as an agent in agreeing to an absolute date, the respondent cannot be held to have given its assent to that stipulation, and upon the rule sanctioned by the authorities above cited, that a written contract cannot be void as to some of its terms and binding as to others, and unless the minds of the parties met, and there was mutual assent to every one of its terms, the instrument is entirely void, the respondent had a lawful right to reject this charter party when apprised of its contents and terms.

For the reasons which I have stated the court decides that the respondent's contention (if sustained by the evidence) constitutes a valid and complete defense.

In order to reach a conclusion as to whether the respondent did or did not authorize the execution of a charter party containing the abovementioned conditions, the circumstances which affected the transaction, as well as the correspondence between the respondent and Wulffsohn, must be considered, and it is necessary to keep in mind the fact that there was no direct communication between the libelant and the respondent. Wulffsohn was the German consul, residing at Vancouver, B. C., and intimately associated with the libelant in the brokerage business. If they were not partners, they were correspondents, and co-operated with each other in that business, and they were interested in placing merchandise of European production on the market of Seattle for the profit they could make on sales as well as commissions to be earned by chartering ships. The respondent was doing a mercantile business at Seattle, and desirous of expanding its business as an importer of foreign merchandise. Preliminary to the correspondence relating to the chartering of the Muskoka, there had been conversations between the managers of respondent and Wulffsohn relating to the purchase of cement of the kind designated as "Flying Cask" cement and salt, and, before placing with Wulffsohn a definite order for the purchase of a ship load of these commodities, inquiry was made to ascertain if a ship could be chartered to load at Hamburg in January or February, 1904, and Wulffsohn obtained through the libelant an offer of the Muskoka, which was expected to arrive at Hamburg in time to load during the month of March. The most definite information obtainable in regard to the position of the ship at the time was that she had sailed from Junin on the coast of South America, for Hamburg, on the 18th of November, 1903. It was understood by the parties that an early sailing date was an important factor in the negotiations, for the reason that unless the cargo could be delivered in time for the fall trade it would probably have to be carried over the winter season, which would be a detriment to the respondent, involving the risk of loss by fluctuations in the price of the commodities as well as interest on the capital invested and insurance. In the negotiations it was contemplated that a charter party, if made, would conform, generally, to the printed blank known as the "Hamburg-Californian Charter Party." Promptness in loading, sailing, and discharging the cargo is an important factor in every contract for the hire of a ship. These are the circumstances and conditions to be kept in view in reading and construing the following correspondence pursuant to which the charter party was executed at Hamburg:

"Seattle, Wn., Dec. 16, 1903.

"Mr. Johann Wulffsohn, City—Dear Sir: Confirming our conversation, we this day make you a firm offer, good for ten days, of five shillings per barrel for Flying Cask cement, freight rate not to exceed fifteen shillings, and $3.60 per ton for salt. The understanding is that the cargo may contain from 12,000 to 18,000 barrels of cement, and in the neighborhood of 500 tons of salt. Shipment to be made in January or February, 1904.

"Yours respectfully, Galbraith, Bacon & Company,
"Per ———."

"Seattle, Wn., Dec. 23, 1903.

"Mr. J. Wulffsohn, City—Dear Sir: Confirming our yesterday's conversation with you, in which we authorized you to charter on our behalf, the ship Muskoka expected to load in March, 1904, at Hamburg for Seattle, at the freight rate of sixteen shillings per ton; we now confirm the same, and also confirm purchase from you today of Cement and Salt to be shipped on the Muskoka, as follows: Flying Cask cement at five shillings one and one-half pence per barrel. Salt at not over fifteen shillings per ton of 2,240 pounds, all f. o. b. ship at Hamburg. It is understood that the salt will not exceed 500 tons, in amount, and perhaps will be less than that amount, the balance of the cargo to be Flying Cask cement. It is further agreed and understood that we are to have one-half of the 2½ per cent. address commission; also, that we are to receive port agency fee amounting to $100.00.

"Yours respectfuly, Galbraith, Bacon & Company,
"[Signed] Per C. H. B."

"Seattle, Washington, Dec. 24, 1903.

"Messrs. Galbraith, Bacon & Co., City—Gentlemen: Confirming my respects to you of this morning, I now beg to advise you that I have just received a cablegram from my Hamburg friend informing me that the charter of S/V Muskoka on your behalf has been closed. Trusting that this first transaction may be the commencement of a pleasant and mutually advantageous relation between us, I remain, gentlemen, wishing you the compliments of the season.

"Yours very truly, [Signed] Johann Wulffsohn."

"Seattle, Washington, Dec. 24, 1903.

"Messrs. Galbraith, Bacon & Co., City—Gentlemen: I beg to acknowledge the receipt of your favor of the 23d inst., in which you put on record the rate of freight and conditions at which you have authorized me to charter on your behalf, the S/V Muskoka and also confirming the purchase from me of a cargo of cement and salt to be shipped in said vessel and f. o. b. prices to be paid by you for same, and further stating the proportion of cement and salt to be shipped. All of which I find in order and beg to confirm hereby. I notice that in your letter, under reply, you have overlooked to confirm the terms of payment as arranged and agreed between us and which are as follows, viz.: You agree to furnish me with a letter of credit on Hamburg or arrange through your bank here to open a credit with the Bank in Hamburg for the amount of your purchase, plus insurance (if insured over there) and also for the one-half of the freight, payable in Hamburg on signing of bill of lading. The price for the cement and salt is net payable at Hamburg in exchange against shipping documents. On the half of the charter money you are to be allowed a discount of 6 per cent. for interest and insurance. All bank charges, if any, to be entirely on your account. I shall be glad to have your confirmation of the above at your earliest convenience, and also the name of the Bank in Hamburg at which the credit will be opened, so that I can advise Mr. Paul Adler.

"Very truly yours, [Signed] Johann Wulffsohn."

"Seattle, Wn., Dec. 24, 1903.

"Mr. J. Wulffsohn, City—Dear Sir: We beg to acknowledge receipt of your letter of this date to us confirming the terms of our purchase from you of

cement and salt, and as it is in accordance with our understanding, we now hereby confirm the same.

"Yours respectfully, Galbraith, Bacon & Company,
"[Signed] Per J. E. Galbraith."

These letters constitute the agreement between the respondent and Wulffsohn, and they contain all the terms thereof except the printed clauses of the Hamburg-Californian form of charter party, which are implied terms. And this contract, including the implied terms, defines the extent and limitations of Wulffsohn's authority to charter the Muskoka for the respondent. It is to be noted that this agreement was made at Seattle, that the authority to charter the Muskoka was incidental to the purchase of a cargo of cement and salt, and given to Wulffsohn personally, and did not include general discretionary power, nor special authorization, to assent to any terms not indicated by the correspondence or the printed form, nor to fix absolutely the date to which the charterer's option to cancel the charter party should be postponed. The libelant, in acting as the representative of the respondent, was but a subagent having only the same power that the respondent conferred by its contract with Wulffsohn. He assumed discretionary power in making the charter party containing the clauses to which the respondent objects, and it is the decision of the court that by doing so he exceeded his authority, and that the respondent had a lawful right to reject the charter party for that reason.

A certified copy of the charter party was sent by Wulffsohn to the respondent on January 30, 1904. It was received on February 3d. On the same day the respondent rejected and returned it, and by a telegram and letter informed Wulffsohn of its determination to reject, and in the letter assigned the unwarranted assumption of authority, and the two objectionable clauses as grounds for repudiating it. Until that date the respondent could not have become obligated to accept the charter party by ratification of the unauthorized act of the libelant in assenting to the stipulation covering the cost of towage and in fixing May 31st as the canceling date. This is so because until then it did not have knowledge of the facts. A principal cannot be held to have ratified an unauthorized act of an agent without proof of a declaration made, or of an act, whereby he expresses definitely his intention to ratify after he has acquired true information of all the material facts of the transaction. This is an elementary principle of the law of this country. 1 Amer. & Eng. Encyc. of Law (2d Ed.) 1189. The laws of this country, rather than the laws of Germany, are controlling in this case, for the reasons that the only authority for chartering the Muskoka on the respondent's behalf was conferred by a contract made at Seattle, all of the respondent's transactions, declarations, and communications were with Wulffsohn, and by being associated together, as above stated, the libelant and Wulffsohn must be regarded as one and the same party, so far as the respondent's rights and obligations involved in this lawsuit are concerned; otherwise the libelant was not an agent of the respondent for any purpose whatever, and his cause is groundless, so that necessarily his claims are subject to the laws of this country.

At all times and in all of its communications after the receipt of the

charter party the respondent was steadfast in refusing to accept it. Therefore there is no foundation upon which a finding that it was ratified with knowledge of its terms can be predicated.

Discussion of the correspondence which passed between the respondent and Wulffsohn, subsequently to December 24, 1903, would lead to no conclusion beneficial to the libelant. Therefore I refrain, except to say: That the proctors for the libelant wisely omitted to plead the supposed general custom, allowing a chartered ship from 30 to 90 days to reach her loading port after the probable date on which she would be due to arrive, which Wulffsohn lays stress upon in his letters. This custom, if it were pleaded and proved, would be considered as a reasonable and flexible rule, and if it were read into the charter party the respondent would be entitled to have the urgency for an early sailing date considered as one of the circumstances affecting the time allowance. Lowber v. Bangs, 2 Wall. (U. S.) 728, 17 L. Ed. 768. And in view of all the material circumstances 30 days might be the limit. Whether that or a longer period would be allowable, the custom is one thing and the time allowance as limited by the canceling date is different, and an agent's power to fix a canceling date without consulting his principal cannot be supported by the custom.

In a general view of the whole case, it appears to be without merit, and the reasons for denying relief to the libelant are ample. In addition to strictly legal grounds of defense relied upon, it is to be observed that the libelant in accepting an agency became bound to act in good faith and with business prudence; but, instead of doing so, he improvidently chartered the Muskoka, allowing her the privilege of loading in June a cargo which he bought simultaneously to be delivered for shipment in March. He withheld from the respondent for an unreasonable time information as to the exact date to which its right to cancel the charter party for delay was postponed. When the respondent refused to accept the charter party, the libelant endeavored to extricate himself from complications by obtaining the opinions of experts and a German lawyer, the expense of which he has endeavored in this lawsuit to cast upon the respondent, although it would appear from the advice given that the questions submitted evaded entirely the point at issue as to his rights as a special agent, under the authority conferred by the correspondence between the respondent and Wulffsohn. On the 9th day of May, 1904, the libelant, through Wulffsohn, gave the respondent an ultimatum to either load the Muskoka, pay £1,000 sterling for canceling the charter party, or be held for "all damage, loss, expense, costs and attorney's fees that may be incurred," and on May 14, 1904, a certificate canceling the charter party was signed and sworn to by himself and an agent of the owners, which declares that by mutual consent the charter party was canceled May 10th, "and that Mr. Paul Adler has handed a cheque for £1,000 (one thousand pounds British Str.) to the owners," whereas, in fact he compromised with the owners by the payment of £700 sterling, and the presumption is almost conclusive that there was an attempt on his part, by connivance with an agent of the owners, to mulct the respondent for £300 in excess of the amount actually paid. In his deposition the libelant complains bitterly of delay on the part of the re-

spondent in giving notice in definite form of its rejection of the charter party, and he asserts that in the beginning of January he could have secured the owners' consent to cancellation by paying them £56, and he pretends to think that if he had taken advantage of his opportunity then, acting upon his own initiative, he would have made himself liable to the respondent. This complaint brings into clear view his inexcusable negligence in failing to promptly acquaint the respondent with the terms of the charter party. If he had given that information as early as he gave news of the detention of the Muskoka at Valparaiso, he would have received a definite notice of the rejection of the charter party in the first days of January, or, if not, he could upon just and legal grounds claim that by failure to reject promptly the respondent elected to accept it and become obligated to observe all of its terms. He certainly would have no cause to regret the decision this court would render, if there had been any dalliance on the part of the respondent after being apprised of the terms of the charter party, and if the libelant had not been dishonest in demanding a larger sum than he was required to pay for its cancellation. As stated in the beginning of this opinion, this case must be determined according to the principles of equity, and the libelant is not entitled to equitable relief in view of the evidence showing that these transactions with the respondent are not free from the taint of fraud.

Let a decree be entered that the libelant take nothing, and that this suit be dismissed, with costs.

In re ROGERS & STEFANI.

(District Court, W. D. Arkansas, Ft. Smith Division. October 10, 1907.)

1. BANKRUPTCY—COMPENSATION OF STATE RECEIVER—JURISDICTION OF STATE COURT TO ALLOW.

A state court took possession of the property of a partnership through its receiver in a suit between the partners for a dissolution, and subsequently, in accordance with a stipulation between the parties, it ordered the receiver to return the property which he did. Some time later, and more than four months after the commencement of the partnership suit, bankruptcy proceedings were instituted against the partnership, in which an adjudication was made and a trustee appointed, who took possession of the property from the bankrupts. Afterwards the receiver made his report to the state court, which approved the same and discharged the receiver, at the same time making him an allowance for his services, which it directed to be certified to the bankruptcy court for payment. *Held* that, on the return of the property to the partners, such court lost jurisdiction over the same, or to make any order with respect thereto, and its order was not binding on the bankruptcy court, which had previously succeeded to the possession of the property and full jurisdiction to administer the same.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, §§ 321–323.]

2. SAME—RIGHT OF RECEIVER TO COMPENSATION.

A court of bankruptcy will not allow compensation to a receiver of a state court, who previous to the bankruptcy had possession of the bankrupt's estate, for time during which no service was rendered, nor for services which were of no benefit to the estate.

3. SAME.

A receiver of a state court, who, on turning over the property to the parties pursuant to an order of the court, with their consent withheld certain accounts for collection, the proceeds to be applied on his compensation, but who made no effort to collect the same, is not entitled to return them to a trustee in bankruptcy, subsequently appointed for the owners of the property, after they have become worthless, and to be allowed their amount from the estate.

In Bankruptcy. On review of referee's decision in re claim of E. G. Connolly.

Youmans & Youmans, for petitioner.
A. A. McDonald, for trustee.

ROGERS, District Judge. This claim of E. G. Connolly is before this court for review of an order of Hon. L. H. Southmayd, one of the referees in bankruptcy of this court, who disallowed the whole claim as without merit, except as to the item of $26.25 thereof, which he allowed as a preferred claim. The facts are these: On the 17th of March, 1905, A. L. Rogers filed a complaint in equity in the chancery court for the Greenwood district of Sebastian county, Ark., against his partner in the saloon business, Charles Stefani, praying for judgment dissolving the copartnership, the sale of the property through a receiver to be appointed, the payment of the firm debts, and the distribution of the net proceeds between the partners; and on the same day the chancellor appointed the present claimant, E. G. Connolly, receiver, with full powers. Presumably the case took the usual course for like cases, until the 10th of August, 1905, when at the instance of the parties to the suit, and with the consent of the principal creditors, the chancellor, at chambers, made an order directing the receiver, on certain conditions specified in the order, to turn all the property in his hands back to the parties in the suit, and to file, on or before August 21, 1905, a complete report and account of his receivership. The order also provided that the receiver should not be discharged until said account (which should remain open for inspection until the third day of the October term of court) should be approved. On August 18th this order was temporarily suspended until August 21, 1905, at the instance of a creditor who was not represented when it was made. On the 29th of August, 1905, acting under the order of August 10, 1905, the receiver delivered to the owners, Rogers & Stefani, all the assets in his hands belonging to them except some books of account, and some accounts aggregating $139.60, the latter of which he kept, intending to collect the same and pay himself certain allowances made him in the order of August 10, 1905. These accounts he did not collect, or make any effort to collect, and took no further steps in the receivership until October 25, 1905, when he filed his report and account as receiver under the order of August 10, 1905. In that report he charges himself with the $139.60 in accounts which he had withheld to collect and pay himself with. His account showed that they were taken for collection. But he did not collect them, or make any effort to do so, until December 2, 1905, when he filed an amendment to his October 25th account and credited himself with the same amount,

$139.60, and also set up claim for three months' services, from September 1st to December 1st, at $150 per month, and $30 for personal expenses in attending upon the chancery court.

There is some confusion in the evidence as to what became of the $139.60 in accounts, but not a dollar was ever realized upon them by the estate of Rogers & Stefani, and no effort was made by Connolly to do so at any time from August 10th to December 2d, and the proof affirmatively shows that during that period he performed no services of any character of any value to the estate of Rogers & Stefani. Meantime, on the 11th of September, 1905, 13 days after he had, under the order of August 10, 1905, delivered to Rogers & Stefani all their assets then in his hands, a petition in bankruptcy was filed against Rogers & Stefani, and on the 31st of October, 1905, they were adjudicated bankrupts, and in due course of procedure a trustee was appointed, who took into his custody the estate of Rogers & Stefani, and the same was in his hands as such trustee and in due course of administration on December 2, 1905, when the final report and amendment thereto of claimant as receiver came on to be heard for approval by the chancery court for the Greenwood district of Sebastian county, Ark. On the hearing of this report the following order was made:

"Now on this day the parties appear, and Ed Connolly files supplemental report, in which he asks credit for $139, the same being for claims which he charged himself, which are uncollectible, and also for his salary for three months from the 1st day of September to December 1, 1905, $450, and also his necessary expenses for attending court at Greenwood for two terms, $30; also a fee of $54 paid to his attorney, J. M. Spradling. Upon consideration whereof, the said claim for uncollectible bills is allowed, $139; expenses attending court, two terms, $26.25; and, it appearing that the said receiver has not been discharged in this action and has been at all times subject to the orders of this court in the discharge of his duties, is allowed the said sum of $450 for his said services from September 1 to December 1, 1905, making in all $615.25, and the said attorney's fee of $54 is also allowed, which is ordered taxed as costs in this action. Also comes the clerk of this court, who was appointed master, and who has heretofore filed his report, which was approved, including a fee of $50 allowed him and taxed as costs, and further shows that his costs as clerk not heretofore paid is the sum of $3.60. And also comes the sheriff and shows to the court that his costs not heretofore paid is $3.05, which respective sums are allowed and ordered paid. And it appearing to the court that this is an action between partners to dissolve and settle the partnership existing between them, and that during the pendency in this court the creditors of said partnership proceeded in the District Court of the United States for the Western District of Arkansas, at Ft. Smith, Ark., against said partners, under the bankruptcy law of the United States, and in such proceedings of said court adjudged said partners to be bankrupts. Now, therefore, the clerk of this court is ordered to certify all the aforesaid costs to the said United States court, and the referee thereof, to the end that the same may be preferred and paid according to law. And it is further ordered herein that the said receiver, Ed Connolly, having fully reported, is finally discharged."

It is upon this order of the chancery court that the claim of the petitioner is based.

The question raised is whether this court is bound by that order, or whether it will pass upon this account upon its merits. In this case the said chancery court acquired jurisdiction of the persons and property of Rogers & Stefani, the bankrupts, more than four months before the proceedings in bankruptcy were begun, and if it had retained posses-

sion of the property until the order in controversy was made it would not have lost control of the property by the adjudication in bankruptcy. If the trustee in bankruptcy in a case of that kind had any rights in the property in the custody of the state court through its receiver, the law and the procedure in such case is well established. In re Knight (D. C.) 11 Am. Bankr. Rep. 1, 125 Fed. 35; Metcalf v. Barker, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122; Pickens v. Roy, 187 U. S. 177, 23 Sup. Ct. 78, 47 L. Ed. 128; Jaquith v. Rowley, 188 U. S. 620, 23 Sup. Ct. 369, 47 L. Ed. 620. But there is no pretense that the trustee acquired possession of the estate of the bankrupt by taking it from the receiver of the state court, either with or without his consent; on the contrary, it is undisputed that he took it from the bankrupts themselves, to whom the receiver had delivered it under an order of said chancery court entered more than 60 days before the trustee was appointed. True, the receiver had not been discharged, nor had his account been approved, by the said chancery court; but manifestly the said chancery court did not regard the property as being in the hands of its receiver, for in that event, presumably, it would have held onto the property, and by appropriate orders compelled the payment of the costs of its officers and all legitimate expenses incurred, as it had the undoubted right to do, and would not have certified its order making allowances to its officers to the bankrupt court for payment. This last statement is limited to cases in which the state court had acquired jurisdiction more than four months before the proceedings in bankruptcy were begun. The question is not before the court in this case as to what the law is with reference to cases in which the state court has acquired jurisdiction within the four-months period.

This case, therefore, stands in this attitude: The state court by its own orders caused its receiver to surrender the bankrupts' estate to the bankrupts, in whose possession it was subsequently seized by the trustee in bankruptcy. Afterwards that court made an order fixing the allowance of its receiver, his attorney, and its clerk, and made such allowance a preferred claim upon the assets of the bankrupt in the hands of the trustee, and caused the same to be certified to the bankrupt court accordingly. In effect the making of this order was tantamount to an effort on the part of the state court to administer, as far as this order went, the estate of the bankrupt, rightfully and previously in the possession of the bankrupt court. This was attempted in the case of In re Reynolds (D. C.) 11 Am. Bankr. Rep. 758, 127 Fed. 760, in which case, five days after the adjudication in bankruptcy, a mortgagee of a part of the bankrupt's property took possession of it under the terms of his mortgage, which was executed and duly recorded more than four months before the bankruptcy proceedings were begun, which property, at the time he took possession, had not been actually seized by the trustee in bankruptcy. The mortgagee then filed suit in the state court to foreclose the mortgage, and prosecuted it to judgment. The trustee by appropriate proceedings brought the matter to the attention of the bankrupt court. The court said:

"The only question here presented is as to the effect of the adjudication of bankruptcy in the premises. An adjudication in bankruptcy operates in rem, and from the moment of the adjudication the bankrupt's estate is under the

jurisdiction of the bankruptcy court, which will not permit any interference with its possession, even though it be by an officer of a state court acting under its process. Being a proceeding in rem, all parties interested in the res are regarded as parties thereto, including the bankrupt and trustee, as well as the creditors, secured and unsecured. The adjudication vests in the trustee or temporary receiver the title of the bankrupt's property, and stays all seizures made within four months. An adjudication of bankruptcy has the force and effect of an attachment and an injunction. It is a caveat to all the world. Bank v. Sherman, 101 U. S. 403, 25 L. Ed. 866; Conner v. Long, 104 U. S. 228, 26 L. Ed. 723; Mueller v. Nugent, 184 U. S. 14, 22 Sup. Ct. 269, 46 L. Ed. 405; Id., 7 Am. Bankr. Rep. 224, 105 Fed. 581, 44 C. C. A. 620; In re Pekin Plow Co., 7 Am. Bankr. Rep. 369, 112 Fed. 308, 50 C. C. A. 257; In re Fraizer (D. C.) 9 Am. Bankr. Rep. 21, 117 Fed. 746; In re Brooks (D. C.) 1 Am. Bankr. Rep. 531, 91 Fed. 508; In re Huddleston, 1 Am. Bankr. Rep. 572; In re Smith & Dodson (D. C.) 2 Am. Bankr. Rep. 9, 92 Fed. 135; Chesapeake Shoe Company v. Seldner, 10 Am. Bankr. Rep. 470, 122 Fed. 593, 58 C. C. A. 261; Brandenburg's Bankruptcy, §§ 250, 494, 495. * * * The question as to the bar of the judgment pleaded, and the estoppel claimed to have been presented thereby, is without merit. In virtue of the adjudication in bankruptcy, this court acquired jurisdiction over the res. The jurisdiction thus acquired was both complete and exclusive. Being prior to that of the state court, it was permanent. The state court was without jurisdiction in the premises, and any judgment it may have rendered as the result of the litigation between Strain and said trustee it was and is powerless to enforce, and is not binding on this court; and such judgment cannot affect the right and power of this court to assert its jurisdiction over the property in question, and proceed to a determination of the right to its possession. Collier on Bankruptcy (4th Ed.) 222; In re Chambers et al. (D. C.) 3 Am. Bankr. Rep. 537, 98 Fed. 865; In re Russell, 3 Am. Bankr. Rep. 658, 101 Fed. 248, 41 C. C. A. 323; In re Baird (D. C.) 8 Am. Bankr. Rep. 649, 116 Fed. 765."

In Hanson v. Stephens, 11 Am. Bankr. Rep. 172, 116 Ga. 722, 42 S. E. 1028, the Supreme Court of Georgia went as far, perhaps, as any court has gone in a case of this kind. In that case a bill in equity was filed on the 27th of November, 1901, and, after making certain allegations, prayed for equitable relief and for an injunction and a receiver, and on the 5th of March following a receiver was appointed and an injunction granted. Pending that condition a petition in involuntary bankruptcy was filed against the defendant, and on April 5th following an adjudication was had, and during the same month a trustee appointed. On May 19th, following the established practice, the bankrupt court authorized the trustee to appear in the state court and apply for an order requiring and directing the receiver to surrender to him the property in controversy. That was done, and no one resisted the application of the trustee to regain possession of the property; but the attorneys representing the receiver applied to the state court for an order allowing their fees and expenses out of the assets of the bankrupt. The state court made an order directing its receiver to surrender the property to the trustee in bankruptcy upon payment of the expenses of the receiver, amounting to $32.60, and payment of $500 to the receiver and $500 to the attorneys, which the court adjudged to be due them. The trustee excepted to this order of the state court, and an appeal was had to the Supreme Court of Georgia. That court held that the action of the lower court was error. It recognized the right of the state court to appropriate any cash its receiver might have on hand to the payment of the expenses incurred in the state court, but denied the power in the state court to cause property in the hands

of its receiver to be sold to pay such expenses, or to pass any order that would be binding on the bankrupt court. It said:

"It was admitted that the only fund in the hands of the receiver was $43.39, and the only way in which the additional sum ordered to be paid could be raised was by the sale of sufficient assets in the hands of the temporary receiver. But, at the time the order was passed, title to these assets had vested in the trustee in bankruptcy. By section 70a of the bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451]) it is declared that the trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he should have one or more, upon 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 a bankrupt, except in so far as it is to the property exempt. * * * At the very date of the passage of the order in this case, by operation of the bankrupt law the title to the property had been taken out of the bankrupt and put in the trustee for the benefit of the bankrupt's creditors. The bankruptcy court had assumed full jurisdiction, and the trustee was entitled to have the estate of the bankrupt, wherever that might be found. There is a marked difference in charging a fund already raised by a sale of the property of a debtor with the expenses of its conversion into cash, and subjecting the property to sale for the purpose of raising funds for the purpose of paying costs and expenses after he has been adjudged a bankrupt. It is our opinion that the judge erred in passing the order to which exception has been taken; and, while he could very properly have devoted to legitimate expenses and costs the cash in the hands of the temporary receiver, he had no power or authority to make the order for the delivery of the assets contingent upon the payment of the fees of the receiver and attorneys, or cause the property of the bankrupt in the hands of the temporary receiver to be sold for the purpose of raising such funds. Any person, under such circumstances, urging a claim to be paid from the bankrupt's estate, whether he is a creditor of the bankrupt, or because he has rendered services in caring for the estate or preserving the property for the benefit of creditors, should be referred to the proper court of bankruptcy, where the merits of such claims and their priorities can be passed on and established. It was, in our opinion, immaterial that the judge refused to pass on the question of dissolving the temporary injunction and receivership. The effect of adjudicating the debtor to be a bankrupt transferred the control and management of his estate to the bankrupt court, and placed the right of adjudicating the claims of creditors in another forum. But he erred in granting an order making the transfer of the property of the bankrupt to the trustee in bankruptcy conditional upon the payment of costs and expenses. He should have granted the prayer of the trustee as to the transfer, and remitted the temporary receiver and the attorneys to the bankruptcy court for an adjudication and settlement of their respective claims."

In the case at bar the effect of the chancellor's order was exactly the same as if he had directed his receiver to seize the property of the bankrupt and sell it and appropriate the proceeds to the payment of the expenses he had allowed. This was an invasion of the jurisdiction of the bankrupt court. In the case of In re Rogers (D. C.) 8 Am. Bankr. Rep. 723, 116 Fed. 435, a similar question was presented. In that case the jurisdiction of the state court had been invoked under the insolvency laws of the state, and a receiver was appointed. Within the four months bankruptcy proceedings were instituted and an adjudication was had, and upon the application of the petitioning creditors an injunction was granted restraining the plaintiffs in the state court from prosecuting their suit. Afterwards counsel for the petitioning creditors and for the bankrupt applied to the bankrupt court for an order modifying the injunction granted by that court, so as to permit the attorney for the plaintiffs and the receiver in the state court

to apply to that court to have their fees and expenses fixed by that court. The bankrupt court declined to make that order, saying:

"This court further held that, if it should decide it ought to modify the injunction so as to allow counsel to go before the state court and claim that fees should be fixed by that court, it might in certain cases have very far-reaching and serious consequences—especially in cases where this court was of the opinion that the proceedings in the state court were coram non judice, because they had been suspended by the operation of the bankrupt law."

Application was then made to the state court to dissolve the temporary injunction and discharge the receiver, whereupon the state court entered an order directing its receiver to surrender the property to the trustee in bankruptcy upon the payment of the expenses, amounting to $32, incurred by the receiver, and upon the payment of $500 to the receiver, and the further payment of $500 to his attorneys. To this order of the state court the receiver excepted, and then an application was made to the bankrupt court for an order to the effect that, if the receiver of the state court should turn over the assets in his hands to the trustee, the trustee should at once proceed to sell enough of the property belonging to the bankrupt's estate to pay off the allowances made by the state court, and the allowance thus made should be a first lien on all the assets of the bankrupt. The bankrupt court refused to make that order, and said:

"The trustee either has or has not the right to the possession of the assets of the bankrupt in the hands of the temporary receiver of the state court. That court declines to pass upon the question of dissolving the temporary injunction and receivership in that case on the ground that the proceeding in bankruptcy suspended the proceeding in the state court. If, then, the proceedings are suspended, as is clearly the effect of the bankruptcy law, the state court has no right or authority to fix the fees of its receiver having charge of the property, and less right to refuse to turn over the same until those fees have been paid by the proper officers of the bankrupt court. If the assets are delivered to the trustee by the receiver of the state court, this court will consider any application for compensation which may be made by officers of the state court, and, if allowable, will grant suitable compensation; but it must definitely decline to recognize the authority of the state court to incumber the assets of the bankrupt by a judgment of this character, especially when accompanied by the ruling that such assets will not be delivered to the trustee in bankruptcy until the allowances thus made by the state court are paid off and discharged. The order would be declined for the further reason that the order of the superior court does not indicate in manner by whom the fees allowed in that court shall be paid; but this is unimportant, when contrasted with the principal question in the case, namely: Has the state court, upon proceedings instituted under the insolvency laws of the state, suspended by the enactment of the bankruptcy legislation, the right and authority to adjudicate liens against bankrupt's assets in favor of its own officers, and to refuse to surrender the assets to the proper official of the bankruptcy court until such fees are paid? Should such a precedent be recognized, it may not be impossible that in a large number of bankruptcy cases the assets might suffer from a mulcting process of this sort before they reach the hands of the officers appointed under the act of Congress to administer and distribute them. Besides, if the officers of the bankrupt court are entitled to the assets, the state court has no authority to impose conditions as a prerequisite to their delivery; nor can a bankrupt court, by action in any sense appropriate, give its sanction to any such imposition, whether expressly or impliedly made. The practice for which the order sought might be regarded as a precedent would not only largely increase the expenses of such litigation, but would inevitably result in great delay in the final disposition of bankruptcy litigation. It is

represented to this court that, since the judge of the state court has held that he now has no authority to pass any order in the premises, the assets of the bankrupt will deteriorate and largely disappear, unless this court will direct a sale of a portion of the assets to pay off the debt created against them by the state court in behalf of its officials. This, if true, is, of course, deplorable. There are, however, considerations involved in this question which are far graver than the loss of assets in a particular case. They involve the supremacy of the Constitution and laws of the United States, the power of Congress to create a uniform system of bankruptcy, the legislation of Congress creating that system, and the settled principle that insolvency proceedings in state courts are suspended while the bankrupt law is in force. It is the duty of a court of the United States to take care that by no judicial order of its own the effectiveness and vigor of the laws with the enforcement and administration of which it is intrusted shall be nullified and whittled away."

These cases are decisive of the question at bar. This court cannot recognize the right of the state chancery court to make any order binding upon it with reference to property in its custody and over which it has exclusive jurisdiction. The state chancellor had no power to make the order, and the order itself is absolutely void.

The claim of the receiver of the state court is based upon three items. The one for expense account, $26.25, was allowed by the referee, and is not appealed from, and the order of the referee in that respect must stand.

As to the order for $450 for salary for the receiver, the referee held that the claim was absolutely without merit, because the receiver had rendered no service during the period for which it was allowed. In this view of the referee the court concurs. In re Kellog, 10 Am. Bankr. Rep. 7, 121 Fed. 333, 57 C. C. A. 547. The Supreme Court of the United States in a case presenting that question said:

"We are not prepared to go further than to allow compensation for services which were beneficial to the estate."

As no services beneficial to the estate were rendered in this case by the receiver, no allowance should be made, and the action of the referee as to that item in the account is approved.

The history of the remaining item of $139.60 in accounts is sufficiently given in the statement of the case. On August 29, 1905, when the receiver, under the order of the state chancellor dated August 10, 1905, turned over all the other assets in his hands, except some old books of account of Rogers & Stefani, these accounts for $139.60 he kept, presumably by the consent of Rogers & Stefani, as he had no other authority for doing so. To retain them otherwise was a violation of the order of the chancellor made on August 10, 1905, in which order he was directed to take credit for his services and expenses and turn over all the assets to Rogers & Stefani. It appeared that he did not have money enough to pay his allowances and expenses, and so he kept these accounts, as he now says, intending to collect them and pay himself, and, if he did not collect them, he expected Rogers & Stefani to pay him. They were saloon accounts. In his report and account filed October 25, 1905, and which was made in pursuance of the directions of the chancellor in his order of August 10, 1905, he charges these accounts to himself "for collection." On December 2, 1905, in an amendment to that report and account, he claims credit for the ac-

counts as uncollected. At what time he turned over these accounts to the trustee does not appear. He made no effort to collect them. He says he did not, because the bankruptcy proceedings had been begun on September 11, 1905, and he did not think he had a right to do so. When he turned them over to the trustee, if he ever did (about which there is some confusion in the evidence), they were a total loss. The order of the state court, as heretofore stated, giving him credit for these accounts, is void. After taking these accounts some time in August, 1905, he should have attempted to collect them and satisfy his allowances, and not have held them until October 25th without making any effort to collect them, thus depriving Rogers & Stefani from collecting them. Should he now, after they have become worthless, be permitted to surrender them to the trustee in bankruptcy and set up, in lieu of them, a claim against the bankrupt's estate to the prejudice of the creditors of the bankrupts? I do not think so. He made his choice, and he must abide by it. He either kept the accounts by agreement with Rogers & Stefani, or he kept them without right and in violation of Chancellor Bourland's order of August 10, 1905. If he took them by agreement with Rogers & Stefani, he was bound to exercise proper diligence to collect them, or stand the loss himself. If he kept them in violation of the chancellor's order, and without the consent of Rogers & Stefani, until they were worthless, making no effort to collect them, the same result follows. It would be inequitable and unjust to Rogers & Stefani and the creditors of their estate if the loss of these accounts should be shifted from him to the estate. He knew of the pendency of the bankruptcy proceedings from about the time they were instituted on September 11th until the 25th of October, when he filed report and claimed to hold the accounts in order to get his allowance paid. He claimed them, and took them for collection, to pay himself, notwithstanding the pendency of the bankruptcy proceedings. He should not now be heard to say that he claimed them, and undertook the collection of them while the bankruptcy proceedings were pending, and in the same breath say he did not try to collect them because the bankruptcy proceedings were pending, and he did not think he had the right to do so. It is equivalent to saying:

"I attempted to do a thing I did not think I had any right to do, and I did not do it because I did not think I had any right to do it, and yet, by reason of my undertaking to do the thing, and neglecting to do it, the estate sustained a loss for which I am not responsible."

Such a position is totally inconsistent and irreconcilable with equity and justice, and cannot be upheld.

The claim for this item should be disallowed, and the action of the referee approved and affirmed, at the costs of petitioner; and it is so ordered.

THE WYNERIC.

(District Court, D. Oregon. October 7, 1907.)

No. 4,878.

1. SHIPPING—INJURY TO STEVEDORE'S EMPLOYÉ—LIABILITY OF VESSEL.
The liability of a vessel for an injury to an employé of a stevedore while working on the vessel does not depend upon any contractual relation between the vessel or owner and the employé, but, where it exists, rests upon the breach of some implied duty to exercise due care as to the condition of the vessel and appliances which might affect the safety of persons necessarily employed to work thereon.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, §§ 349–351.]

2. SAME—UNSAFE PLACE TO WORK.
Under a charter party requiring the vessel to be furnished with clear holds for receiving cargo and in every way fitted for the service, it was the owner's duty to render her safe for workmen to enter her holds, and to there perform the services ordinarily required in loading and stowing the cargo, and the vessel is liable to a stevedore employed by the charterer for an injury received by him while stowing cargo in a dark water ballast tank from the falling upon him of loose planks which had in some manner caught in the beams at the top of the tank, probably when it was full of water, and were negligently permitted to remain there.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, §§ 349–351.]

In Admiralty.

Giltner & Sewall, for libelant.
Williams, Wood & Linthicum, for claimant.

WOLVERTON, District Judge. A libel to recover for personal injuries received by libelant while at work stowing lumber in a water ballast tank in the lower hold of the ship Wyneric. Libelant was in the employ of Brown & McCabe, stevedores, who were under contract with the Pacific Export Lumber Company, charterer of the ship, to load her. The charter party represents the ship as being "ready, with clear holds, to receive cargo, and tight, staunch, strong, and in every way fitted for the service, having water ballast," etc. On the day of the accident giving rise to the libel, namely, October 4, 1906, libelant had gone into the tank with Holm, another employé of Brown & McCabe, and the two together had stowed two slings of lumber, so called from the manner in which the lumber was lowered, and, while carrying a timber 3 by 12 inches and 20 feet in length, and placing it in stowage, two planks fell from above, and struck libelant upon the head, causing the injury of which he complains. The tank is described as being 41 feet in length, 18 feet in width at the forward end, and 10 at the other, and from 10 to 12 feet in depth. The hatchway, in dimensions five feet square, is in the corner of the tank. The libelant was carrying the end of the timber farthest from the hatchway, and had proceeded aft along the tank partition to the corner when he was hurt. He testified:

"I stooped myself down, and the plank was about a foot from the floor when I dropped it; and, as soon as I dropped the plank, two plank came down

on me when I stooped over. The first one knocked an inch and a half hole on my head, and the second one came across my back."

On cross-examination he says:

"Yes; I did put down a 3 by 12, just easing it down, when it came on top of me, those two planks. Q. And Holm was at the other end of that stick? A. Yes."

Andrew Holm, the man who was assisting libelant, corroborates him in the main, but not in detail, being unable to see libelant plainly from where he was. He says that the fall of the planks knocked libelant senseless, but that he came to in about five minutes, and witness helped him out. The libelant states, however, that he ascended the ladders to the upper deck without assistance. The men, finding the light admitted through the hatches insufficient for doing their work conveniently, were furnished with two candles, which were being used at the time; but with these the tank was yet illy lighted.

The tank was provided with a wooden floor, and, from the testimony of the officers of the ship, it appears that two of the planks thereof had been missing for some time, and had not previously been located. In further detail, it appears that the tank contained stanchions running up and down the sides thereof, and iron beams across the top, leaving a space between the beams and the top. The boatswain, being examined as to the possibility of loose boards getting caught above these beams by floating in above them while the tank was full of water, testifies as follows:

"Q. Isn't there an angle bar running over the tank just below the top of the tank and the tank? An iron beam running there? A. Yes, sir; there is beams running right over the tanks. Q. And it is possible for loose boards to get caught up there, isn't it? A. Between them? Q. Between the beams and the top of the tank, isn't there room for them to get caught? A. Yes, sir; but they are made to fit. * * * Q. It is possible to put some planks between the beam that runs across the top of the tank and the tank, isn't it—between the space where sticks could be put in? A. Yes, sir; if you would put them in. Q. And if they should be loose at the bottom they might fall in there and get caught? A. There is nothing to catch on. Q. There is a space, isn't there, between the top of the tank and the beams? A. Yes, sir. Q. Now, if they got caught in there? A. Yes, sir; they would come out the same way they come in. They wouldn't stick. Q. Isn't it possible they might stay there? A. It may be possible."

The boatswain testifies, further, that on the forenoon preceding the accident he, with three men, went into the tank and cleaned it out; that it was necessary to sweep it down upon the sides and the top because of the slime and rust that would accumulate from the action of the water; that his men were at work in each tank perhaps half an hour; and that they discovered nothing of the plank in question while employed in cleaning out the tank.

As it respects the extent of the injury, libelant testifies that he went to his employer at once after he was hurt, and was sent to Dr. Wheeler, who sewed up and dressed the wound upon his head, but did not examine his back, although he informed the doctor that it was hurt also. This was on the 4th of October. On the 11th or 12th of the same month he went to Dr. Sewall, who, with the assistance of Dr. Tilzer, examined him for injury to the spine. These physicians found no evi-

dence of pain from pressure upon the vertebræ, but a tenderness was discovered in the lumbar region, and, when required to stoop, it was ascertained that libelant favored his back, and hence it was concluded that he had sustained a sprain of the ligaments in the locality designated. It was thought the effect upon the nervous system would be very temporary. When asked whether he thought the injury was permanent, Dr. Sewall answered:

"I do not. Just as I told you in respect to a sprain, it isn't as good as it was before it was sprained. * * * I mean a ligament, after it has been stretched, is not as good as it was before it was stretched."

Dr. Wheeler testifies that he examined libelant the day he was hurt, and found that there was a slight contusion, the scalp was cut, and that, on further examination, he found a slight abrasion on the left shoulder, apparently where the plank had grazed him, and that the patient made no complaint of his back. Libelant was requested to call again on the next day or the day following, but he never returned.

This résumé sets forth in practical effect the facts attending the controversy. The first question presented is whether the ship is liable at all, the libelant being in the employ of Brown & McCabe, stevedores, who were contractors with the charterer for loading and stowing the cargo.

It is argued by proctors for respondent that there were no contractual relations existing between libelant and respondent, and that, by reason thereof, respondent could not be held liable for the injury sustained. The question is not a new one, so that we are not without precedent for its determination. A ship's liability for tort of the kind does not depend, as is supposed, upon any express contractual relations existing between the craft, or its owner or master, and the party injured. If it was a matter of duty which it owed to the libelant not to be negligent concerning the condition that conduced to libelant's injury, other relations, whether contractual or not, may be dispensed with. Wallace, J., in discussing a cause analogous in its controlling feature, says:

"Nor did the relation of master and servant, in its technical sense, exist between the libelant and the shipowner. But it is conceived that this does not in the least affect the obligation of the master not to be negligent towards the libelant, or the degree of care which it was incumbent upon him to exercise. The libelant was performing a service in which the shipowners had an interest, and which they contemplated would be performed by the use of appliances which they had agreed to provide. They were under the same obligation to him not to expose him to unnecessary danger that they were under to the master stevedore, his employer. There was no express contract obligation on their part to either to provide safe and suitable appliances, but they were under an implied duty to each; and the measure of the duty towards each was the same." The Rheola (C. C.) 19 Fed. 926, 927.

To the same purpose, see The Para (D. C.) 56 Fed. 241. The doctrine was applied in another case (Gerrity v. Bark Kate Cann [D. C.] 2 Fed. 241), the facts of which come very near to those out of which the present controversy arises. The Kate Cann was under charter to receive and transport a cargo of grain. The libelant was engaged in turning the grain as it came into the elevator. He was hurt by the fall of dunnage that had been carelessly and insecurely stowed by the

ship's crew in the between decks upon braces overhead, and it was determined that the ship was liable. The court says:

"This neglect was the neglect of a maritime duty, and attaches to the ship herself. Not only did the neglect occur upon navigable water, but in the performance of a service necessary to be performed to enable the ship to receive her cargo. The stowing of this dunnage was part of the ordinary duty of the ship's crew, and in this case was done by the crew. The object of stowing the dunnage was to facilitate the taking in of the very cargo upon which the libelant was employed at the time he was hurt. Still, further, the dunnage and plank that, by reason of neglect in the manner of stowing, fell upon the libelant, were part of the apparel and furniture of the ship."

A like view was entertained in a later case, wherein it appears that a stanchion, which was defective in its fastenings, fell and injured one of the stevedore's gang. The William Branfoot (D. C.) 48 Fed. 914. This case is affirmed by the Court of Appeals, by an opinion written by Mr. Chief Justice Fuller. See 52 Fed. 390, 3 C. C. A. 155.

In the present case the charter party obligates the owners to furnish the ship with clear holds, and in every way fitted for the service. This means, as construed by Mr. Wheelwright, she shall be put in a condition fit in every way to receive her cargo. It was the owner's duty, therefore, to render her safe for workmen to enter her hold, or any compartment thereof, and there to perform the services ordinarily required of them in loading and stowing cargo. From this duty springs liability for any injury, arising from the negligence of the owner or crew, that may be sustained by persons lawfully engaged in the stowage of cargo within her hold. And it is not always essential that direct or specific contractual relations exist between the libelant and the ship or her owners. It is evident to my mind that the planks that did the injury became in some manner clogged between the beams and the covering of the tank, while floating in the water, so that they were held insecurely in position. And they must have remained there for some time, as they were missing from the floor for a considerable time anterior to the accident. True, it is in evidence that the boatswain, with three men, cleaned out the tank immediately before the libelant entered for stowing the lumber, and that nothing was discovered of the planks. But it is hardly possible, if a careful inspection had been made, that they should have been overlooked. They were nearly half the length of the tank, and the height of the tank was not so great but that they could have been readily detected above. There was either carelessness, therefore, in making the inspection and in cleaning out and fitting the tank for receiving cargo, or else the planks were discovered and negligently allowed to remain in their position without determining whether they were secure or safe. I say one of these alternatives must be true, because there is no doubt that the planks were lodged overhead, as otherwise they could not have fallen upon the libelant. That they fell without any apparent cause and injured libelant is a fact beyond controversy. This is not a case of res ipsa loquitur, but there is evidence pertinent to fix the liability and responsibility. The planks were out of their place in the floor. They fell from above, where they ought not to have been, and their position while above ought, by reasonable care and prudence, to have been located prior to

the injury, and they taken down or made secure and safe if it was desired that they should remain there.

This leaves for determination the amount of the recovery. The contusion upon libelant's head healed readily, and has left no ill effects; and I am not convinced that the injury to the ligaments about the lumbar region of his back was of permanent character. It is probable he did not complain of his back to Dr. Wheeler, and it was a week before he had any examination made thereof. The physicians who examined him then discovered nothing of a serious nature. He was probably disabled from doing the heavy work of a stevedore for a while, but he could have pursued a lighter occupation any time after the accident. He was earning from $4.10 to $4.20 per day, and I will allow him $100 for loss of wages (which is for nearly a month's time) and $200 additional for the pain and suffering endured. The aggregate recovery will therefore be $300.

KORSSTROM v. BARNES et al.

(Circuit Court, W. D. Washington, N. D. September 17, 1907.)

No. 1,491.

1. WILLS—EFFECT AS PASSING TITLE—DEVISE TO TRUSTEES.

Under what is known in Washington as a "nonintervention" will, by which full powers were conferred on the executors to take possession of and wind up the estate of the testator without any judicial proceedings whatever, except those necessary to establish the will, and which devised and bequeathed all of testator's property absolutely to his executors as trustees, with instructions to sell the same and use the proceeds as therein directed, the legal title to the testator's real estate was vested in such trustees regardless of the validity of the disposition made of the proceeds.

2. LIMITATION OF ACTIONS—ACCRUAL OF CAUSE OF ACTION—ACTION AGAINST GRANTEE OF TESTAMENTARY TRUSTEES.

Where land was devised by a testator to trustees absolutely, and there was no repudiation of the trust nor demand made upon the trustees for the land which the latter sold and conveyed, the statute of limitations does not begin to run against an action by one claiming to be the owner by descent from the testator to recover the same from the grantee until the date of the conveyance to him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 506–510.]

3. TRUSTS—ADVERSE POSSESSION BY TRUSTEE—AVAILABILITY OF DEFENSE—GRANTEE OF TRUSTEES.

Ballinger's Ann. Codes & St. Wash. § 5503, which provides that a party in actual open and notorious possession of real estate under claim and color of title in good faith for seven consecutive years, and who shall have during that period paid all taxes thereon, shall be held to have become the legal owner to the extent and according to the purport of his paper title, will not avail a grantee of real estate from executors and trustees under a will who has had possession and paid taxes for less than seven years as a defense to an action to recover the property by one claiming ownership through descent from the testator; the possession of the executors not being adverse to such claim.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, § 181.]

4. ACTION—EQUITABLE DEFENSE IN ACTION AT LAW—LACHES.
Laches for a period of time less than that necessary to raise the bar of limitation is an equitable defense not cognizable in an action at law in a federal court.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Action, §§ 153–155.]

5. JUDGMENT—CONCLUSIVENESS OF ADJUDICATION—DECREE OF DISMISSAL.
A decree of dismissal is not a bar to a second suit on the same cause of action, unless it is shown that the cause was decided on the merits.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 1030–1032.]

At Law. Action to recover real estate. Heard upon a motion to strike out parts of the affirmative defenses pleaded in a separate answer by two of the defendants, and upon a demurrer to each of said defenses. Overruled in part and sustained in part.

W. E. Crews and Bard & Fenton, for plaintiff.
Guie & Guie, for defendant.

HANFORD, District Judge. The answering defendants, Victor Hugo Smith and wife, set up as a first affirmative defense an adverse claim of title to one of the distinct parcels of land claimed by the plaintiff by virtue of a deed given by executors named in the last will and testament of Charles A. White, deceased, and in support of their claim they also allege facts constituting laches on the part of the plaintiff, and that they are bona fide purchasers in good faith. The plaintiff's motion to strike attacks the equitable grounds of defense; that is, the allegations of plaintiff's laches and good faith of the defendants in acquiring the property by purchase from the executors. It is the opinion of the court that the validity of this defense must be affirmed or denied upon strictly legal grounds. The court is required to ascertain and declare the effect of the provisions of the will under which the executors acted in disposing of the property, and in doing so the legal rights of the parties will be determined. If the answering defendants hold the legal title to the property they claim, it is unnecessary for them to aid their legal title by proving facts proper to be considered only in a court of equity, and, if they have not acquired the legal title, their equitable grounds of defense are insufficient to defeat the plaintiff in this action. Therefore the motion to strike, so far as it relates to the matter included in the first affirmative defense, will be granted. The court overrules the demurrer to the first affirmative defense in this answer and sustains said demurrer to the second, third, fourth, and fifth affirmative defenses.

My reasons for so ruling are as follows:

1. This is an action to recover the possession of real estate. The plaintiff in her complaint, without deraigning title, rests her case upon allegations of her absolute ownership, and right of possession, and wrongful ouster by the defendants. The answering defendants, conformably to the Code of this state, requiring defendants in such actions to set forth the nature of their title or claim, have pleaded in this affirmative defense that they are the owners and entitled to possession of a distinct parcel of the land included in the list of property which the plaintiff seeks to recover, that said tract of land was former-

ly owned by one Charles A. White, who died testate in the year 1898, and constituted a part of the estate of said decedent. The answer also pleads the last will and testament of said White, and alleges that it was duly admitted to probate, and established by a decree of the superior court for King county, and letters testamentary thereon were issued to the defendants Barnes and Stein, and that Smith purchased said tract from them in the year 1905, for the price of $17,000, and received from them a deed conveying the title to him, and that he is now the owner of said tract by virtue of said purchase and deed. The demurrer attacks the validity of the will, and the question to be decided is whether the succession to the decedent's title was diverted by the will.

Excepting formal parts, the will reads as follows:

"I, Charles A. White, of the city of Seattle, county of King, state of Washington, being of sound mind and memory, do hereby make, publish and declare this to be my last will and testament, that is to say:

"First. I direct that my body be embalmed and cremated as soon as possible after my death, at the nearest crematory existing at the time to the place of my decease.

"Second. I direct that my funeral expenses, the expenses of my last sickness, and cremation, and all debts owing by me, be paid as soon as possible after my decease and out of the first moneys that shall come to the hands of my Executors, hereinafter named, from any portion of my estate, real or personal.

"Third. All the rest, residue, or remainder of my estate, real, personal and mixed, wherever situated, I give and bequeath to my Executors Frank I. Blodgett and Henry W. Stein, or the survivor of them, in trust nevertheless and upon the following conditions, to-wit:

"That the said trustees, or the survivor of them, as speedily as consistent with the best interest of my estate, shall sell all the property belonging to my said estate, and, after paying the necessary and proper expenses of said trust, pay the proceeds of said sale to the trustees of the Theosophical Society at Adyar, Madras, India, or wherever the said Theosophical Society may be located, appointed or acting under a deed of trust, dated the 14th day of December, A. D. 1892, and duly enrolled.

"And I direct that the receipt of the said trustees, or the reputed trustees for the time being, shall be sufficient discharge for said legacy. It is my express will that the said legacy, to the said Theosophical Society in India be used for the purpose, as far as possible, in obtaining translations into English of the ancient Hieratic Scriptures, believed to exist in India and elsewhere, for the use of the Theosophical Society and its branches all over the world.

"Fourth. It is my will that, upon my death this my will shall be proved as such in the Superior Court of the County of King, State of Washington, and order of Probate thereof obtained, and that no further proceedings be had or taken in the matter of this my will nor in matter of my estate by said Superior Court, tribunal or officer whatever; and it is my will that, upon my death my said Executors forthwith enter into possession of my estates, and the whole thereof, and that absolute title rest in my said Executors, hereinafter named; in trust, however, as hereinbefore provided, without any other or further proceedings in or on the part of said Superior Court, Board, Tribunal or Officer whatsoever; and shall be managed by them without accountability therefor, or supervision thereof, or control thereof of any other Court, Board, Tribunal or Officer whatsoever.

"Fifth. I further direct that my said executors pay no claim or claims that may be made by my former wife Elin M. C. White, or whatever her name may be, except in accordance with my statement of accounts, hereto attached, unless otherwise ordered in a court of justice, having competent jurisdiction.

"Sixth. I hereby nominate and appoint as the Executors of this my will

and testament, Frank I. Blodgett and Henry W. Stein, both of Seattle, Washington, and direct that they be not required to give bond.

"Seventh. I hereby revoke all former wills made by me."

By a codicil Thomas A. Barnes was substituted in the place of Frank I. Blodgett as an executor.

The theory upon which the demurrer attacks the sufficiency of the first affirmative defense is that the devise or bequest to the Theosophical Society is void for uncertainty as to the identity of the beneficiary intended, and as to the use to be made of the testator's gift, and the power of sale given to the executors, being merely incidental, is also void, so that the title to all the real estate of which the testator was seised and possessed at the time of his death descended directly to his heirs. The will confers general powers upon the executors to settle and wind up the business affairs of the testator, in the best manner according to their own discretion, without any judicial proceedings whatever except the proceedings necessary to establish the will. It is what is known in this state as a "nonintervention will," and, furthermore, it is a testamentary conveyance of the legal title to the executors as trustees. The intention of the testator is expressed in positive and clear words, leaving no room for doubts or differences of opinion to be removed by construction. The third paragraph, by apt words in common use, disposes of the entire estate by devising and bequeathing it in trust to two designated persons, and the manifest intention of the testator is emphasized by a clause in the fourth paragraph which reads as follows:

"And it is my will that upon my death my said executors forthwith enter into possession of my estates, and the whole thereof, and that absolute title rest in my said executors, hereinafter named; in trust however as hereinbefore provided."

Although the devisees are designated as "executors," a trust is created by the will, and the persons named are the trustees. Smith v. Smith, 15 Wash. 239, 46 Pac. 249. I hold that by the will the legal title to all of the decedent's lands was conveyed to and became vested in the trustees, and that it did not descend to his heirs, and it is a necessary conclusion from the premises that the plaintiff has no title upon which to maintain an action of ejectment. Lincoln v. French, 105 U. S. 614, 26 L. Ed. 1189; 22 Encyc. of Pl. & Pr. p. 155. If the will fails to make a final disposition of the estate by a donation of the residue to a discoverable donee for an ascertainable use, its validity as a conveyance of the title to real estate is not impaired; but in that case the heirs can claim that there is a resulting trust in their favor, and hold the trustees accountable, in equity, as trustees for their use, to the extent only, of the residue of the estate remaining after payment of the testator's debts, and expenditures for taxes and costs of administration of the trust, or by a suit in equity, against vendees, if the facts warrant, they may establish equitable rights and obtain a decree which will convey the title and give them the property. Whatever controversy the plaintiff may have with respect to the legacy to the Theosophical Society will require for its determination exercise of the powers of a court of chancery.

2. The second defense is based upon the statute of limitations of this state. The statute, however, allows a period of 10 years within which to commence an action for the recovery of real property, and it appears that the action was commenced within 10 years from the date of the deed conveying the property in question to the answering defendants, which is the time when the statute commenced to run. This is so for the reason that no demand having been made upon the trustees for possession of the property, and as no repudiation of the trust is alleged, they held the property as trustees only, by virtue of the title vested in them by the provisions of the will. That is to say, their possession was not adverse to the equitable owner. The statute of limitations is not a bar to the plaintiff's claim for damages, for the reason that the answering defendants are not liable for use and occupation or rents and profits for any time antedating their actual possession under their deed.

3. The third defense is based upon a statute by the terms of which a party in actual, open, and notorious possession of real estate under claim and color of title in good faith for seven consecutive years, and who shall have, during that period, paid all taxes legally assessed, shall be held to have become the legal owner to the extent and according to the purport of his or her paper title. Ballinger's Ann. Codes & St. § 5503; Pierce's Code (Ed. of 1905) § 1160. These answering defendants do not claim to have paid taxes for seven years, nor to have had possession during that period, and it is not alleged that the trustees expended their own money in payment of taxes, and if they had done so, by the terms of the statute, their estate as trustees would not have been converted into a title in their own right. Having no paper title other than the will, that document would be still their muniment of title, and it would express the limitations thereof.

4. The fourth defense is an attempt to plead an estoppel in bar of the action. If this defense has any merit at all, it is a purely equitable ground of defense not cognizable in a federal court. It is true that there are exceptions to the rule excluding equitable defenses in actions at law in the federal courts, as when the holder of the legal title to property prosecutes an action at law to recover possession thereof from a party having a superior right of possession for the time being (City of Cincinnati v. White's Lessee, 6 Pet. [U. S.] 441, 8 L. Ed. 452), but an estoppel arising from mere laches for a period of time, less than the time necessary to raise the bar of the statute of limitations does not come within any known exception.

5. The fifth defense sets forth that, previous to the commencement of this action, the plaintiff commenced a suit in the superior court to obtain a decree annulling the will of Charles A. White, and all the transactions of the executors in disposing of his estate, and to establish her rights as his sole heir, which suit has been since the commencement of this action by a decree of the superior court dismissed with prejudice to another action by the plaintiff. This is insufficient as a plea in bar, for the reason that it is not alleged that the cause was heard and decided upon its merits, nor that the plaintiff voluntarily entered a retraxit. Woodward v. Davidson (C. C.) 150 Fed. 840.

UNITED STATES v. HEMET.

(District Court, D. Oregon. September 27, 1907.)

No. 4,964.

1. ALIENS—CONSTRUCTION OF IMMIGRATION ACT—EXECUTIVE ORDER EXCLUDING LABORERS.

Immigration Act Feb. 20, 1907, c. 1134, § 1, 34 Stat. 898 [U. S. Comp. St. Supp. 1907, p. 389], provides "that whenever the President shall be satisfied that passports issued by any foreign government to its citizens to go to any country other than the United States or to any insular possession of the United States or to the Canal Zone, are being used for the purpose of enabling the holders to come to the continental territory of the United States to the detriment of the labor conditions therein, the President may refuse to permit such citizens of the country issuing such passports to enter the continental territory of the United States from such other country or from such insular possession or from the Canal Zone." Pursuant to said provision, the President, on March 14, 1907, issued an order that such "citizens of Japan or Korea, to wit, Japanese or Korean laborers, skilled and unskilled, who have received passports to go to Mexico, Canada or Hawaii and come therefrom, be refused permission to enter the continental territory of the United States." The order further directs the Secretary of Commerce and Labor to take such measures and to make and enforce such rules and regulations as may be necessary to carry the order into effect. *Held*, that neither such statute nor order applies to aliens who have no passports from their governments, nor does the order authorize the exclusion of Japanese or Korean laborers other than those having passports to go to Mexico, Canada, or Hawaii; that a rule, adopted by the commissioner, that if a Japanese or Korean laborer applies for admission and presents no passport it shall be presumed that he did possess a passport limited to Mexico, Canada, or Hawaii, is beyond any power conferred on him by either the act or the President's order, and affords no authority for excluding a Japanese or Korean laborer who presented no passport, the natural presumption in such case being that he had none, and there being no basis for the presumption stated in the rule.

2. SAME—FAILURE OF MASTER OF VESSEL TO RETURN ALIENS EXCLUDED—LIABILITY.

The master of a vessel is not subject to the penalty prescribed by section 19 of Immigration Act Feb. 20, 1907, c. 1134, 34 Stat. 898 [U. S. Comp. St. Supp. 1907, p. 389], for failing to detain on board his vessel and return thereon to their own country aliens brought by him to the United States and who are not entitled to enter under the law, in a case where such aliens were shipped by him in a foreign port as seamen for the round voyage, and after being refused admission to the United States and returned to his vessel they escaped notwithstanding all reasonable efforts made by him in good faith to detain them, short of putting them in irons.

Wm. C. Bristol, U. S. Atty.
C. Henri Labbe, for defendant.

WOLVERTON, District Judge. The defendant is charged by information of the district attorney, with having brought within this country, in violation of Act Feb. 20, 1907, c. 1134, 34 Stat. 898 [U. S. Comp. St. Supp. 1907, p. 389], two aliens, to wit, Y. Oguri and Y. Kokehara, who are Japanese from Kobe, Japan, and who were, it is alleged, without passports and disqualified by the executive order of the President of the United States, issued March 14, 1907, to enter the

United States, in and upon a certain French bark St. Louis, of which he, the said Hemet, was master, and not immediately sending said aliens back to the country whence they came, and failing to detain them on board said bark, contrary to the provisions of section 19 of the act alluded to.

The bark left Kobe, Japan, for Australia February 2, 1907, and came to Portland from the latter country, arriving in Astoria August 24th, and in this port August 29th. The two Japanese shipped on the vessel as seamen, for the "round voyage." After their arrival in this port, they applied to the immigration officer for admission into the United States; their purpose being, as they stated under oath, to seek employment at manual labor. The matter was submitted to the board of special examiners, and, after examination had, the board adopted a motion excluding the parties from admission, basing its action upon the last proviso of section 1 of the immigration act and paragraph "b" of rule 22 of the immigration rules and regulations adopted in pursuance thereof. This occurred September 6th. The Japanese were then taken aboard the bark, and the defendant notified of what had been done, and required to deport them to the port whence they came. They remained aboard until the 18th or 19th, when they escaped; and, the vessel being now about to depart, the master is unable to take them with him.

The question is presented whether Oguri and Kokehara are subject to deportation. This requires an examination of the act of February 20, 1907, and the rules and regulations adopted by the Commissioner General of Immigration in pursuance of the act. The proviso of section 1 alluded to reads as follows:

"That whenever the President shall be satisfied that passports issued by any foreign government to its citizens to go to any country other than the United States or to any insular possession of the United States or to the Canal Zone are being used for the purpose of enabling the holders to come to the continental territory of the United States to the detriment of labor conditions therein, the President may refuse to permit such citizens of the country issuing such passports to enter the continental territory of the United States from such other country or from such insular possession or from the Canal Zone."

Section 2 of the act provides that certain enumerated classes of aliens shall be excluded from admission into the United States, such as idiots, imbeciles, feeble-minded persons, professional beggars, persons afflicted with tuberculosis, etc. But there is no regulation debarring the entry of any alien not having a passport from his home government. If such a regulation exists, I am not aware of it. The President, in pursuance of the proviso above set out, on March 14, 1907, issued an order which, after quoting the proviso, reads as follows:

"And whereas, upon sufficient evidence produced before me by the Department of Commerce and Labor, I am satisfied that passports issued by the government of Japan to citizens of that country or Korea and who are laborers, skilled or unskilled, to go to Mexico, to Canada and to Hawaii, are being used for the purpose of enabling the holders thereof to come to the continental territory of the United States to the detriment of labor conditions therein;

"I hereby order that such citizens of Japan or Korea, to wit, Japanese or Korean laborers, skilled and unskilled, who have received passports to go to

Mexico, Canada or Hawaii, and come therefrom, be refused permission to enter the continental territory of the United States.

"It is further ordered that the Secretary of Commerce and Labor be, and he hereby is, directed to take, through the Bureau of Immigration and Naturalization, such measures and to make and enforce such rules and regulations as may be necessary to carry this order into effect."

Rule 21 of the Commissioner General of Immigration was adopted in aid of the executive order, and reads:

"Japanese and Korean laborers.—The following rule is promulgated for the purpose of giving effect to an executive order of the President issued on March 14, 1907, reading:

* * * * * * * * * * * * *

"(a) Aliens from Japan and Korea are subject to the general immigration laws.

"(b) Every Japanese or Korean laborer, skilled or unskilled, applying for admission at a seaport or at a landborder port of the United States and having in his possession a passport issued by the government of Japan, entitling him to proceed only to Mexico, Canada, or Hawaii, shall be refused admission.

"(c) If a Japanese or Korean laborer applies for admission and presents no passport, it shall be presumed (1) that he did not possess when he departed from Japan or Korea a passport entitling him to come to the United States, and (2) that he did possess at that time a passport limited to Mexico, Canada, or Hawaii.

"(d) If a Japanese or Korean alien applies for admission and presents a passport entitling him to enter the United States or one which is not limited to Mexico, Canada, or Hawaii, he shall be admitted, if it appears that he does not belong to any of the classes of aliens excluded by the general immigration laws.

"(e) If a Japanese or Korean alien applies for admission and presents a passport limited to Mexico, Canada, or Hawaii, and claims that he is not a laborer, either skilled or unskilled, reasonable proof of this claim shall be required in order to permit him to enter the United States."

It seems to me that the President has correctly interpreted the proviso, which means that the order shall extend to and comprise such citizens of any foreign government as shall have passports therefrom to any country other than the United States and are using such passports for the purpose of enabling the holders to come into the United States to the detriment of labor conditions. It does not, as I read it, extend to all citizens of the government issuing such passports, but only to the citizens of such government to whom the passports defined have been issued; and the President may, as he has done, refuse them permission to enter. There is no discrimination here between the citizens of different nations. The law is general, and extends to all aliens alike, of whatsoever nation or clime, and the "favored nation" idea has no place in the controversy. But rule 21, in my opinion, goes beyond the authority of the act in excluding Japanese and Koreans who are without passports from their government vouchsafing their entrance into this country direct. I say this because such is the effect of subdivision "c" of the rule. The Commissioner General's authority for making any rules is found in section 22 of the act:

"He shall establish such rules and regulations * * * as he shall deem best calculated for carrying out the provisions of this act, and for protecting the United States and aliens migrating thereto from fraud and loss."

Thus his rules and regulations are to be designed to carry the act into practical effect; but he can make no rule contrary to the spirit of the law, and much less can he add to the law any provisions excluding aliens not already approved and adopted by Congress.

Now, referring to subdivision "c," it is a natural enough inference or deduction, if a Japanese or Korean presents no passport, that he possesses none entitling him to come into the United States; but it is altogether an unnatural and illogical sequence, if he presents no passport, to say that he does possess at the time a passport limited to Mexico, Canada, or Hawaii. The Congress might declare that from certain conditions certain results would become conclusively presumed, which presumption would then become the law to be observed. But there is no power accorded the Commissioner General to conclude parties by declaring such a presumption. As well might the Commissioner General have said by rule in the present case that, if a subject of Japan or Korea presents no passport, it shall be presumed that he is an idiot or professional beggar, or comes within one of the classes of aliens not entitled to admission, as defined by section 2 of the act. The inference is just as remote in the one case as in the other. So it seems to me that no presumption that the foreign subject possesses a passport limited to Mexico, Canada, or Hawaii, when he presents none at the time he applies for admission, can prevail; and it was beyond the authority of the Commissioner General to adopt such a rule. The present case presents a most apt illustration that such a presumption could not follow from the premises. It appears, and was made to appear beyond peradventure, that Oguri and Kokehara came into this country from their own country, by way of Australia, so that they could not have come into this country from either Mexico, Canada, or Hawaii, and the supposed presumption entails a fallacious non sequitur, and cannot be indulged. If it had been shown that these men came in from one of the three provinces or states inveighed against by the President's order, the inference or deduction involved by the declared presumption would have been more natural and logical, and might have been indulged as a rule or regulation. But not so where the positive proofs are to the contrary, and it is perfectly manifest that the subjects did not come here from either of the provinces or states mentioned. By subdivision "d" of rule 21, if a Japanese or Korean alien applies for admission and presents a passport entitling him to enter the United States, or one which is not limited to Mexico, Canada, or Hawaii, he shall be admitted if it appears that he does not belong to any of the classes of aliens excluded by the general immigration laws. This is a reasonable regulation, and perfectly logical under the act. But it cannot be deduced from that regulation, or from any other, that a Japanese or Korean shall be excluded because he comes with no passport at all. So I hold that the resolution of the board of examiners excluding Oguri and Kokehara was beyond its authority under the law, and that, notwithstanding the resolution, such persons are entitled to remain in the United States.

This disposes of the case, but it should be said of Hemet, the defendant, who is very intelligent, and apparently fair-minded, that he did all he could to keep Oguri and Kokehara aboard ship, and to re-

tain their services for the homeward voyage, except to put them in chains. Although they were engaged for the "round voyage," at their instance Hemet increased their pay for the return voyage, and they agreed, for such further consideration, to remain with him. This subsequent to the order of the board of special inquiry excluding these persons, and the notice from the inspector in charge to return them to the port whence they came. Relying not altogether upon their agreement, Hemet kept a watch on board; but, notwithstanding, they got ashore contrary to his purpose, and he has been unable to secure them since. That these persons departed clandestinely is evidenced by the fact that they left on board ship their clothing and personal effects, and the master is in their debt for a considerable portion of their wages theretofore earned. This is sufficient, to my mind, were the law otherwise than as I have determined it to be, to exonerate the defendant from the charge preferred under the information.

The order will therefore be that defendant be discharged.

PAINTER v. NAPOLEON TP. et al.

(District Court, N. D. Ohio, W. D. September 18, 1907.)

No. 1,310.

1. BANKRUPTCY—VOIDABLE PREFERENCES—LIABILITY OF TOWNSHIP TO SUIT.
A trustee in bankruptcy may maintain a suit against a township or its trustees 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], to recover a preferential payment received on behalf of the township under such circumstances as to render it voidable under said section.

2. SAME—SUIT BY TRUSTEE TO RECOVER PREFERENCE—SUFFICIENCY OF BILL.
A bill by a trustee in bankruptcy to recover a preference under Bankr. Act July 1, 1898, c. 541, § 60b [as amended by Act Feb. 5, 1903, c. 487, 32 Stat. 799 (U. S. Comp. St. Supp. 1905, p. 689)], must contain four essential allegations, viz.: (1) That the bankrupt was insolvent when the alleged preference was given; (2) that it was within four months prior to the bankruptcy; (3) that the effect of the enforcement of the judgment or transfer will be to enable the defendant to obtain a greater percentage of his debt than any other creditor of the same class; and (4) that defendant had reasonable grounds to believe that a preference was intended. The omission of any one of such allegations renders the bill demurrable.

In Equity. On demurrer to bill.

Charles K. Friedman and James P. Hagan, for trustee in bankruptcy.
Donovan & Dittmer, for board of trustees of Napoleon township.

SATER, District Judge. The bill alleges that on or about September 12, 1906, the bankrupt, Delventhal, who was five days later adjudged a bankrupt, knowing that he was insolvent and unable to pay his creditors in full, with intent to prefer as a creditor the township of Napoleon, Henry county, Ohio, and its board of trustees, and to defraud his other creditors, and in violation of the bankrupt law, took from his funds the sum of $2,500, and transferred and paid the same to the defendants, and that the defendants at that time had rea-

son to believe and know that Delventhal was insolvent, and that the payment so made to them by him was for the purpose of preferring them as one of his creditors. The bankrupt's assets in the trustee's possession are alleged to be insufficient to pay his creditors. The prayer is that the money so paid by him be declared to be held in trust by the defendants for the bankrupt's estate, and that its recovery be awarded. The township having been dismissed, the case is for decision on the demurrer of the board of trustees to the bill.

The first contention of the board of trustees is that in view of Commissioners of Hamilton County v. Mighels, 7 Ohio St. 109, an action of this kind cannot be maintained against it. In that case an action for damages for personal injuries was brought against the board of county commissioners. The seventh section of the act of March 12, 1853 (51 Ohio Laws, p. 423), establishing boards of county commissioners and prescribing their duties, provided that the board of commissioners of each county shall be capable of suing and being sued, pleading and being impleaded, in any court of judicature in the state, and authorized and required such board to ask, demand, and recover, by suit or otherwise, any money or other property due to its county on account of advances made by it on any contract for the erection or repair of any public building or bridges, or on any other contract which the board was authorized by law to make, and also to sue for and recover in money the value or amount of any labor or article of value, subscribed instead of money, to aid in erecting or repairing public buildings or bridges, if such money or thing of value shall not have been paid or delivered in a reasonable time. All money recovered was to be paid into the county treasury. Under that statute a board of county commissioners might sue only as to matters arising out of some contract which it was by statute authorized to make, and, although the statute was silent as to matters in reference to which such board might be sued, it was nevertheless said that it might fairly and reasonably be implied that such a board might be sued on all causes of action originating in contracts which it had statutory authority to make. As the statute did not authorize the maintenance of an action sounding in tort, the court found that the people of the county could not be held thereunder to answer for the torts committed by its board of commissioners or its members while in the discharge of official functions. The act of 1853 did not constitute a board of county commissioners a body corporate; but it is manifest that, had it done so, that fact would not have been influential, because the court, to sustain its conclusion, cited Board of Chosen Freeholders of Sussex County v. Strader, 18 N. J. Law, 108, and Hedges v. County of Madison, 1 Gilman (Ill.) 567, both of which cases were decided under statutes expressly creating boards of county commissioners bodies corporate. The court held that, in an action sounding in tort, a board of county commissioners had no liability either under the statute or at common law. The doctrine of the Mighels Case has been repeatedly affirmed by the same court, and it was not until the General Assembly so amended the county commissioners act as to render a board of county commissioners liable for negligence and carelessness that an action sounding in tort could be maintained against such a board.

The Ohio statute does not authorize the bringing of an action against a board of trustees of a township, or its members, while in the discharge of official duties, for negligence or carelessness. Section 1376, Rev. St. Ohio, among other things, provides as follows:

"Every civil township heretofore or hereafter lawfully laid off and designated, is declared to be, and is hereby constituted, a body politic and corporate, for the purpose of enjoying and exercising the rights and privileges conferred upon it by law; it shall be capable of suing and being sued, pleading and being impleaded, and of receiving and holding real estate by devise or deed, or personal property, for the benefit of the township for any useful purpose."

Then follow provisions to hold such property in trust, to receive conveyances of real estate when necessary to secure or pay any debt or claim due to the township, and to sell the real estate so received. Other sections of the statute confer the right to enter into given contracts. The attitude of a board of township trustees is substantially that of a board of county commissioners under the act of 1853, and it is therefore urged that an action of this character cannot be maintained.

In May v. Board of Commissioners of Logan County, Ohio (C. C.) 30 Fed. 250, decided in 1887, the doctrine of the Mighels Case was refused recognition as an authority when interposed as a defense to an action brought under a federal statute operating uniformly throughout the United States and enacted in pursuance of power vested in Congress by the federal Constitution. The powers of boards of county commissioners were then substantially the same as under the act of 1853. May sued for the infringement of a patent. The defense made in that case was the same as the defense made in this, and was based on the Mighels Case. Jackson, J., said:

"It is well settled by the authorities that political subdivisions of the state, such as counties and townships, are not responsible for acts of omission by their officials, as for their negligence in constructing public buildings, or in erecting, maintaining, and repairing highways, bridges, etc. The case of Hamilton County Com'rs v. Mighels, 7 Ohio St. 109, belongs to this class of authorities, which exempts counties from liability for mere personal injuries arising from negligent acts of omission or commission on the part of their agents. It has no application whatever to cases like the present, in which the property of another has been either willfully or negligently appropriated by such agents to the use and benefit of the county. In such cases the benefit secured cannot be retained and enjoyed by setting up the wrongful act in obtaining it. To allow this would violate the plainest dictates of justice and common honesty. * * * The state could not, by either direct or indirect legislation, exempt its counties from liability for the infringement of patents, nor has it attempted to do so. The patentee's rights and remedies are created and defined by Congress, which has, under the Constitution, the exclusive control of the subject. The right is given and remedy created by federal statute, which does not exempt counties from the obligation to respect the exclusive grant to the patentee of making, selling, and using his invention. * * * It is equally unsound to say that the plaintiff's rights in such cases are dependent upon the state permission to make counties liable for torts. No special enactment of the state of Ohio is needed to make her counties liable for the infringement of a patent."

The May Case, supra, is cited and approved in May v. County of Ralls (C. C.) 31 Fed. 473, 474, and in May v. Saginaw Co. (C. C.) 32 Fed. 629, in both of which cases the same ruling was made. See, also, May v. County of Fond du Lac (C. C.) 27 Fed. 691, May v.

Mercer County (C. C.) 30 Fed. 246, and May v. Commissioners of Johnson County, Fed. Cas. No. 9,334, in all of which counties were held liable for the infringement of a patent. From Bliss v. Brooklyn, 8 Blatchf. 533, Fed. Cas. No. 1,544, it appears that the state of New York, by express legislative enactment, endeavored to exempt the city of Brooklyn from damages for any nonfeasance or misfeasance of the common council, or any officer of the city, or appointee of the common council, of any duty imposed upon them by certain provisions of the act, and to relegate the party aggrieved for his remedy for any such nonfeasance or misfeasance to mandamus, or other proceeding or action against the members of the common council, officer, or appointee, as the case might be. The act in question, in so far as it sought to relieve the city of Brooklyn from liability to pay the complainant for the use of his patent, was held to be without effect. Other cases holding municipal corporations liable in damages for the infringement of a patent are Ransom v. New York, 1 Fish. Pat. Cas. 252, Fed. Cas. No. 11,573, and Asbestine Tiling & Mfg. Co. v. Hepp (C. C.) 39 Fed. 324. It is true the doctrine of the Mighels Case was followed in Jacobs v. Hamilton County, 1 Bond, 500, Fed. Cas. No. 7,161, and the county was relieved from liability for the infringement of a patent, but that case is expressly disapproved in May v. Board v. Commissioners of Logan County, supra, is not in harmony with the weight of authority, and has never been followed. The course of reasoning which in May v. Commissioners of Logan County limited the application of Commissioners of Hamilton County v. Mighels as an authority, and on which rest all of the foregoing cases for the infringement of patents, is applicable to this case, and overthrows the contention of the board of township trustees.

The recitals of the bill indicate that the pleader intended to cover violations of section 60a and section 60b, Bankr. Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], as amended by Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799 [U. S. Comp. St. Supp. 1905, p. 689], and section 67e of the bankrupt act. By the act of 1903 amending sections 23b, 60b, and 70e, a trustee in bankruptcy is authorized to bring a suit to recover property. This is not an action for personal injury arising from the negligent act of omission or commission on the part of the township's agents, but an action authorized by the national bankrupt law to recover money charged to have been paid to the board of township trustees by Delventhal, while insolvent, within five days prior to his adjudication as a bankrupt, with an intent to create a preference and to defraud his other creditors, and to have been received by the board with reason on its part to believe and know that he was insolvent at the time of payment, and that the payment was purposely made to prefer the township as a creditor. If the averments of the bill are true, and if the effect of the payment to the board of trustees was to enable it to obtain a greater percentage of its debt than any other creditor of the same class, then Delventhal's property, in the distribution of which his creditors are entitled to share, was wrongfully, and in violation of the provisions of the bankrupt act received and appropriated by the board of trustees to the use and benefit of the township, and the board

now seeks to retain and enjoy the benefits thus obtained by its own wrongful act. The nature of the bankrupt's liability to the township is not stated, nor is there a showing of when and how such liability arose; but, if the board's contention is correct, an insolvent debtor, within four months prior to the filing of a petition in bankruptcy, or after the filing of such petition and before the adjudication thereof, may designedly and successfully, with an intent to defraud his creditors, create a preference in favor of a township whose agents know or have reasonable cause to believe and know that a preference in its behalf is intended, and that the enforcement of such transfer will be to enable it to obtain a greater percentage of its debt than any other of the bankrupt's creditors of the same class. The township would thereby obtain and retain a greater percentage of its debt than any other creditor of the same class, and thus defeat the salutary provisions of a beneficent law designed to accomplish an equitable distribution among creditors of bankrupt estates. In Marsh v. Fulton County, 10 Wall. 676, 19 L. Ed. 1040, Mr. Justice Field said:

"The obligation to do justice rests upon all persons, natural and artificial, and, if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation."

The same obligation in this respect rests upon a township as upon a county. The rights and remedies of a trustee in bankruptcy are created and defined by Congress, which, under the federal Constitution (article 1, § 8, cl. 4), has exclusive control of the subject of bankruptcies, with the one qualification that its laws thereon shall be uniform throughout the United States. The rights given and the remedies thus created by federal statute may be enforced against townships or their boards of trustees. Nor is the state's permission, by legislative enactment or otherwise, necessary to the maintenance of an action of this character, or to make townships or their boards of trustees liable therein. Had the Legislature of Ohio specially enacted that townships and their boards of trustees should be exempt from liability in cases like this, such enactment would be ineffective. Bliss v. City of Brooklyn, 8 Blatchf. 533, Fed. Cas. No. 1,544; May v. Com'rs of Logan County (C. C.) 30 Fed. 250; May v. County of Ralls (C. C.) 31 Fed. 473. If a state law conflicts with an act of Congress, the state law must yield (Smith v. Parsons, 1 Ohio, 236, 13 Am. Dec. 608), because the laws of the United States, when made in pursuance of the Constitution, form the supreme law of the land, anything in the Constitution or laws of the state to the contrary notwithstanding (McCulloch v. Maryland, 4 Wheat. 316, 4 L. Ed. 579; article 6, Const. U. S.; In re Debs, 158 U. S. 564, 579, 15 Sup. Ct. 900, 39 L. Ed. 1092; Lewis' Sutherland's Stat. Constr. [2d Ed.] 22).

The contention that this action cannot be maintained, and that no liability was incurred by receiving payment from Delventhal, because the powers of the township and of its board of trustees are such only as are defined by statute, and that the bill does not disclose that the cause of action arose out of the exercise of some power expressly conferred or necessarily implied, or that the board was acting within its corporate authority when it received the money paid to it, is the

same as was made in Salt Lake City v. Hollister, 118 U. S. 256, 6 Sup. Ct. 1055, 30 L. Ed. 176, in which the city, admitting that it had distilled and sold spirits and had received the money therefor, denied its corporate authority so to do, and claimed exemption from the payment of the tax which the laws of the United States require of every one else who did the same thing. Mr. Justice Miller answered the argument thus:

"The truth is that, with the great increase in corporations in very recent times, and in their extension to nearly all the business transactions of life, it has been found necessary to hold them responsible for acts not strictly within their corporate powers, but done in their corporate name, and by corporation officers who are competent to exercise all the corporate powers. When such acts are not founded on contract, but are arbitrary exercises of power in the nature of torts, or are quasi criminal, the corporation may be held to a pecuniary responsibility for them to the party injured."

The demurrer, in so far as it questions the right to maintain the action against the board of township trustees, is overruled.

The demurrer, however, also questions the sufficiency of the bill. The bill does not aver that the enforcement of the transfer alleged will be to enable the board of trustees to obtain a larger percentage of its debt than any other creditor of the same class. Such an averment is essential to the statement of a cause of action. Section 60a of the bankrupt act as amended. "The test of a preference, under the act, is the payment, out of the bankrupt's property, of a larger percentage of the creditor's claim than other creditors of the same class receive." Swarts v. Fourth Nat. Bank of St. Louis, 117 Fed. 1, 4, 54 C. C. A. 387. To recover, the bill must allege and the proof must sustain four statutory elements constituting a preference:

"First, the insolvency of the debtor at the time the judgment was entered or the transfer made in favor of the creditor; second, that this was done within four months of bankruptcy; third, that the effect of which was that the defendant obtained a greater percentage of his debt than any other creditor of the bankrupt of the same class; and, fourth, that the defendant or his agent had reasonable grounds to believe that it was intended by such transfer of property (or judgment) to give a preference to the defendant within the meaning of the acts of Congress relating to bankruptcy. If the trustee fails to allege any one of these claims, his bill, declaration or petition is bad on demurrer. If he fails to prove all of these elements, judgment should be entered for the defendant." Loveland on Bankr. (3d Ed.) 622.

The bill having failed to allege the third of the foregoing statutory requirements, the demurrer is for this reason sustained.

KREBS v. SECURITY TRUST & LIFE INS. CO.

(Circuit Court, D. Oregon. October 12, 1907.)

No. 3,032.

1. INSURANCE—FORFEITURE OF POLICY—PAYMENT OF PREMIUMS.

Where premiums on a life insurance policy, due on a specified date each year, were customarily paid by the insured by depositing a draft in the post office on that date addressed to an agent of the company, which was received and retained without objection, such custom constituted a prac-

tical construction of the contract or a waiver of strict compliance with its terms, which precludes the company from asserting a forfeiture of the policy for nonpayment of a subsequent premium which was deposited in the same way.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 1057.]

2. SAME—REPUDIATION OF CONTRACT BY INSURER—MEASURE OF DAMAGES.

Where a life insurance company has wrongfully repudiated a policy, if the holder is in a state of health to enable him to procure other insurance of like nature and kind, his measure of damages is the difference between carrying the insurance which he has and the cost of new insurance for the same amount and term, with the addition, in case his policy has an investment feature or entitles him to accumulations and profits, of all such profits or accumulations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 515.]

At Law. On demurrer to complaint and motion to strike out paragraph.

This is an action for the recovery of damages alleged to have been sustained by plaintiff through the refusal on the part of defendant to accept further payments of premium on a life insurance policy issued to the plaintiff, or to further recognize such policy as still of binding force and effect. The policy was issued March 14, 1899, in consideration of the sum of $313, and an annual premium of a like amount to be paid on the 15th day of March of each year thereafter for 19 years, and conditioned for the payment of the sum of $10,000, with certain accumulations and dividends, on the death of plaintiff, to Conrad Krebs, her husband.

Plaintiff paid six annual premiums, and defendant refused to receive the seventh. By the fourth and fifth paragraphs of the complaint it is alleged:

"That the defendant directed this plaintiff to pay the said annual premium so due by the provisions of said policy to one Charles B. Soule, who was manager for said defendant having his office at the city of Chicago, in the state of Illinois, and all the foregoing payments so made to the defendant by plaintiff were made to the said Soule, as manager of the defendant at Chicago, and the said defendant issued receipts to the plaintiff for such payments by and through the said Soule, and on the 15th day of March, 1905, plaintiff, in accordance with the usual custom of dealing with defendant in regard to the payment of said premium, mailed to the said Charles B. Soule, to his address in the city of Chicago, Ill., a certified check, payable to the order of said defendant company, for said sum of $313, and deposited the same in the United States post office at Salem, Or., directed to the said Charles B. Soule, as aforesaid.

"That shortly thereafter the said check, and the said letter containing said check, was returned to the plaintiff unopened, whereupon plaintiff immediately remailed said check to the defendant itself at its office in the city of Philadelphia, Pa.; but, despite the fact that plaintiff was willing and anxious to pay said annual premium, and that said check was payable to said defendant company and was mailed on the date the same was due to said Charles B. Soule, as plaintiff had theretofore done when paying said premium, and despite the fact that defendant received said check and knew all said facts, it wrongfully refused to accept said payment or said check, and returned the same to the plaintiff with a notification that her policy had lapsed, and wrongfully refused further to be bound thereby, for the alleged reason that said Soule, to whom said check was sent, was no longer its agent; but plaintiff alleges that if such was the fact the defendant wholly failed to notify her of any such change of agency."

By the seventh paragraph it is further alleged, in effect, that defendant has always retained, and now wrongfully retains, each and all of the annual premiums paid to it by plaintiff, to her damage in the sum of $2,365.50, being the sum of six annual premiums, of $313 each, paid as aforesaid, with interest on such payments from date thereof at 6 per cent. per annum.

Defendant interposed a motion to strike out this last paragraph, but at the

argument the question was submitted also, as if upon demurrer, whether the complaint states facts sufficient to constitute a cause of action.

Carson & Cannon, for plaintiff.
Chamberlain & Thomas, for defendant.

WOLVERTON, District Judge (after stating the facts as above). Upon the question whether the complaint states facts, it is submitted that, since the complaint shows that the payments of premium were to be made in Chicago, Ill., and there being no allegation that premiums were receivable by mail, it was incumbent upon plaintiff to have the check in Chicago on or before March 15th, the day upon which the premium was made payable by the terms of the policy, and that it was not sufficient to constitute payment at the time required that the premium was placed in the post office at Salem, Or., addressed to the defendant's manager at Chicago, on that date.

Answering the objection, I am of the opinion, however, that, having alleged that defendant directed plaintiff to pay the premiums to Soule, the manager of defendant at Chicago, to whom all foregoing payments had been made, and having further alleged that, in accordance with the usual custom of dealing with defendant in regard to the payment of such premiums, plaintiff mailed to Soule at Chicago, by certified check, the premium, by depositing it in the post office at Salem, Or., on March 15th, the complaint is sufficient to show payment to the company on that date. These allegations are sufficient to show that, by a course of dealing between the plaintiff and the insurance company with reference to the payment and receipt of the annual premiums, such premiums were not only payable to Soule at Chicago, as recognized by the company, but payable through the post office, thus effecting a waiver of strict payment to the company, in person, at its home office, on or before the very day on which the premium fell due. When payment by mail was authorized or recognized by the company, and there do not appear to be any restrictions that the money shall be at the company's office on or before the date when due, a deposit in the post office, even at a distant point, on the due date, will fulfill the requirements, for in such a case a deposit in the post office is at the risk of the creditor, and payment is deemed to have been made at the time of the deposit. Primeau v. National Life Association, 77 Hun (N. Y.) 418, 28 N. Y. Supp. 794. Forfeiture is a harsh remedy. The courts abhor it, and will not enforce it unless by the very letter, so that whenever the parties have dealt with reference to a stipulation for a forfeiture as if it would not be literally insisted upon, the courts are quick to take them at their word and relieve against the strictness of fulfillment, so as to accord justice more fitting the transaction. In consonance, therefore, with this principle, I hold, under the complaint, that plaintiff has not forfeited her previous payments, but, rather, that defendant has, by its conduct and mode of dealing with plaintiff, recognized payment by deposit in the post office as sufficient. See, further, as to this subject, Braswell v. American Life Insurance Co., 75 N. C. 8; Protection Life Insurance Co. v. Foote, 79 Ill. 361. The demurrer will be overruled.

The motion presents a question not so easily solved, which is whether

the paragraph moved against states the proper measure of damages to which plaintiff is entitled should she prevail in her action.

There is a sharp and irreconcilable conflict of authorities touching this subject. I need only to state the prevailing rules, and to note the one by which I feel bound. On the one hand, it is held that where the insurance company wrongfully revokes its policy, and refuses further to be bound by it, the holder may elect whether to enforce the contract or to treat it as rescinded. If he elects to pursue the latter course, his measure of relief is the amount of premiums paid, with interest, and this though he has had the benefit of insurance under the policy from its inception to the time of revocation, and even though such revocation would not operate in law to avoid the policy. This rule is said, by the learned authors of the American and English Encyclopedia (volume 19, p. 99) to be supported by the weight of authority. See, also, Van Werden v. Equitable Life Assurance Society, 99 Iowa, 621, 68 N. W. 892; American Life Insurance Co. v. McAden, 109 Pa. 399, 1 Atl. 256; Alabama Gold Life Ins. Co. v. Garmany, 74 Ga. 51; McKee v. Phœnix Insurance Co., 28 Mo. 383, 75 Am. Dec. 129; McCall v. Phœnix Mutual Life Ins. Co., 9 W. Va. 237, 27 Am. Rep. 558; Frain v. Metropolitan Life Ins. Co., 67 Mich. 527, 35 N. W. 108; Ætna Life Insurance Co. v. Paul, 10 Ill. App. 431; Braswell v. American Life Insurance Co., 75 N. C. 8.

On the other hand, it is held by many authorities that, if the assured is in a state of health that he can secure other insurance of like nature and kind, his measure of damages is the difference between the cost of carrying the insurance which he has, for the term stipulated for, and the cost of new insurance at the rate he would then be required to pay for a like term. If, however, he is unable to obtain other insurance, then his measure of damages will be the present value of his policy as of the date of death, less the estimated cost of carrying the same, from the date of cancellation, at his then age. Ebert v. Mutual Reserve Fund Life Ass'n, 81 Minn. 116, 83 N. W. 506, 834, 84 N. W. 457; Speer v. Phœnix Mutual Life Ins. Co., 36 Hun (N. Y.) 322; Brooklyn Life Ins. Co. v. Weck, 9 Ill. App. 358; Day v. Conn. General Life Ins. Co., 45 Conn. 480, 29 Am. Rep. 693; Universal Life Ins. Co. v. Binford et al., 76 Va. 103; Continental Life Ins. Co. v. Houser, 89 Ind. 258; New York Life Ins. Co. v. Statham et al., 93 U. S. 24, 23 L. Ed. 789; Smith et al. v. Charter Oak Life Ins. Co., 64 Mo. 330; Lovell v. St. Louis Mutual Life Ins. Co., 111 U. S. 264, 4 Sup. Ct. 390, 28 L. Ed. 423.

None of these cases seem to have made any distinction between a policy of insurance that provides for insurance alone and one that provides for such insurance with an investment feature added, or when the assured is entitled also to accumulations and profits. A case has come to my notice from West Virginia (Abell v. Penn Mutual Life Ins. Co., 18 W. Va. 400), where this distinction is discussed very intelligently and ably, and the measure of damages is there stated. In such a case the company can only claim payment for the actual risk it has run, and cannot rightfully claim to be paid anything as profits on the policy. The company must therefore, when it is at fault, surrender the entire

profits of the insurance contract, and be content to retain only what will compensate it for the risk it has run. It would follow, then, that the measure of damages in such a case would be increased by the amount of profits to which the assured would be entitled, none of which the company could claim, because it has rendered no just consideration therefor to the assured.

Unaccompanied by the feature discussed in the West Virginia case, I am constrained to adopt the latter of the two rules indicating the measure of damages to which the assured is entitled, because it has the sanction of the Supreme Court of the United States. However, as the present policy, as appears from the complaint, has the accumulation feature added, it seems to me, and I so hold, that the measure of damages should be in accordance with the West Virginia doctrine.

The plaintiff has not stated whether she is able or not to procure other insurance upon her life; but, on the presumption that things remain as we find them unless facts are shown indicating a contrary or different condition, I have assumed that other insurance could be had. In view of these considerations, the motion to strike out should be sustained.

The order will be, therefore, that the demurrer to the complaint be overruled, and the motion to strike out sustained.

STIMSON v. UNITED WRAPPING MACH. CO. et al.

(Circuit Court, W. D. New York. September 19, 1907.)

No. 191.

1. COURTS—JURISDICTION OF FEDERAL COURTS—ACTION BY ASSIGNEE.

Where the assignor of a cause of action before the assignment could have prosecuted the action in a federal Circuit Court, the assignee, if the requisite diversity of citizenship exists, can prosecute the action in such court in the district of which he is a resident or in that of the defendant, and in the former case it is not required that the assignor should have also been a resident of the same district so that he might have brought suit therein.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, §§ 865–874.]

2. REMOVAL OF CAUSES—SEPARABLE CONTROVERSY.

An action to recover the price of property sold, brought against the original purchasers and one to whom they assigned their contract, who assumed payment and to whom the property was delivered, presents a separable controversy as to the assignee, who may remove the same into a federal court, where the requisite jurisdictional facts appear, regardless of the citizenship of the other defendants.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Removal of Causes, §§ 94–99.

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.]

On Motion to Remand to State Court, and Motion by Defendant to Stay Action and to Enjoin Further Proceeding in State Court.

Herbert B. Lee, for plaintiff.

Alfred L. Becker and Duncan & Duncan, for defendant United Wrapping Machine Company.

HAZEL, District Judge. The Kidder Press Company, a West Virginia corporation, entered into a written contract with the defendants Wilson and Field and Egbert W. Gillette, by which it agreed to manufacture and sell, and the latter agreed to purchase, a printing press and attachments as specified in the agreement. Such agreement was later assigned by the said individuals to the United Wrapping Machine Company, an Illinois corporation, which assumed the payment of the purchase price of the press and the conditions imposed under the agreement. After delivering the printing press to the A. H. Pugh Company, as directed by the assignee of the contract, the Kidder Press Company assigned its claim for the purchase price of the press to the plaintiff, a citizen of the state of New York and resident of the Western district, who subsequently brought an action in the Supreme Court of the state of New York to recover the amount of such purchase price, to wit, $9,350. The defendant United Wrapping Machine Company, before answering, filed its petition and removed the action from the state court into this court on the ground of diversity of citizenship, and also moved the court to enjoin the further procedure of an action between the parties in the Municipal Court of Buffalo, which is claimed to involve the same subject-matter, and for other relief. The order of removal having been duly entered in the state court clerk's office, and the transcript of record filed in this court, the plaintiff, now appearing specially for the purpose of this motion only, moves to remand the case to the state court on the grounds that the action is not removable because this court would not have had original jurisdiction, plaintiff's assignor not being a resident of this district, and that the complaint does not disclose a separable controversy between the plaintiff and the removing defendant. The defendants Wilson and Field are citizens of Illinois, Brower is a citizen of New Jersey, and Lee is a citizen of the state of New York.

The objections which assail the jurisdiction of this court are not well taken. The federal Circuit Court, pursuant to sections 1 and 2, of Act March 3, 1875, c. 137, 18 Stat. 470, as amended by Act March 3, 1887, c. 373, 24 Stat. 552, and Act Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, pp. 508, 509], has original jurisdiction of this controversy. The moving papers show that the plaintiff's assignor, because of diversity of citizenship, could have brought the action in the Circuit Court of the United States either in the district of its residence or in the district of the residence of the defendant. McCormick Co. v. Walthers, 134 U. S. 41, 10 Sup. Ct. 485, 33 L. Ed. 833; Ex parte Wisner, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264; Southern Pacific Co. v. Burch (C. C. A.) 152 Fed. 168. The rule has been established that the right to sue in the Circuit Court of the United States is not lost by an assignment of the chose in action where the suit might have been begun by the assignor in a Circuit Court if the assignment had not been made and where the assignee is a citizen of a different state from that of the defendant. White v. Leahy, Fed. Cas. No. 17,551; Bolles v. Lehigh Valley R. Co. (C. C.) 127 Fed. 884; Noyes v. Crawford (C. C.) 133 Fed. 796. See, also, Emsheimer v. New Orleans, 186 U. S. 33, 22 Sup. Ct. 770, 46 L. Ed. 1042. That the venue is in the Western district of New York, and not in the district of

which the assignor is a resident, is inconsequential. Upon this point Judge Coxe, in the Bolles Case, supra, speaking of the change of venue by the assignment, says:

"The statute could hardly have intended to deny jurisdiction simply because the venue is laid in a different district from the one which would have been selected had no assignment been made. The assignor and the defendant are citizens of different states, so are the assignee and defendant. The plaintiff, as such assignee, could sue the defendant in the United States Circuit Courts of Pennsylvania. This conceded, but it is said that the plaintiff cannot sue in this district because his assignor could not do so. This contention loses sight of the fact that this court might have had jurisdiction of the suit between the original parties if the defendant had consented to be sued here."

If the law were as contended by the plaintiff, namely, that the assignor must have been able to begin the action in this district in order to give the assignee such right, it would, of course, follow that the chose in action could only be assigned to a resident of the district of the assignor to give the Circuit Court of the United States jurisdiction. Such interpretation of the removal statute is not warranted, and I think that if the assignor, before the assignment, could have prosecuted the action in the federal Circuit Court, the assignee, if the requisite diversity of citizenship exists, can prosecute the action in the district of which he is a resident or in that of the defendant. Ex parte Wisner, supra, does not alter the rule of law above stated. In that case no question of the assignment of the chose in action was involved. The defendant, a citizen of the state of Louisiana, removed to the Circuit Court of the United States an action brought against him in the state court of Missouri by a citizen of the state of Michigan, and the Supreme Court decided that this could not be done. The action was remanded on the ground that under the act of March 3, 1875, as amended, where neither of the parties to an action brought in a state court are citizens of the state in which such action is begun, there can be no removal by the defendant to the federal Circuit Court of that state, because such court would not have had jurisdiction in the first instance. The first ground for remand is therefore overruled.

Is this a separable controversy? I think it is, and this apparent from a perusal of the complaint. That one of the defendants is a citizen of New York, of which state the plaintiff is also a citizen, does not deprive the United Wrapping Machine Company from removing the action to this court if the complaint avers a separate and distinct controversy as to the removing defendant. Manufacturers' Commercial Co. v. Brown Alaska Co. (C. C.) 148 Fed. 310. The test, I think, is whether the controversy can be fully determined between the plaintiff and the defendant removing the cause without the presence of any of the other parties to the action. The claimed liability of the defendant United Wrapping Machine Company is set forth in a single cause of action and arises from its assumption of the contract of purchase made between the plaintiff and the individual defendants Wilson and Field and Gillette. That the plaintiff, in its endeavor to recover the purchase price of the press, elected to join in the action the assignors of the contract together with the defendants Brower and Lee, who are claimed to have an interest in the contract, the nature and extent of which is

not disclosed, and demands a joint recovery, is not of material importance in the absence of essential allegations disclosing a nonseparable suit. Whether such defendants are properly joined in this action need not be passed upon. The fact that the defendant Lee is a citizen of the same state as the plaintiff would, undoubtedly, preclude removal if such defendant were an indispensable party. The complaint indicates no sufficient reason for making him a party defendant, and therefore his citizenship must be disregarded. 18 Ency. of Pl. & Pr. 196. True, the assignors may still be liable for failure to perform the contract, but the action against the assignee is independent of such assignors and may be prosecuted without joining any of them. The contract for the purchase of the printing press was not joint in the sense that at its inception it was jointly binding upon all the defendants, and upon such a motion as this the subject-matter of the action is of paramount importance in considering the question of proper joinder and right to demand joint recovery. The liability of the United Wrapping Machine Company springs from the assignment and its assumption to fully perform the agreement and comply with the conditions imposed upon the assignors. See Manufacturers' Commercial Co. v. Brown Alaska Co., supra; Iowa Lillooet Gold Min. Co. v. Bliss (C. C.) 144 Fed. 446; Chase v. Beech Creek R. Co. (C. C.) 144 Fed. 571. In Mecke v. Valley Town Mineral Co. (C. C.) 89 Fed. 114, the headnote of the case substantially states that a suit against a debtor and one who had assumed his debts presents a divisible controversy with the latter. The motion to remand must therefore be denied.

As to the motion by the defendant United Wrapping Machine Company for a stay of this action until the determination of a prior action pending in the court of common pleas of the county of Hamilton, state of Ohio, and also from proceeding with the action brought in the Municipal Court of Buffalo, it is sufficient to say, without deeming it necessary to pass upon the power of this court to restrain the action of the state court under sections 716 and 720 of the Revised Statutes [U. S. Comp. St. 1901, pp. 580, 581], that there is not shown such a multiplicity of suits as to warrant enjoining further proceedings in this action. The moving papers do not satisfy me that the subject-matter of the motion brought in the Municipal Court of Buffalo is involved herein. Plaintiff claims and has read affidavits tending to show that the action in the Municipal Court has a distinct object arising from different relations between the parties which arose subsequently to the making of the contract in suit. That the Municipal Court has jurisdiction of the subject-matter and also the parties is not denied. Under these circumstances, it is not for this court to enjoin its proceeding.

The motion is denied.

THE WILLIAM P. DONNELLY.

THE SANDY HOOK.

(District Court, W. D. New York. August 6, 1907.)

1. MARITIME LIENS—STATUTORY LIENS—SUPPLIES FURNISHED TO DOMESTIC VESSELS.

A lien on a domestic vessel for supplies furnished in her home port, given by Laws N. Y. 1897, pp. 526, 527, c. 418, §§ 30–32, as amended by Laws 1904, p. 494, c. 246, may be enforced in a federal court; but such lien will not attach in the absence of proof that credit was given to the vessel, and the rule is not altered by the fact that the vessel was under charter or in the possession of a prospective purchaser.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Maritime Liens, §§ 30, 111.

For supplies and services, presumption as to credit to vessel, see note to The George Dumois, 15 C. C. A. 679.]

2. SAME—SUPPLIES FURNISHED ON CREDIT OF VESSEL—EVIDENCE.

The testimony of one furnishing supplies for a vessel in her home port that they were furnished on the credit of the vessel is not of controlling weight, unless it is corroborated by other competent evidence; nor is the fact that they were charged on the books against the purchaser and the vessel of great weight.

3. SAME—BURDEN OF PROOF.

There is no presumption that the supplies furnished to a vessel on order of a charterer at its place of residence were so furnished on the credit of the vessel; but such fact must be affirmatively proved by evidence showing that there was a mutual understanding to that effect.

4. SAME—EVIDENCE CONSIDERED.

Libelants furnished supplies to vessels on the orders of a contracting corporation of the same port engaged in dredging work to which the vessels were chartered for the season under charters requiring the charterer to furnish all supplies and to return the vessels free from liens. It did not appear that libelants knew of the charters or made any inquiry in respect to the ownership of the vessels. The supplies were charged on the books to the corporation and the vessel to which they were furnished, and libelants testified that they were furnished on the credit of the vessels. From time to time they settled with the charterer, sometimes taking its notes for the balance due. The vessels were domestic vessels registered in the same port. The charterer having been adjudged bankrupt, libelants filed claims for liens under Laws N. Y. 1897, pp. 526, 527, c. 418, §§ 30–32, as amended by Laws 1904, p. 494, c. 246, and brought suit to enforce such liens. *Held*, that the evidence was not sufficient to show a mutual agreement or understanding pledging the credit of the vessels, nor to entitle libelants to a lien thereon.

In Admiralty. Suit to establish and enforce a lien for supplies.

Clinton & Clinton, for libelants.

Love & Keating, for claimant.

HAZEL, District Judge. The libel was filed in this cause to recover the sum of $356.64 for supplies furnished the tugboat William P. Donnelly at the port of Buffalo, N. Y., during the season of navigation on the Great Lakes for the year 1904. Reliance is placed upon the statute of the state of New York (Laws 1897, pp. 526, 527, c. 418, §§ 30–32, as amended by chapter 246, p. 494, Laws 1904), which provides for liens upon vessels for supplies and materials furnished

and for work done in the repair or equipping of domestic vessels at their home port. That a valid lien upon a domestic vessel filed under the above statute is enforceable in admiralty is clearly settled by the authorities. The Lottawanna, 21 Wall. 558, 22 L. Ed. 654; The J. E. Rumbell, 149 U. S. 1, 13 Sup. Ct. 498, 37 L. Ed. 345. Both sides concede that according to decisions controlling upon this court a valid lien will not attach in the absence of proof that credit was given to the ship. This rule applies equally to liens enforceable in admiralty under the general maritime law and under state statute, and such rule is not altered by reason of the fact that the vessel proceeded against is under charter or in the possession of a prospective purchaser. The Golden Rod, 151 Fed. 6–8, 80 C. C. A. 246.

The claimant contends that the supplies were furnished on the credit of the Donnelly Contracting Company, and not of the vessel. In so far as material, the evidence in this case shows that the supplies in question were delivered by libelants pursuant to directions received by them over the telephone from an employé of the charterer, the Donnelly Contracting Company. It was customary for libelants to each month deliver itemized statements for groceries and supplies furnished to the tugboat and to other vessels chartered by the Donnelly Contracting Company, and at different times promissory notes were taken for the total amount due them. On July 12 and September 9, 1904, promissory notes were taken to evidence the debt, which said notes were surrendered at the trial, and the amount of the debt representing deliveries of supplies to the tug Donnelly is now sought to be recovered herein. Indeed, the course of business for some time prior to the indebtedness in question was to take notes from the Donnelly Contracting Company for the amount of supplies furnished to vessels chartered by it. The Donnelly Contracting Company was a domestic corporation, and at the time the debt was incurred was engaged in the business of dredging at the port of Buffalo, N. Y., where libelants were also engaged in transacting the business of grocers. The tugboat in question had painted on her stern the corporate name of the charterer, and she was enrolled at Buffalo, N. Y., in the name of William P. Donnelly, who was the treasurer of the corporation. But it is not claimed that libelants made any inquiries in relation to the enrollment, or that they in any manner were induced to give credit to the vessel by the distinguishing name or mark upon her stern. They were not informed of the fact that the vessel was chartered by the Donnelly Contracting Company, and at the time the supplies were furnished they had no knowledge in relation thereto. In the month of November, 1904, the charterer was declared bankrupt, and thereupon the local lien in the form required by the statute was filed in the office of the clerk of Erie county. The proofs show that under the terms of an oral charter party the charterer was to pay all the expenses for the navigation of the tugboat and return her "free and clear at the end of the season." Libelants testified that the supplies were furnished on the credit of the vessel. Such testimony, however, is not entitled to controlling weight, unless it is corroborated by other competent evidence of the surrounding circumstances. The Gracie May, 72 Fed. 283, 18 C.

C. A. 559; The Acme, 7 Blatchf. 366, Fed. Cas. No. 28; Kelly v. Pittsburgh, Fed. Cas. No. 7,674. Nor is the evidence that the supplies were charged against the Donnelly Contracting Company and the tugboat on the books of the libelants entitled to great weight. The Samuel Marshall, 54 Fed. 396, 4 C. C. A. 385.

Upon the above facts the libelants did not in my opinion obtain a lien on the vessel for the supplies furnished and not paid for. It is clear that, if libelants had made inquiries regarding the ownership of the tugboat, they would have learned that she was chartered to the Donnelly Contracting Company and used in its business of dredging for the season of 1904. In The Valencia v. Ziegler, 165 U. S. 264, 17 Sup. Ct. 323, 41 L. Ed. 710, the Supreme Court substantially held that a person supplying goods to a vessel or repairing her on the order of a charterer who was obliged under the charter party to pay for such supplies or repairs cannot acquire a maritime lien "if [to quote from the syllabus] the circumstances of the transaction put him upon inquiry as to the existence and terms of such charter party, and he fails to make the inquiry, and chooses to act on a mere belief that the vessel will be liable for his claim." So, in the case at bar, the bare assertion by libelants that they parted with the supplies on the credit of the vessel, or that they believed the boat would be liable for groceries delivered in the absence of an understanding as to her actual liability, is not thought sufficient to bind her. That in The Valencia a maritime lien in a foreign port was asserted, while here we are dealing with a lien arising under a local statute for supplies furnished in the home port is not of material significance as applied to the elicited facts.

The enunciated principle is applicable to the proofs, and would seem to apply to both maritime liens and state liens for supplies furnished the vessel, as may be assumed from the approval by the court of the decision in the case of The Samuel Marshall, supra, where a similar local lien was considered, and where the limitations of a maritime lien were read into it. In The Golden Rod, supra, cited by both proctors in support of their respective contentions, the elicited facts fairly indicate that credit was given the vessel. The repairs were ordered by the agent of the owner, and were performed in the presence of the master, who substantially pledged the credit of the boat. Here the case is devoid of any testimony from which the inference would be warranted that the vessel was regarded as the responsible element for the value of the groceries furnished. On the contrary, the transaction is susceptible of the inference that the minds of the parties failed to meet upon an intention to hold the vessel responsible. Cuddy v. Clement, 113 Fed. 454, 51 C. C. A. 288; The Kalorama, 10 Wall. 204, 19 L. Ed. 914. It may be true that the libelants intended to sell their goods on the credit of the vessel as testified by them; but the intention to trust the vessel must spring from the acts express or implied of both parties. The mere act of charging the supplies to the Donnelly Contracting Company and the vessel upon the bills or monthly statements delivered to the contracting company is insufficient, standing alone, to justify the reasonable inference that there was a mutual understanding to give credit to the vessel.

Libelants contend, citing The Vigilant (C. C. A.) 151 Fed. 747, that the presumption of law is that the goods were delivered to the vessel upon her credit, and accordingly the state lien will be enforced by this court, unless such presumption is removed or overcome by the evidential facts. The case cited would seem to favor the rule adopted in various prior adjudications, namely: The Iris, 100 Fed. 104, 40 C. C. A. 301; The Underwriter (D. C.) 119 Fed. 713; The Alvira (D. C.) 63 Fed. 144. But, on the other hand, equally well reasoned adjudications, including a decision in this circuit, enunciate a different principle. In The Electron, 74 Fed. 689, 21 C. C. A. 12, Judge Shipman based his reasoning upon the authority of the Supreme Court in the Lottawanna Case, from which he quotes the following:

"Of course, this modification of the rule cannot avail where no lien exists; but where one does exist, no matter by what law, it removes all obstacles to a proceeding in rem, if credit is given to the vessel."

Commenting upon this quotation, he says:

"If full force is given to the last clause of the sentence, it is an implication that no proceeding in rem can be had against domestic ships, if no credit had been given to the vessel, and that such credit necessarily preceded any lien which could be recognized by an admiralty court."

From this language it is fair to presume that no such presumption arises from the mere delivery of goods to the ship as is here claimed. The Circuit Court of Appeals for the Second Circuit, in The Golden Rod, speaking of its prior decision in The Electron, supra, says:

"We find no reason for modifying our former opinion, which seems to be in accord with the views of the Supreme Court in The J. E. Rumbell."

And in Alaska Company v. Chamberlain, 116 Fed. 600, 54 C. C. A. 56, the Circuit Court of Appeals for the Ninth Circuit broadly held that, where supplies have been furnished to the charterer at the place of his residence, the presumption arises that credit was given to him, and not to the vessel; and in that case The Valencia, supra, was cited as an authority in support of the enunciated principle. See, also, The Westover (D. C.) 76 Fed. 381; The Lighter, 57 Fed. 664, 6 C. C. A. 493; The Rosalie (D. C.) 75 Fed. 29; The Norman (D. C.) 6 Fed. 406.

The evident weight of the authorities, as I read them, constrains me to hold that libelants have not affirmatively shown that they trusted the vessel for the supplies furnished by them on the order of the charterer, and therefore the libel should be dismissed with costs.

The Sandy Hook.

In the libel filed against the tug Sandy Hook the amount of supplies furnished amounted to $486.29. The evidence considered in the case against the tugboat William P. Donnelly also applies here, and in fact both cases were tried and submitted upon substantially the same record.

For the reasons stated in the foregoing decision, the libel should be dismissed, with costs.

THE OCEANICA.

(District Court, W. D. New York. July 25, 1907.)

No. 341.

1. TOWAGE—INJURY TO TOW—MEASURE OF DAMAGES.
Under a decree awarding damages against a tug for negligent injury to her tow, an allowance of an item of expense for piling water-logged lumber at double the rate charged for piling dry lumber sustained; it being shown that such charge was customary.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Towage, § 38.]

2. SAME—LOSS OF CARGO.
The measure of damages recoverable from a tug for cargo of the tow lost through the tug's negligence is the market value of such cargo at the port of shipment, together with the carrying expenses incurred.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Towage, § 38.]

3. ADMIRALTY—FINDING OF COMMISSIONER—REVIEW.
A finding of a commissioner on a question of fact, based on conflicting evidence, will not be disturbed, unless obviously erroneous.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Admiralty, § 770.]

4. EVIDENCE—VALUE OF VESSEL—SALE PRICE OF SIMILAR VESSELS.
Upon an issue as to the value of a barge lost through the negligence of a towing tug, evidence to show the selling price of other similar vessels is inadmissible.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 267.]

In Admiralty. On exceptions to commissioner's report.
For former opinion, see 144 Fed. 301.

Brown, Ely & Richards, for libelants.
Clinton & Clinton, for cargo interests.
Crangle & Burke, for respondent.

HAZEL, District Judge. The first exception of the claimant to the allowance of the item of expense for piling water-logged lumber, to wit, $151.29 for 403,456 feet, is overruled. The testimony of the witness Meyer that the expense of unloading water-logged lumber was double the rate on dry lumber is sufficiently comprehensive to warrant the inference that the rate for hauling, inspecting and piling it would also have been double. That it ordinarily costs an additional amount to tally, inspect, and pile lumber in the yard after unloading it was not controverted, and, although the direct testimony upon this point was indefinite, the witness on his redirect and recross examinations made it reasonably clear that after water-logged lumber is unloaded a double charge is usually made for conveying it to the yard and piling the same.

The item of expense for back-piling and hauling dry lumber, amounting to $226.35, and objected to by libelants (first exception), was properly disallowed.

The allowance of the item for measuring and tallying 780,714 feet of lumber at $117.10 is sustained (claimant's second exception). Evidently this item was allowed by the commissioner on the reasonable assumption that, as the shipper was also the consignee, he probably

would not have incurred this expense at the port of unloading, even though it was usual for a consignee to take this precaution.

The libelants' third and fourth exceptions to the disallowances for use of steam pump and scow, and for towing same, are overruled.

The item of expense for the second attempt to dislodge the Massasoit, amounting to $687.30, is allowed, and claimant's third exception overruled. The evidence satisfactorily shows that the second attempt to dislodge the Massasoit was made in good faith, and no reason is apparent why the finding of the commissioner in relation thereto should be disturbed.

The libelants have excepted to the rule of damages adopted by the commissioner under the seventh paragraph of his report, wherein he allowed at the rate of $14.50 per 1,000 feet for the lumber shown to have been lost (libelants' fifth exception). They contend that the correct measure of damages was the market value of the lumber at the port of destination. The rule adopted by the commissioner of allowing the commercial value at the place of shipment is not inapplicable. The cases of Mobile, etc., Ry. v. Jurey, 111 U. S. 584, 4 Sup. Ct. 566, 28 L. Ed. 527, Railroad v. Estill, 147 U. S. 617, 13 Sup. Ct. 444, 37 L. Ed. 292, and Phœnix Ins. Co. v. Erie Trans. Co., 117 U. S. 322, 6 Sup. Ct. 570, 29 L. Ed. 873, cited by libelants, arose out of breach of contract of carriage, and not out of collision. That the proper rule of damages, where cargo is lost in transit on account of collision, is its value at the place of shipment, together with the carrying expenses incurred, is settled by the authorities. The Scotland, 105 U. S. 24, 26 L. Ed. 1001; The Umbria, 59 Fed. 489, 8 C. C. A. 194; The Vaughan & Telegraph, 14 Wall. 258, 20 L. Ed. 807.

This finding is also excepted to by claimant (fourth exception) upon the ground that no damages whatever arising from lost lumber have been proven. The commissioner found the value at the place of shipment based upon certain testimony of the libelants' witness Pfohl on cross-examination, and he states in his report that his conclusion is founded upon slender proof. Evidence in relation to the value of the lumber was submitted by libelants upon the theory that the damage recoverable was the value at the place of delivery. No testimony whatever was given by libelants as to value at the point of shipment. The evidence is not thought sufficient to uphold the finding. In view of the circumstances, the libelants should be permitted to make proof of the market value at the place of shipment, if they desire to do so, and for that single purpose the report of the commissioner is recommitted, and the case may be reopened to take such proof. If the libelants elect not to take such evidence, but to rely upon their claim that the value at the destination is the proper rule, then their exception will be overruled, and the exception of the claimant sustained.

The fifth exception of the claimant to the eighth finding of the commissioner is overruled. The reason assigned in the report for allowing the item is accepted as sufficient by the court.

The exception of the claimant (sixth) to the allowance of the sum of $10,000 in the eleventh paragraph of the commissioner's report, for total loss of the Massasoit resulting from negligent towage, is

overruled. The testimony regarding the amount of repairs to the vessel, claimed to have been about $5,000, is not free from criticism, in that it is indefinite as to the amount and nature of the repairs; no bills or vouchers being produced. Mr. Boland, one of the owners of the Massasoit, testified that most of the repairs were made by the ship's men at Tonawanda under the supervision of her master; but neither her master nor any of her men gave testimony, and no reason is assigned for such failure to give testimony. However, two other credible witnesses for libelants, who were familiar with the vessel and her value, explicitly assert that in their opinion her value at the time of collision was from $10,000 to $12,000. The commissioner has taken the lowest amount of the value as testified to by libelants' witnesses, and although the value reported, considering her age and the indefiniteness as to the amount expended for repairs, may be regarded as fairly liberal, yet his finding, which is one of fact and depending upon conflicting testimony, is not obviously erroneous, and therefore should not be disturbed. The North Star, 151 Fed. 168, 80 C. C. A. 536, and cases cited.

Claimant contends (seventh exception) that the commissioner erred in excluding evidence offered in its behalf to show the purchase price of other vessels of like construction and carrying capacity at about the time of the disaster, as bearing upon the value of the Massasoit. The testimony offered was properly excluded. That the evidence of the purchase price of an article is incompetent to prove the value of another article, although such article is similar to the article previously bought or sold, is well settled in this state. Blanchard v. N. J. Steamboat Co., 59 N. Y. 292; Gouge v. Roberts, 53 N. Y. 619; Huntington v. Attrill, 118 N. Y. 365, 23 N. E. 544; Matter of Thompson, 127 N. Y. 463, 28 N. E. 389, 14 L. R. A. 52. In Blanchard v. Steamboat Co., supra, the Court of Appeals expressly held it to be incompetent to show the commercial value of one vessel by showing the value of another vessel with which it might be compared. In Matter of Thompson, supra, the reason for the rule is well stated by Parker, J., from whose opinion I quote:

"The test in legal proceedings is: What is the present market value of the property which is the subject of the controversy? It may be shown by the testimony of competent witnesses; and on cross-examination, for the purpose of testing their knowledge respecting the market value of land in that vicinity, they may be asked to name such sales of property, and the prices paid therefor, as have come to their attention. But a party may not establish the value of his land by showing what was paid for another parcel similarly situated, because it operates to give to the agreement of the grantor and grantee the effect of evidence by them that the consideration for the conveyance was the market value, without giving to the opposite party the benefit of cross-examination to show that one or both were mistaken."

This excerpt in my judgment has peculiar force and aptitude to vessel property, the value of which is largely dependent upon its precise physical conditions, tonnage, equipment, construction, speed, carrying capacity, etc. It is true the adjudications upon this question in different states are not harmonious, and my attention is called to but one case in admiralty (The Laura Lee [D. C.] 24 Fed. 483), and after careful search I have been unable to find another, where the learned

court seemed to lay stress upon testimony of sales of other vessels of a similar kind to ascertain the value of the lost vessel. But as I read the opinion of the court such testimony was simply corroborative of an expressed opinion as to the value of the vessel there in question, and not in fact to establish her value. In view of the general difficulty to form a correct estimate regarding values of vessel property when the testimony is discrepant, I am clearly of the opinion that to open the door wide for the reception of such testimony to establish value would afford no material assistance in its ascertainment. Indeed, testimony of this description could only remotely guide the court in its determination, and after making comparisons the value would still be problematical. As it is, reliance must be placed upon the opinion of experienced witnesses acquainted with the property as to its value, and to test the witnesses' qualifications it is perfectly proper on cross-examination to ascertain the sales and prices of other like property, with which he may be familiar or to which his attention has been directed.

Except as hereinbefore specified, the report of the commissioner is sustained.

BLISS v. ANACONDA COPPER MINING CO. et al.

(Circuit Court, D. Montana. October 21, 1907.)

No. 280.

EQUITY—REFERENCE TO MASTER—PROCEDURE.

Where a Circuit Court has referred an equity cause to a master to make and report findings of fact, either with or without consent, it is proper practice for the master to submit a draft of his report to counsel for the respective parties, for the purpose of inviting suggestions or requests for additional findings, or for modifications or greater certainty in those submitted; and it is the duty of counsel in such case to make and file with the master such objections or exceptions to the draft as they deem advisable and proper, and it is within the discretion of the court to refuse to consider any objections or exceptions to the completed report not presented to the master. It is also convenient practice to provide by stipulation or order that objections filed before the master shall stand as exceptions filed with the clerk.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 907.]

In Equity. On motion to require master to file report.

An order of reference was made in this case against the objection of the complainant. The substance of the order was that the master should take the testimony, and make findings of fact, and report the same to the court. The master made a draft of his findings, and gave to each party a copy thereof, and announced that, upon a day fixed, he would receive from the respective counsel any written objections, exceptions or proposed amendments to the draft served. Counsel for complainant objected to the action of the master, and demanded that he file his report, together with his findings, with the clerk of the circuit court, as provided in equity rule 83 of the rules of practice of the Supreme Court. But the master declined to follow this course. Thereafter the complainant moved the court for an order to require the master to file his findings of fact, together with his report of the testimony and proceedings. It is contended that in setting a time to receive exceptions to his report the master violated equity rule 83 of the Supreme Court, and that his

said action was also in violation of rule 52 of the rules of practice of the Circuit Court in and for the District of Montana. Rule 52 of the rules of this court relates to hearings in equity and references where consent for reference has been had. It is provided in the rule that the findings and conclusions of the master will be subject in all respects to review by the court upon exceptions to his report, which exceptions shall be taken before the master and stated in his report.

C. M. Sawyer and R. L. Clinton, for complainant.
A. J. Shores, C. F. Kelley, D. Gay Stivers, and Forbis & Evans, for defendants.

HUNT, District Judge (after stating the facts as above). The reference in this case having been without consent of both parties, rule 52 of the rules of the court is not directly applicable. That rule presupposes reference by consent. In such cases it is plain that exceptions to the report of the master must be taken before him and stated in his report. Therefore, as there is no rule of court that controls, we must arrive at a proper practice by reason and analogous cases. There can be no doubt that the information to be communicated by the findings of the master upon the evidence he has heard will be merely advisory to the court. The court may accept them, by adopting the same views the master has taken, or it may disregard them, or act upon them in part, or modify or reject them, or any of them, as in the judgment of the court the weight of the evidence may warrant. This is clearly the implied doctrine of the opinion of the Supreme Court in Kimberly v. Arms, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764. The findings will be the advice, however, of a trained and impartial mind, which has weighed the evidence fully and formulated deductions therefrom.

That the court had power to seek the aid of an examiner is well established, and, having pursued the practice of directing a reference, it should not attempt to circumscribe the procedure before the master by preventing him from having every aid of counsel before finally making up his report. There is a palpable distinction between a final report of a master upon matters submitted to him and a draft of a report upon such matters laid before respective counsel as the basis for a report. The report embodies the final, ultimate conclusions of the master, and when it has been signed by him and filed with the court the case is entirely removed from the control of the master. It may be sent back to him by the court under some special order, as, for instance, to supply a technical or clerical error, or that there may be a finding upon some material matter which has not been found upon at all; but until the essential formalities of a report are complied with, there is no report. The paper or draft is a mere preliminary expression by the master, subject to revision by amendment, or even change of judgment upon the effect of the evidence, or by modification of his conclusions, as he finally finds proper and right. He may invite counsel to give him the benefit of argument upon some point upon which there was none, or ask for further argument where his mind is not satisfied. In other words, where there is no suggestion of intentional abuse of authority, or of unreasonable delay or wrong on the part of the master, he has the right to announce proba-

ble findings, and to ask that counsel make any objections or suggestions to the same or any part thereof as they believe should be made. This practice enables the master to perfect his report, and, where there may have been a large amount of evidence, it would seem a most appropriate practice for the master to express his opinion in this informal way, in order to give counsel opportunity to aid him further in his efforts to perform his duty as completely as possible by covering all the material issues, finding accurately thereon. From the standpoint, too, of aiding the court, the master may exercise the right of correction and revision, or reconsideration. A court, in seeking the aid of a master, desires that the report may be as finished as would the court have its own findings, were the evidence heard by the judge himself.

Under the former English practice, the master made a draft of his report, notified counsel of his proposed findings, gave them an opportunity to point out errors, and the master considered and corrected them. In Story v. Livingston, 13 Pet. 357, 10 L. Ed. 200, in 1839, which was before the equity practice rules were promulgated, the Supreme Court recognized that strict chancery practice refused to permit exceptions to a master's report to be made which were not taken before the master, although the court did not restrict exceptions to the course indicated. Equity rule 83 requires the master, as soon as his report is ready, to return the same into the clerk's office, and then the parties "shall have one month from the time of filing the report to file exceptions thereto, and if no exceptions are within that period filed by either party the report shall stand confirmed on the next rule day after the month is expired." In the Seventh Circuit, Judge Gresham, in Hatch v. Railroad Company (C. C.) 9 Fed. 856, held that rule 83 modified the old English practice; and the same view was taken by the court in Fidelity Insurance & Safe Deposit Co. v. Shenandoah Iron Co. (C. C.) 42 Fed. 372. But in the later case of Celluloid Mfg. Co. v. Cellonite Mfg. Co. (C. C.) 40 Fed. 476, Judge Wallace held that while the reason of the old English practice does not fully obtain, yet a dissatisfied party should be required to state his objections before the master. And in the still later case of Gay Mfg. Co. v. Camp, 68 Fed. 67, 15 C. C. A. 226 (1895), the Court of Appeals of the Fourth Circuit held that equity rule 83 was not a modification of the English chancery practice, and that, where a party desires to contest the findings of fact made by a master, he must base his exceptions upon objections previously filed in the master's office. The court that heard the argument upon what was the correct practice was composed of Chief Justice Fuller and Judges Simonton and Goff. Judge Simonton, speaking for the court, characterized the filing of exceptions to a master's report dealing with facts to which his attention was never called as a "loose" one, which did not commend itself. He said:

"It frequently operates a surprise, and it shuts the door to any explanation. It gives room for the display of skill and strategy on the part of ingenious counsel. It may secure success at the expense of right. * * * To prevent misapprehension, it is best to state that we do not require the conclusions of the master on matters of law to be first excepted to before him. This is unnecessary. But we do require that matters of fact upon which exceptions

to his report are made be brought to his attention, in order that he might report them."

In Gray v. New York N. B. & L. Ass'n (C. C.) 125 Fed. 512, Judge Platt has recently decided that a party dissatisfied with a master's findings of fact should make his objections thereto to the master, and where that is not done the court will not consider an exception to a finding on the ground that facts were omitted which should have been found. Similar practice prevails in the Sixth Circuit, where Judge Severens regards the English chancery practice as still obtaining, and holds that a party desiring to contest the findings of fact made by a master must, as a basis for exceptions, file objections with the master and have the same passed upon by him. He is also reported to have refused to consider exceptions to a master's report which were not founded on written objections made to the draft of the report while it was still in the master's hands. Henderson's Chancery Practice, § 372. In Columbus S. & H. R. Co. Appeals, 109 Fed. 177, 48 C. C. A. 275, the Court of Appeals of the Sixth Circuit held that it was proper to object to a master's report before it left his hands.

In Henderson's Chancery Practice there is a very clear and exhaustive statement of the practice prevailing throughout the several judicial circuits, together with the decisions up to 1903. The author shows a diversity of practice, and argues that an amendment to equity rule 83 would be well, in order to settle the question whether objections before the master should be done away with entirely, thus allowing exceptions to be taken for the first time after the coming in of the report, or the master should be required to follow the English practice. The author himself commends the old chancery practice. The only decision that has been brought to my attention, or that I have been able to find by my own research, in our Ninth Circuit, is McNamara v. Home Land & Cattle Co. (C. C.) 105 Fed. 204, where Judge Knowles expressed the opinion that the English practice still prevailed, and refused to consider objections that were not presented to the master.

Referring to rule 52 of the rules of this court, which is taken literally from the rules of the Circuit Court for the Northern District of California, it appears that upon a consent reference exceptions to the report must be taken before the master, who is required to state the exceptions in his report, and "such exceptions" are for hearing before the court. There is, therefore, at least a partial adoption of the English practice, in that the dissatisfied party must make objections before the report is filed by the master, and in that the court will act upon the exceptions brought to the attention of the master. Whether the court will permit other exceptions after the report is filed is not altogether certain, but inferentially it will not. True, the cases cited above were where consent was given for reference; but the principle which recognizes a reference as a process to develop facts should control, and ought to be of the same general application, whether reference has been had by consent or not. After reading many of the cases, my judgment is that the master or examiner is authorized to submit a draft of his report to counsel for the respective parties, for the purpose

of inviting suggestions or requests for additional findings, or for modifications of or greater certainty in those submitted. Under this practice it becomes the duty of counsel to make to the draft submitted by the master such objections or exceptions as they find advisable and proper. The duty of counsel is to make their objections or exceptions as full and fair as they would make them before the court, and as if in the first instance they were before the court. If the master wishes brief argument, he may ask for it. Thereafter the master should consider the objections, suggestions, and exceptions, and act upon them as his judgment dictates, and then make up his report, which should be accompanied by the objections and exceptions interposed and his action thereon.

When the report is filed with the clerk, equity rule 83 obtains, and the dissatisfied party should proceed "to file exceptions" to the report. If the master has reformed his findings by allowing the exceptions made before him, there is, of course, no necessity for filing any exceptions to the report; but, if he has failed to do so, the dissatisfied party should within the time allowed by rule 83 file his exceptions with the clerk. It is a convenient practice for the parties to stipulate, or for the court to make an order, that the objections filed before the master shall be the exceptions filed with the clerk. This saves needless duplication of work. It being, therefore, within the power of the master to fix a time for making objections to his draft, and the duty of counsel to make their objections, if any they have, it logically follows that, unless a dissatisfied party does make his objections before the master, the court may, within its discretion, refuse to consider any objections as exceptions which have not been presented to the master. This practice finds approval in McMicken v. Perin, 18 How. 507, 15 L. Ed. 504, and in Sheffield, etc., Railway Co. v. Gordon, 151 U. S. 285, 14 Sup. Ct. 343, 38 L. Ed. 164, decisions rendered by the Supreme Court after equity rule 83 was adopted, and in the opinions by Justice Bradley, sitting as a circuit judge, in Cowdrey v. Railroad Co. et al., Fed. Cas. No. 3,293, decided in 1870, and Gaines v. New Orleans, Fed. Cas. No. 5,177, decided in 1871.

It may be that, in a case where the record is very large and the issues numerous, in filing exceptions to a report, counsel will desire to amplify those filed to the draft submitted by the master, or to supplement them by exceptions not presented before the master. While this is a practice not to be encouraged, yet, within reasonable limitations, the court may permit it. By that I mean that, where counsel have fairly and fully given the master the benefit of their positions by so inviting his attention to any errors or omissions on his part as to have given him opportunity to correct or change his report, yet additional objections have occurred to counsel, which were not laid before the master, and which they could not have fairly presented to the master in their objections before him, the court, in its discretion, may not refuse to consider such amplified or additional exceptions. As indicated, though, better practice under the authorities is against such consideration, except under special circumstances.

I trust that counsel may be aided by these views, which lead to the denial of the motion of the complainant.

In re HEDLEY.

(District Court, W. D. New York. September 21, 1907.)

No. 2,165.

1. BANKRUPTCY—RIGHT TO DISCHARGE—FRAUDULENT TRANSFER OF PROPERTY.
Where a bankrupt, who, although insolvent, was transacting business for his wife under a written power of attorney, several years before his bankruptcy assigned certain certificates of stock standing in his name to her, and placed the same in a box in his possession in which he kept her papers, the facts that such certificates were not actually delivered to her and that she did not know of the assignment are not sufficient to show that the transfer was fraudulent as against his creditors and to defeat his right to a discharge.

2. SAME—CONCEALMENT OF ASSETS.
Evidence considered, and *held* insufficient to sustain objections to a bankrupt's discharge on the ground of concealment of assets from his trustee.

In Bankruptcy. On motion to confirm report of special master recommending the bankrupt's discharge.

Cummings & Cummings, for bankrupt.
Edward L. Jellinek, for trustee and objecting creditor.

HAZEL, District Judge. On a prior reference to the special master the specifications of the objecting creditor, who is also the trustee herein, alleged that the bankrupt omitted to keep books of account from which his true financial condition could be ascertained, and that with fraudulent intent and in contemplation of bankruptcy he destroyed his books from which his financial status could have been ascertained. The special master, after consideration of the evidence, recommended a discharge by this court, and at the hearing for confirmation of the report the objecting creditor was given leave to file amended specifications, setting forth that the bankrupt concealed certain property from his trustee and that he had made a false oath in omitting to schedule such assets. A report in favor of a discharge has again been filed, and the same is now before me for confirmation.

The trustee, again opposing the discharge, practically abandons the grounds mentioned in the earlier specification and lays stress upon the testimony applicable to the amended specifications. The claim of the trustee arose from a deficiency judgment recovered November 1, 1902, which was assigned to him. The bankrupt was adjudicated on his voluntary petition on June 21, 1905. I do not intend to discuss the evidence in detail. It will suffice to refer to it in a general way only. It tends to show that in all of the principal transactions herein involved, and since November 29, 1898, the bankrupt under a written power of attorney acted as the agent of his wife. Such power of attorney was not recorded; its authenticity resting solely upon the testimony given by the bankrupt and his wife. Prior to the enactment of the present bankrupt act, the bankrupt borrowed from his wife about $7,000 or $8,000, and subsequently an interest amounting to about $12,000 in a certain mortgage covering real estate located at Cleveland, Ohio, was assigned to her. The testimony is silent as to whether such assign-

ment was to secure the amount borrowed, or whether it was in fact an investment for the benefit of the lender, made by the bankrupt, who was engaged in business as a real estate broker. The oral testimony as to the accounts, loans, and ownership of stock is not free from the criticism of indefiniteness. The bankrupt did not at any time prior to his bankruptcy claim in any of the transactions in controversy to be acting as agent for his wife, and at the time of filing the petition in bankruptcy he held in his own name certain certificates of shares of stock in several land companies, and at the same time acted as an officer or director in some of such companies. Such shares of stock are claimed by him to have been assigned to his wife in the years 1897 and 1901, respectively, without actual delivery thereof being made or the assignment recorded on the books of the company. The shares of stock in the Military Road & Kenmore Land Company and the Enterprise Land Company, which were assigned to his wife in writing indorsed on the certificates thereof, were kept in a box in the office where other papers belonging to his wife were kept, though she did not have actual knowledge of such assignments to her.

It is claimed by the trustee that the transfer was colorable and in fraud of creditors; but I do not think such an inference is warranted from the mere assignment and failure to deliver, as the presumptions of law are in favor of the innocence of an alleged wrongdoer. To effectuate a legal transfer of the shares of stock mentioned it was not necessary to make manual delivery to the assignee. While ordinarily, to complete an assignment of personal property, there should be a delivery and acceptance thereof by the assignee, yet as the assignment in question was placed with papers and documents belonging to the wife, though remaining in the possession of her husband, a delivery and acceptance thereof will be presumed. Indeed, the rule is that, where the assignor is the agent of the assignee, he may in behalf of the assignee accept the assignment from himself. 4 Cyc. 29, note.

The specific questions for decision arise from the asserted fraudulent concealment by the bankrupt of the property consisting of the shares of stock already mentioned and certain other shares or capital stock in the Delevan Terrace Land Company and Rochester Land Company, a certain claimed equity in the so-called Colby mortgage, and certain bonds of the Western New York Land Company. That there was such concealment would be beyond serious question, if the power of attorney from the wife to the husband, together with the above-mentioned assignments, were colorable and for the purpose of keeping such property from the creditors of the bankrupt. Under the well-settled rule the objecting creditor, to succeed in his contention, must establish by clear and convincing proof that the bankrupt, since he was adjudicated, has with fraudulent intent concealed from his trustee property belonging to his estate. It is important to consider whether the power of attorney which authorized the bankrupt in behalf of his wife to sign and execute any and all instruments, transfer her property, and in fact conduct all business in her name, is entitled to any weight as corroboratory of the claim of the bankrupt. Was it made in good faith, or was it brought into the record to deceive the court, and to conceal the true ownership of the property in controversy? The mas-

ter, who has given the testimony careful consideration, reached the conclusion that the document on its face appeared to have been executed at about the time it bears date. The worn appearance would seem to indicate that it was prepared and signed some years ago, and probably it has some weight entitling it to consideration with the testimony of the bankrupt and his wife on this point.

True, there are suspicious circumstances, and the indefiniteness of the testimony justified the hesitation evinced by the master to report in favor of the bankrupt's discharge; but, after careful consideration, I also conclude that the trustee has not affirmatively shown his asserted claims by convincing proof. The bankrupt, while insolvent, at different times obtained money from his wife, amounting in the aggregate, as already stated, to $7,000 or $8,000, which are claimed to have been used in real estate transactions for her benefit. There is nothing unusual in a man transacting business in the name of his wife, though concededly it was somewhat out of the ordinary to have an insolvent husband act as agent for his wife without disclosing that fact. It should be remembered that the bankrupt act was passed to enable those who were unfortunate in business "to emerge from a questionable and undignified seclusion and face the vicissitudes of the business world openly and honestly," as Judge Coxe remarked in Re Fitchard (D. C.) 103 Fed. 742, where the relationship of a husband as agent for his wife was discussed. As suggested by the master, the bankrupt, Hedley, though apparently insolvent and unable to cope with his more successful rivals in business, deemed it desirable by fatuous pretense to conceal his insolvency and his true position as long as possible. Such conduct, however, on his part, was in my opinion not sufficient ground for withholding a discharge.

The specifications are overruled, the report of the master is confirmed, and the discharge is granted.

BENJAMIN SCHWARZ & SONS v. KENNEDY.

(Circuit Court, D. Oregon. October 7, 1907.)

No. 3,095.

1. EQUITY—DEFAULT—GROUNDS FOR SETTING ASIDE.

A court of equity may properly set aside a default before decree has been entered to permit a defendant to answer, where it is shown that it resulted from an oversight of counsel in failing to file a pleading.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 977.]

2. JUDGMENT—EQUITABLE RELIEF—SET-OFF.

Plaintiffs recovered a judgment in trover against defendant for the value of certain hops which defendant's intestate had bought from the raisers and paid for; it being shown that plaintiffs had previously bought them and became vested with title thereto. Plaintiffs, however, had not paid for them, and after the judgment defendant obtained an assignment from the sellers of their claim against plaintiffs for the price. *Held*, that such facts, set up in an answer, constituted matter of defense to a bill in equity by plaintiffs to enjoin defendant from attempting to set off such claim against the judgment in the probate court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 1669–1688.]

In Equity. On motion to set aside default and for leave to file answer.

See 142 Fed. 1027.

Carson & Cannon, for complainants.
Martin L. Pipes, for defendant.

WOLVERTON, District Judge. On June 19, 1906, the complainants recovered a judgment in this court for the sum of $2,602.30 against the defendant, in an action in trover, for the conversion of 86 bales of hops, instituted against John Kennedy in his lifetime. The complainants claimed the hops by reason of an alleged purchase from two Chinamen, Lee Gon and Ah Chop; the purchase price, however, not having been paid. Kennedy claimed to have purchased the hops from the same Chinamen, but at a later date, for a consideration, which he paid. He acquired possession, and later disposed of the hops to other persons. It having been determined that the Chinamen were without title to the hops when they pretended to sell to Kennedy, and Kennedy having paid the Chinamen therefor, he had a valid demand against them for the return of such purchase money. This demand became an asset of Kennedy's estate, and, complainants not having paid the Chinamen for the hops, although they had judgment against the defendant for their value, the Chinamen, in consideration of the demand due from them to the estate, assigned their claim against the complainants to the administratrix. This negotiation and arrangement was had subsequent to the acquirement of complainants' judgment, but prior to the institution of the present suit; and the defendant, as administratrix, now claims to be the owner of such claim and demand against the complainants. The complainants bring the present suit to enjoin the defendant from in any manner setting off, or endeavoring to set off, said claim or demand against the complainants in the county court for Marion county, state of Oregon, having jurisdiction for the conduct and settlement of the estate of John Kennedy, deceased, or in any court of the state, or from settling the estate of John Kennedy, deceased, until said judgment is fully paid.

The defendant entered no appearance of record in the cause within the time required by rule 18 of the equity practice, and an order pro confesso was taken against her. Prior to the time, however, when complainants were entitled to a decree for the relief prayed for, the defendant came into court, and now asks to be relieved of her default, and for leave to file an answer, which she tenders. The answer takes issue with the bill in some matters, and sets up the transactions hereinbefore set out, averring also that John Kennedy purchased the hops in question in good faith, but was misled as to the title by the misrepresentations of the Chinamen; and shows, further, that the Chinamen are insolvent, and that the complainants are nonresidents of the state and have no property therein upon which attachment or execution may be levied.

Two questions are presented for consideration: First, whether the defendant's oversight or negligence in not appearing before defau:

is of such a character as the court will not relieve against; and, second, whether the answer states a defense to the bill.

As to the first, it appears that one of counsel for defendant had supposed that he had filed a demurrer to the bill, but, when he came to call it up, he was apprised of the fact that he had not done so. I am impressed that counsel was acting in entire good faith, but found he was mistaken, and for this reason the default should be opened.

As to the second, I am of the opinion that the answer contains pertinent equities, which will in all probability entitle the defendant to relief in the state courts. I do not state this as a matter unalterably controlling, but for the present purposes I am impressed that way. "As equity," says Mr. Black, in 23 Cyc. 1019, "may order one judgment to be set off against another, so it has power to restrain the execution of a judgment when it is made to appear that the judgment defendant has a debt against plaintiff exceeding the judgment in amount, and which he cannot otherwise collect."

The power of a court of equity to set off a simple contract debt against a judgment, and in what cases it will be exercised, was not discussed at the hearing, so that I am not fully advised in the premises. But considering the apparent equities attending the answer, I am disposed to allow it to be filed, and such will be the order of the court, leaving the ultimate legal sufficiency to be further tested as counsel may bring it on for consideration.

One other objection was made to allowing the answer to be filed, which is that it was not sworn to. The defendant, however, has manifested her willingness to verify the same, and was only hindered therefrom by her temporary absence at the time. She should verify it, and, when so verified, she will have leave to file it.

Another question of grave importance was discussed, but it is unnecessary that I should determine the same now, as the foregoing disposes of the immediate controversy.

In re LANDIS.

(District Court, E. D. Pennsylvania. September 26, 1907.)

No. 2,338.

BANKRUPTCY—TIME FOR PROVING DEBTS—CLAIM LIQUIDATED BY LITIGATION.

Where a claimant of property which was in the possession of a bankrupt at the time of his bankruptcy was defeated after litigation in the court of bankruptcy on the ground that the transaction by which the property was delivered to the bankrupt constituted a sale which passed the title, he may prove his claim for the purchase price against the estate, although more than a year has elapsed since the adjudication as one liquidated by litigation within the meaning of Bankr. Act July 1, 1898, c. 541, § 57n, 30 Stat. 561 [U. S. Comp. St. 1901, p. 3444].

In Bankruptcy. On certificate from referee concerning claim of Charles B. Cleaver.

Reiser and Schaffer, for claimant.

Joseph R. Dickinson, for trustee.

J. B. McPHERSON, District Judge. After Cleaver had been determined by this court on March 5, 1907, not to be the owner of the horses in dispute (see opinion reported in 151 Fed. 896), he surrendered them to the trustee, and on April 29th filed a proof of claim as a creditor for $380, this being the amount agreed upon with the bankrupt as the purchase price of the animals. The referee finally rejected the claim in June, giving the following reasons therefor:

"Landis was adjudged bankrupt about September 21, 1905. Cleaver filed his claim for $380 on April 29, 1907. The referee distributed prior and final dividends to Cleaver. The trustee and creditors excepted to this action. The claimant excuses his lateness in filing his proof by showing that he was engaged in bona fide litigation of the kind intended by section 57n of the bankruptcy act, and that he was therefore not compelled, and could not be expected, to file his proof of claim within a year of the adjudication. The claimant relies on In re Fagan (D. C.) 140 Fed. 758, 15 Am. Bankr. Rep. 520 to support his excuse and his right to file his claim on April 29.

"The court in the Fagan Case admits that there are no authorities to support the views expressed. I have found so many cases decided both before and since the Fagan Case, holding to the strict letter of section 57n, that I am bound to conclude that the Fagan Case has not been followed, and that it is not competent authority. The cases of In re Noel, 16 Am. Bankr. Rep. 457, 144 Fed. 439 (District Court of New Hampshire), and In re J. M. Mertens & Co., 16 Am. Bankr. Rep. 825[1] (United States Circuit Court of Appeals, Second Circuit, a New York case), came after the Fagan Case, and are strong authorities. The latter is especially strong, in that it proves to my mind that the claimant here could have filed a proof of claim while his litigation was pending. I believe that, if I dismissed the exceptions to the Cleaver claim, I would be reversed on review. I will therefore sustain the exceptions, and hold that because Cleaver did not file his proof of claim within a year of the adjudication it cannot be allowed to share in dividends but must be expunged."

It will be seen, I think, that these facts are in essentials similar to the facts that appeared in Re Baird, which was decided a few months ago in this district. The reports of the two decisions of that case will be found in 18 Am. Bankr. Rep. 228, and in 154 Fed. 215. For the reasons given in the second decision, and relying again upon the authority of Powell v. Leavitt, 150 Fed. 89, 80 C. C. A. 43, the ruling of the learned referee is now reversed, and the case is recommitted with instructions to allow the claim.

In re OREGON TRUST & SAVINGS BANK.

(District Court, D. Oregon. October 15, 1907.)

No. 1,178.

BANKRUPTCY—INVOLUNTARY PROCEEDINGS—BANKING CORPORATION.

The provision of Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423], which excludes from debtors subject to proceedings in involuntary bankruptcy "banks incorporated under state or territorial laws," applies to a corporation organized for the purpose of carrying on a banking business under the general incorporation statutes of a state which had no special laws relating to banking corporations.

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

In Bankruptcy. On demurrer to petition in involuntary bankruptcy.

[1] 147 Fed. 177, 77 C. C. A. 473.

W. R. McGarry and A. E. Clark, for petitioning creditors.
Dolph, Mallory, Simon & Gearin, for bank.

WOLVERTON, District Judge. A demurrer is interposed to the petition in bankruptcy, assigning as a ground therefor that it appears on the face of the petition that the corporation named in the petition is not subject to be adjudged a bankrupt under the provisions of the bankruptcy act approved July 1, 1898 (30 Stat. 544, c. 541 [U. S. Comp. St. 1901, p. 3418]). The petition alleges that the Oregon Trust & Savings Bank is now, and for several years last past was, a corporation organized, created, and existing under and by virtue of the laws of the state of Oregon; that said Oregon Trust & Savings Bank was and is a corporation, and during all the time herein mentioned conducted and operated a bank of discount and deposit, and the occupation of such corporation during all of said time was general banking. The question was presented at the argument, and arises under the demurrer, whether the corporation is such a one as may be forced into involuntary bankruptcy.

Section 4, subd. "b," provides, among other things, that:

"Private bankers, but not national banks or banks incorporated under state or territorial laws, may be adjudged involuntary bankrupts."

Nothing seems to be plainer than that it was the intention of Congress to exempt all banks incorporated under state or territorial laws from the operation of the act. Under the statutes of the state of Oregon provisions are made for forming corporations, and by virtue of such laws, therefore, corporations might be and are frequently formed for carrying on a banking business. The organization of banks, therefore, comes within the purview of the statutes, and it does not seem to me that it makes any difference as to the effect of the law that no particular laws were made until recently for the regulation of banks organized under the laws of the state. The banks are, nevertheless, organized for the purpose of carrying on a banking business, and hence such corporations come within the intendment of that clause of the bankruptcy act which has been heretofore alluded to, and therefore are not subject to be adjudged involuntary bankrupts.

The demurrer will be sustained.

NEW ENGLAND TELEPHONE & TELEGRAPH CO. v. BUTLER.

(Circuit Court of Appeals, First Circuit. October 18, 1907.)

No. 685.

1. WITNESSES—COMPETENCY—KNOWLEDGE OR MEANS OF KNOWLEDGE OF FACTS.
A clerk in the office of a district foreman of a telephone company is not, from the fact of his position alone, qualified to testify as to the duties of subforemen, who are under the orders of his chief, on an issue as to whether the chief duty of such subforemen was superintendence, so as to render the company liable to other employés for their negligence under the Massachusetts employers' liability act (Rev. Laws, c. 106, §§ 71–79).

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 80–87.]

2. MASTER AND SERVANT—LIABILITY FOR NEGLIGENCE OF SUPERINTENDENT—MASSACHUSETTS STATUTE.
The fact that a foreman having charge of a gang of men works with his hands, the same as the rest of the men, for the greater part of the time, or even all of the time, does not necessarily exclude him from being one "whose * * * principal duty is that of superintendence," within the meaning of the Massachusetts employers' liability act (Rev. Laws, c. 106, §§ 71–79), for whose negligence, causing an injury to another employé, the master is liable.

3. SAME—ACTION FOR INJURY TO SERVANT—QUESTIONS FOR JURY.
Plaintiff was a telephone lineman engaged, with others, under a subforeman, in stringing new wires. He was upon the cross-arm of one pole holding back two wires, while they were being run over the cross-arm of the next pole. To the end of the wires was tied a rope, and beyond that a piece of insulated wire. The foreman and others were beyond the next pole pulling the wires over the cross-arm, when he called to plaintiff to "let them come." Plaintiff did so, and the wires sagged and came in contact with highly charged electric light wires, which ran transversely across the line at a lower level, and he received a shock which caused his injury. There was evidence that the method pursued was not usual nor proper under the circumstances, the plaintiff did not know the position of the light wires, and, because of intervening trees, could not see it distinctly, nor tell whether the insulated wire, the rope, or the bare wires were over the light wires when he was ordered to slack. *Held*, that whether he had such knowledge of the situation that he assumed the risk, or was justified in relying on the care of the foreman and obeying the order, or was negligent in doing so, were questions for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1068–1132.

Assumption of risk incident to employment, see note to Chesapeake & O. R. Co. v. Hennessey, 48 C. C. A. 314.]

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

Henry W. Dunn (Pitt F. Drew and Powers & Hall, on the brief), for plaintiff in error.

William A. Pew, Jr., for defendant in error.

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

DODGE, District Judge. The three counts of the declaration upon which the case went to the jury were all based on the Massachusetts employers' liability act (Rev. Laws, c. 106, §§ 71–79). A fourth count

charging liability at common law was stricken out by amendment. Each of the counts under the statute alleged injuries to the defendant in error (hereinafter called the plaintiff) by reason of the negligence of a superintendent in the employ of the plaintiff in error (hereinafter called the defendant). The first count did not specify wherein the alleged negligence of the superintendent consisted, the second count alleged negligence in failing to adopt proper, suitable, and safe methods for doing the work on which the plaintiff was employed, and the third alleged negligence in giving an order to the plaintiff to pay out a certain wire under circumstances rendering it dangerous to him so to do. The answer denied each and every allegation in these counts.

The plaintiff was one of a gang of men, all employés of the defendant, who were engaged in stringing new telephone wires upon certain poles belonging to the defendant, on Rantoul street, in Beverly. Five men in all composed the gang, including McKenzie, a subforeman, and in charge. McKenzie was the alleged superintendent whose negligence was claimed to have caused the plaintiff's injury.

The jury found for the plaintiff, and the case is here on exceptions to rulings made and instructions refused or given by the court at the trial.

The first assignment of error is that a question put on behalf of the defendant to one of its witnesses was excluded.

The witness was one Gwinn, employed by the defendant as clerk in the office of one of its district foremen. The excluded question was: "What are the duties of the subforemen, one of whom, I understand, McKenzie was?" There was no dispute that McKenzie was a subforeman. It appeared that he was one of four subforemen, all under the authority of the district foreman in whose office the witness was employed. The question at issue as to his duties being whether or not his principal duty was superintendence, if all the subforemen performed, or were expected to perform, or had assigned to them, the same duties, evidence tending to show what those duties were might have been admissible. But it did not appear that Gwinn knew what those duties included, and what they did not include. It was not to be presumed, prima facie, that as a clerk in the district foreman's office he had such knowledge. It appeared that he assumed the district foreman's duties when the latter was absent, as often happened, and in that way came in contact with the four subforemen; that among the duties so assumed was the giving of directions to the subforemen when sent to do work of various kinds on the lines within the district—where to go, what pieces of work to do, and what men to take with them. It appeared that he kept the district foreman's books, made a record of the work done, and paid the men. But in all this there was nothing which would naturally require or enable him to know what the duties were which the defendant had assigned to or expected from its subforemen. As to the duties in fact performed by them when at work, it is not contended that he knew, or had any opportunity to know, from actual observation, what these were. He testified that he was present very little when work was being done. The extent to which he claimed to have knowledge regarding the subforemen's duties was stated by him as follows:

"Q. And did you know the course of the business? A. In what way?"
"Q. In reference to what they did and what their duties were. A. What kind of work they would be doing?"
"Q. Yes. A. Yes.

Even if the question were otherwise admissible, we do not think the court was required, in view of what appeared, to treat this statement as qualifying the witness to testify upon the point inquired about and allow the question excluded to be answered.

The next assignment of error is that the court ought to have directed a verdict for the defendant on all the evidence.

We consider first the claim that there was no evidence sufficient to warrant a finding that McKenzie's principal duty was that of superintendence. That superintendence was his sole duty was not contended.

There was no dispute that McKenzie was in charge, as subforeman, of the gang in which the plaintiff was working when injured, and was thus intrusted with and exercising superintendence. McKenzie was himself a witness for the defendant, and testified that during the entire period of his employment as subforeman he worked himself nearly all his time, that he was doing actual manual labor part of his time; how much of the time during the day he could not state. On cross-examination he said that when in charge of a gang engaged on a particular job he had full charge, the choice of methods rested with him, he gave orders to carry out his own ideas, watched the men to see that his ideas were carried out, told them what material to use, and saw that they used it, kept a supervision over them, whatever else he was doing, had in mind, whatever else he was doing, to see that they were obeying his orders, and was supervising all the time. Before he so testified the plaintiff had introduced evidence which, as the defendant concedes, tended to prove that McKenzie "usually spent the greater part of his time directing the men and only a small part of his time in working with his hands." The defendant contends that the different jobs done manifestly varied so much in character that while McKenzie or any other subforeman might be superintending only on one job, on another he might be doing little or nothing but manual labor; and therefore that evidence as to what he usually did does not necessarily show in what kind of work he was spending most of his time, or what his principal duty was on the day of the accident. It contends further that the only evidence relating to this particular day or job was that McKenzie was working with his hands most of the time. That McKenzie did in fact work with his hands on this job is unquestioned. He was pulling on a wire when the plaintiff was hurt. Two of the men in the gang, witnesses for the plaintiff, said, on cross-examination, one that McKenzie worked pulling ropes and doing such things and helping out most of the time that day; the other that McKenzie might on that day have worked with his hands the same as the rest of the men the greater part of the time, and he thought he did so. No other witness was questioned upon this particular point. But if McKenzie, as might well have been found from the evidence, had been given authority of superintendence, and was not a mere laborer in charge of a gang, the fact alone that he did manual work also, even for the greater part of his time, would not necessarily require the con-

clusion that his principal business was not that of superintendence. Working at all times with his hands would not necessarily prevent the exercise of superintendence in such manner that superintendence would be his principal duty. Canney v. Walkeine, 113 Fed. 66, 51 C. C. A. 53, 58 L. R. A. 33. The jury had before them the nature of the work in hand, as well as the evidence above summarized, and were entitled to judge of the extent to which such work involved or required superintendence. We think that the learned judge who presided at the trial was right in declining to hold that there was no sufficient evidence upon which the jury could find McKenzie's principal duty to have been superintendence.

We next consider the claim that the evidence did not warrant a finding that the plaintiff was injured by reason of McKenzie's negligence.

The manner in which the injury was received was not much in dispute. The evidence regarding it may be stated as follows:

Between the two poles belonging to the defendant, from one to the other of which the new telephone wires were being strung (referred to in the evidence as pole No. 3 and pole No. 4), six electric light wires, not belonging to the defendant and carried on a different set of poles, ran transversely to the direction in which, and somewhat below the level at which, the new wires were to be strung. These wires, or some of them, were charged with a dangerous current. They were coated with a weatherproof compound, but were not true insulated wires. The coating would not, in the majority of cases, prevent a current flowing from them to a bare telephone wire in contact with them, if the telephone wire were grounded somewhere. When injured, the plaintiff was up on pole 3, at the lower cross-arm, holding back the new telephone wires, two in number, which were being strung together. One end of them had been passed over the cross-arm where he was toward pole 4. Both were uninsulated or "bare" wires. To that end of them which had been passed over the cross-arm there had just been attached one end of a piece of rope, and to the other end of the rope insulated wire, which had been passed over the electric wires and over the cross-arm on pole 4. McKenzie, beyond pole 4, was pulling on this insulated wire, thereby drawing it, the rope attached to it, and thereby the new "bare" wires fastened to the rope, in a direction from pole 3 across and above the electric light wires, toward pole 4. At some distance from pole 3, in the opposite direction from it, were two other men belonging to the gang, standing on the sidewalk and paying out the new wires; each holding a coil from which one wire ran. Between them and pole 3 was still another telephone pole, referred to as No. 2, about as far from pole 3 as pole 4, but in the opposite direction. The new wires ran from the coils held by the two men along the ground for some distance, then over a cross-arm on pole 2; thence to pole 3 on which the plaintiff was holding them back; thence, as above described, toward pole 4. The electric light wires were nearer to pole 4 than to pole 3. There was evidence that the poles were 130 feet apart, and the electric light wires 28 feet from pole 4 at their nearest point. As to the exact distance of the electric light wires below the level of the cross-arm on pole 4, to which the new wires were being strung, there was some conflict. The plaintiff's evidence made the distance less

than the defendant's evidence. But, whatever it was, danger to the plaintiff was involved, under the circumstances, in contact between the new "bare" wires and the electric light wires below them. If, when the ends of the new wires had been pulled far enough toward pole 4 to be over the electric light wires, they and the rope or insulated wire whereby they were being drawn across should be permitted to sag between poles 3 and 4 enough to lower them to the level of the electric light wires, such contact would occur. There was evidence that this was what happened, that such contact did occur, and that the plaintiff was injured because of it. McKenzie, according to the evidence, while pulling, as above described, upon the insulated wire, called out from beyond pole 4, where he was: "Let them come." The plaintiff eased up on the wires he was holding, still retaining his hold, one or both the new wires touched the electric light wires, fire was seen at the point of contact, the new wires became charged with electricity, which also manifested itself in the coils held by the two men on the sidewalk, one coil becoming red hot, and the plaintiff fell from his position against other telephone wires already fixed to pole 3. According to his testimony, he remembered nothing after he eased up on the wires in obedience to McKenzie's order, until he was being taken down from the pole in his injured condition.

There was evidence from an expert called by the plaintiff that the above method of stringing the wires was not usual and not proper in view of the circumstances. To use covered or insulated wire, instead of bare wire, would have been wisest in his opinion. This would have prevented danger, and it would be proper to run one wire at a time; the foreman standing in the middle of the street and instructing the men on the poles so that they could pull the wire along, keeping it taut all the time. This witness, it is true, said on cross-examination that, with the method used, if the man holding the wires back did the work as he would expect the ordinary intelligent lineman to do it, he thought the probabilities were that he would get the new wire across; but this, it is obvious, was not necessarily an admission that the method adopted was usual, safe, or proper. Covered wire was at hand at the time, and it appeared, without objection, that the wire finally strung between poles 3 and 4 over the electric light wires—the work being completed by McKenzie and the remaining men after the plaintiff's injury—was covered and not bare wire, though McKenzie's evidence tended to ascribe this use of covered wire to purposes other than that of securing the safety of the men engaged.

There was also evidence that McKenzie himself ordered the plaintiff up pole 3 with the new wires and the rope tied to them, himself tied the other end of the rope, after the plaintiff had passed the wires over the cross-arm on pole 3, to the insulated wire, and himself took part in passing the insulated wire over the electric light wires and the cross-arm on pole 4, before he went beyond pole 4, and pulled upon the insulated wire, as above stated.

It appeared, further, that there were, besides the electric light wires, two trolley wires, which also crossed the line of the telephone wires between poles 3 and 4. These ran at a level considerably below that of the electric light wires. They were bare wires and known to be

dangerous. McKenzie told the plaintiff when he sent him up pole 3 to hold the telephone wires back off the trolley wires; but, according to the plaintiff, no warning as to the electric light wires was ever given him, he did not know they were there, and he was never told, and did not know, that the new wires were to be carried over electric light wires at all. The defendant's evidence was, on the contrary, that McKenzie told the plaintiff, when he ordered him up pole 3, with the new wires, to hold them off the electric light wires.

There was evidence that, after the plaintiff reached the position on pole 3 in which he was when injured, the branches of a tree so obstructed his view as to prevent his seeing the electric light wires from there clearly enough to tell on which side of pole 4 they went, or whether the new wires were going above or below them; and that the building against which they had to be seen from where he was had also the effect of preventing him from seeing them with sufficient distinctness for that purpose. Upon this point there was contradictory evidence from the defendant. The trolley wires he could see, and he was looking out for them.

Whether McKenzie was negligent or not as regarded the plaintiff was clearly a question for the jury on the evidence, unless it be true, as the defendant contends, that:

"Whatever conclusion is reached as to the propriety of the method employed, and on whatever grounds the allegations of negligence in the declaration are rested, the risk was obvious to the plaintiff, was one incidental to the business in which he was engaged, and was therefore one which he assumed."

The defendant further relied in support of this contention upon evidence in substance as below.

The plaintiff had had previous experience in working on wires. This had been gained during the 14 months prior to his injury, the time during which he had worked for the defendant. There was some question as to the nature and extent of his experience in such work within that time. He admitted that he knew, generally speaking, the danger involved in letting bare telephone wires touch uninsulated electric light wires; knew also that without going up and examining them he could not tell whether electric light wires were insulated or not; knew that electric light wires were common in city streets; and knew that there were such wires not only in Beverly, but on some part at least of Elliot street, the street in which the wires ran which caused his injury. He was injured soon after dinner on September 30, 1905. In broad daylight he had, of course, the same opportunity of seeing the electric light wires in question, before he went up pole 3, which was open to any one else in the vicinity. Printed "Instructions for the Avoidance of Accidents," warning its employés to inspect for themselves at all times, directing them not to place reliance upon inspections by foremen or fellow workmen, and cautioning them against the danger from all high-tension wires, were displayed, according to the defendant's evidence, in its stock room at Salem. These the plaintiff denied having seen, but he admitted having visited the room referred to "quite a few times." During his experience with such work he had once been warned by another subforeman regarding danger from an electric light wire, and he had once heard the same subforeman give

a similar caution to another man. With these two exceptions he had never heard the subforeman give such warnings. There was no other evidence that such warnings were usual or customary.

The general risk of injury from electric light wires was doubtless a risk incidental to the plaintiff's employment, and a risk which he had assumed. We do not think, however, that the risk to the plaintiff from these wires was, under the particular circumstances shown, a risk which must necessarily have been obvious to him at the time of his injury.

If it could be said that he must necessarily have known that it would depend on him alone whether the bare wires he held should touch electric light wires or not, the risk involved in letting them do so would have been obvious, and he would have taken the chance at his peril of finding the electric light wires dangerously charged. But that he must have had such knowledge at the time he was ordered to let the new wires come was not the only reasonable conclusion which might have been drawn from the evidence, notwithstanding what appeared as to his experience, or as to his opportunities to know that there were electric light wires somewhere between him and pole 4. It might still have been found not obvious to him, from his position on the pole, that the new wires were to go over the electric light wires, or were to go so near them, if over them, as to involve danger of contact with them. He was not being permitted to do the work in his own way, and had nothing to do with the determination of these questions. They were being settled by McKenzie alone. Still less was it necessarily obvious to the plaintiff how far toward the dangerous wires the new wires had been drawn at the moment of McKenzie's order. So long as slackening them would result only in touching the dangerous wires with the insulated wire on which McKenzie was pulling, or with the rope which came next, letting them come involved no danger. It was not necessarily obvious to the plaintiff that the time had come when, if he slackened them, the bare wires would or might touch the electric light wires. Nor was the court bound to rule that the probability of danger was obviously such as to make it the plaintiff's duty to investigate, at his peril, before obeying McKenzie's order to let the wires come. If the danger was not obvious to him, he was entitled to rely on McKenzie's personal supervision as an assurance that the way in which the work was being done was reasonably safe, and could not be said to have assumed any risk which due care in superintendence might have avoided. Rockport Granite Co. v. Bjornholm, 115 Fed. 947, 53 C. C. A. 429; Mahoney v. Bay State Pink Granite Co., 184 Mass. 287, 68 N. E. 202; Meagher v. Crawford Laundry Machinery Co., 187 Mass. 586, 73 N. E. 853.

The jury might have found that the plaintiff while on pole 3 did not have a fair opportunity to discover for himself what the consequences of compliance with McKenzie's order might be, or to what extent it could be safely complied with. They might have found that McKenzie, in charge of the whole operation and on the ground below, was or could have been in a position to know and judge accurately regarding these matters. If the danger might have been fully obvious to McKenzie, but not obvious to the plaintiff, we think it was rightly

left to the jury, under the circumstances shown, in view of the available means of avoiding danger which McKenzie might have used and the opinion of the plaintiff's expert, to say whether a reasonably prudent superintendent would have followed the method adopted by McKenzie, instead of a method safer in some or all the respects suggested. Or, if the method adopted was found to be in other respects proper, it was still for the jury to say whether reasonable prudence in superintendence did not require a caution to the plaintiff at the critical time not to let the wires come too far, instead of ordering him to "let them come," without any caution whatever. Due care in superintendence might have required such a caution, under the particular circumstances, even if it was not the practice, generally speaking, to warn men at work in running wires regarding the presence of other wires which might be dangerous.

It is also evident from what has been stated that contributory negligence on the plaintiff's part in permitting the new wires to touch the electric light wires did not necessarily appear.

The only remaining error assigned is the refusal of an instruction requested on the question of the plaintiff's due care in another respect. The instruction asked was that he was not exercising due care if, at the time of the accident, any part of his person was in contact with any telephone wires other than the new wires which were being strung. We think it would have been obviously improper to bind the jury thus rigidly to a conclusion from one fact which might have been found, without regard to any other circumstances developed in the case and involving questions for the jury.

Whether or not the plaintiff had proved that he was in the exercise of due care was rightly left to the jury on all the evidence under proper instructions.

The judgment of the Circuit Court is affirmed, with interest, and the defendant in error recovers his costs of appeal.

HAIGHT & FREESE CO. v. WEISS et al.

(Circuit Court of Appeals, First Circuit. October 1, 1907.)

No. 695.

1. COURTS—JURISDICTION OF FEDERAL COURTS—CORPORATIONS.

It is settled law that for purposes of the jurisdiction of a federal court a corporation is a citizen only of the state in which it is incorporated; and, where it is doing business and has an established office in another state, such fact does not affect its citizenship, but it may be there sued in such court by a citizen of the state residing in the district.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 860.

Jurisdiction over corporations, see note to St. Louis, I. M. & S. Ry. Co. v. Newcom, 6 C. C. A. 174.]

2. EQUITY—JURISDICTION—REMEDY AT LAW.

A bill against a corporation, which asks for the cancellation of releases alleged to have been fraudulently obtained by defendant, and further asks that defendant be wound up on the ground of insolvency, and also on the ground that its business is illegal, states a case cognizable in equity, so that the bill cannot be dismissed on the ground that complainant has an adequate remedy at law, because, when a bill states one cause

of action cognizable in equity, it is not subject to a motion to dismiss, even though it states other grounds of suit not so cognizable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 759.]

3. APPEAL—REVIEW—FINDINGS OF MASTER.

Where an order referring the whole cause to a master would have been irregular when made, under the equity rules, unless by consent of the parties, such consent must be presumed by the appellate court, in the absence of anything on the subject in the record.

4. SAME—WAIVER OF RIGHT OF APPEAL—ACQUIESCENCE IN ORDER.

Where, after the entry of an ex parte order appointing a temporary receiver, the defendant by agreement made by counsel consented to the retention of the receivership, he cannot review such order on an appeal taken from a subsequent decree in the cause.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3611.]

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

See 152 Fed. 479.

Gilbert F. Ordway (Franklin Bien, on the brief), for appellant.

William P. Maloney, for appellee Weiss.

William D. Turner (George Hoague, on the brief), for appellees Colt and Campbell and others.

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

PUTNAM, Circuit Judge. This is a bill in equity, brought on May 8, 1905, by Anna L. H. Weiss, administratrix, against the Haight & Freese Company, a corporation, in behalf of herself and other creditors who might intervene; but neither the complainant nor any one else who did intervene had recovered judgment. The complainant describes herself as a citizen of Massachusetts, and the respondent as a corporation created by the laws of New York, with a usual place of business in Massachusetts, and as having appointed the commissioner of corporations of Massachusetts its attorney for receiving service of process Of course, the allegation that it has a usual place of business in Massachusetts, coupled with the allegation that it had appointed the commissioner its agent for receiving service of process, must be accepted as equivalent to a statement that the corporation was transacting business in Massachusetts at the time the bill was brought.

A number of the errors assigned insist merely that the Circuit Court had no jurisdiction because the allegations of the bill make the corporation a citizen of Massachusetts, so that consequently, on its face, both complainant and respondent are citizens of that state. After the Supreme Court has rendered decision on decision that a corporation cannot migrate, and that the fact that it is doing business in a state other than that of its organization does not create it a citizen thereof, it seems quite inconceivable that a proposition of this character should be urged on us. The respondent cites a decision of the Circuit Court for this circuit (Consolidated Store Service Co. v. Lamson Co., 41 Fed. 833); but that decision was entirely in harmony with the law as we have stated it. It is true that in that suit, which was between two corporations, neither corporation was organized in the state constituting

the district where the suit was brought; but that was not the point which was pressed on the court. The court, at page 834, referred distinctly to the rule we have stated, that a corporation cannot migrate, and expressed the fact that this was even then well settled. The opinion continued as follows:

"I think, however, the true ground upon which the court should take jurisdiction is this: That the corporation consents to be sued as a condition for doing business within such state, and that it should be held to its agreement."

At that time this proposition was somewhat doubtful, but it has since been thoroughly established by the Supreme Court to be the law; and it is on that ground, in connection with the fact that complainant is a citizen of Massachusetts, that the corporation was lawfully served in the district of Massachusetts, and the Circuit Court for that district could take jurisdiction.

The complainant declares that she is the administratrix of the estate of one Charles Weiss; that the respondent is a corporation doing what is known as a "bucket-shop" business at Boston, New York, and elsewhere; that her intestate gave the respondent orders for the purchase and sale of stocks, paying in various sums of money amounting in all to $5,380; that he supposed the respondent was actually buying and selling stocks on his account; that, instead of buying and selling, the respondent was simply making book entries, without any actual transactions, thus doing the "bucket-shop" business; that, after the decease of Weiss, the complainant, as administratrix, had a settlement with the respondent in which it made due her only $160; that both the complainant and her intestate were ignorant of the fact that the respondent's transactions with the intestate involved in the account were fictitious, in that no actual purchases and sales were made; that the account was wholly fictitious, unknown both to Weiss and the complainant, as his administratrix; that, in consequence thereof, the respondent really owed the complainant, as such administratrix, at the time of the settlement, $5,380, less $160 paid her by it; that full releases had been given both by Weiss and by the complainant, as his administratrix, in ignorance of the facts; and that the releases were therefore invalid. The bill contained prayers that an account might be taken of the amounts due complainant, and for such other relief as the case might require, which, of course, involved the canceling of the releases.

The bill also complained that the respondent was engaged in an illegal enterprise, meaning what it described as a "bucket-shop" business, and that therefore the corporation should be restrained, and be wound up, and its assets distributed. It further alleged that the corporation had a large number of creditors and not sufficient assets to pay their claims, and that it was carrying on its operations from day to day by means of the money received from its customers, dealing with them in the illegal and fraudulent manner which we have described, and it was so framed as to make the alleged insolvency another ground for the distribution of its assets. The allegations of the bill, and the portions thereof asking relief, were not exactly in the order or the phraseology which we have stated, but the substance was in accordance therewith.

Sundry creditors were permitted to intervene; but we do not per-

ceive, so far as that is concerned, that we will have any occasion to do more than to state the fact.

On the filing of the bill, and without notice to the respondent, but on a motion therefor which was supported by a bond given by the complainant with a surety in the penal sum of $10,000, conditioned to respond to damages as usual, a receiver was appointed, the order for which, of course, was merely interlocutory, so that the receiver as thus appointed should probably be described as an interlocutory receiver. On June 5, 1905, the respondent filed an answer, the substance of which is sufficiently stated by it as follows:

"The answer of the defendant alleged that Charles Weiss, the complainant's intestate, fully understood the nature of his transactions with the defendant, and that the defendant transacted business with said Weiss according to his instructions; that the complainant, as administratrix, was paid the sum due the said Charles Weiss according to his account with the defendant, and thereupon, after a full opportunity to examine the same, freely and voluntarily executed and delivered to the defendant a release under seal, wherein she released and discharged the defendant from all right of action, claim, or demand for any payment at any time heretofore made or value of anything at any time heretofore delivered on any contract or transaction whatever, and covenanted never to sue therefor. The answer further alleged that the business of the defendant was legitimate and proper, and that it kept proper books of account, and was able to meet all its just claims in the ordinary course of business."

It filed no plea nor demurrer. Subsequently it amended its answer; but we need not refer to the details of this. On January 17, 1906, the complainant filed a general replication, and thus the case was put fairly and formally at issue on serious and important questions of fact and law. No proceedings, however, were taken in accordance with the rules in equity 67 et seq., which direct how proofs shall be made up after formal issues in the manner we have described; but the case was referred to a master, who passed on all the substantial issues, and made a report to which the respondent excepted at great length. The exceptions were overruled, and, on June 10, 1906, a decree was entered sustaining the claims of the original complainant and of some of the creditors who intervened, and settling the amount of each. We do not find the decree specifically adjudged that the releases in question were invalid and ordered them annulled. It, however, adjudged that the allegations of the bill of complaint had been fully sustained by the proofs, and, as we have said, it established the claims of the complainant and of the intervening creditors. This necessarily includes an adjudication setting aside the releases, notwithstanding the lack of specific phraseology to that effect. The decree also contained the following:

"Ordered, adjudged, and decreed as follows:

"That the receiver heretofore appointed in said cause, James D. Colt, be, and he hereby is, made permanent receiver, with full power to receive, sue for, and recover all moneys, debts, or property to which said company may be entitled, and to enforce, by suit or otherwise, or to compromise, in his discretion, any and all liabilities of any person or corporation to said company; to sell and dispose of, either at public auction or at private sale, at such prices and upon such terms as he may deem expedient, all property, choses in action, rights of action, and assets belonging to said company; and with all such other powers as are incidental to a full and complete administration of his duties as such permanent receiver, to the end that all the property and effects of said

corporation may be collected and converted into cash, in order to be distributed as hereinafter provided."

This, in accordance with the settled practice of the Supreme Court, was an appealable decree; and thereupon the complainant seasonably appealed to us, and assigned formally 17 alleged errors. The seventeenth referred to the exceptions to the master's report of which we have already spoken, as to which the respondent's brief relies on 31, making in fact 48 distinct alleged errors on which we have been asked to pass.

In the progress of the proceedings, the receiver settled an account, to which some objections were taken by the respondent. The respondent did not, however, take out any citation to the receiver, brought to our attention or which we have discovered, so that the account is not before us. Notwithstanding the receiver was not made a party to the appeal, he has filed a brief, which we have no occasion to consider, not only because no issue involving him is before us, inasmuch as he is not named in the citation, but also because it is the receiver's duty to hold the scales evenly, and not to intermeddle beyond the orders of the court appointing him in questions between the original parties to the litigation which do not personally affect him. As, however, the allowance of the receiver's accounts and certain special allowances to the receiver were assigned by the respondent as errors, and as both parties have submitted certain views in reference thereto, we may as well observe that the record is in no form to enable us to pass on the questions involved with regard to either branch of this topic. The account covers nearly 10 printed pages, and is made up of numerous details, the most of them of petty amounts. The order of the Circuit Court allowing it was general and in lump. The accounts were never sent to a master so far as the record shows; and, even if there were any proofs or suggestions which would enable us in any particular to fathom any of the questions involved, we should decline to do it. As explained by the Supreme Court in Chicago, etc., Railway v. Tompkins, 176 U. S. 167, 179, 20 Sup. Ct. 336, 44 L. Ed. 417, we should not undertake the work which should be done by a master. Therefore in no event is there sufficient in the record to enable us to take up this topic.

A proposition made by the respondent that the court was without authority to allow the receiver's accounts until the final determination of the cause was, of course, without support, either in law or practical sense, with reference to one like that in question here, which related mainly, if not entirely, to minor necessary expenses pendente lite.

Several errors assigned relate to the refusal to grant a motion to dismiss the bill. We are told that some time during the progress of the litigation the respondent moved to dismiss the bill on the ground, as stated by it in its assignment of errors, that the complainant had an adequate remedy at law. The briefs of both parties have paid scant regard to our rules, and, as to this motion, neither has referred us to the page where it can be found, so we take the facts from the parties. It is said that this motion was not made until after replication, the reference to the master, and the filing of his report, and it is claimed by the complainant that this delay operated as a waiver. The bill contains several alleged grounds of proceeding, all of which are equitable in

their nature, and for none of which can a remedy be given at law. The first is for relief by canceling of releases under seal said to have been fraudulently obtained, which is peculiarly a topic for equity. The next is the claim that the corporation was insolvent, and asking for the winding up of its affairs on that ground. Passing by the question whether a bill for that purpose should, if objected to, be allowed to be maintained outside of the district of the domicile of the corporation, and also the question arising from the fact that the Supreme Court has steadily maintained that a debtor has a right to an issue to a jury on a claim which has not gone to judgment, and that therefore, in the federal courts, an ordinary creditors' bill cannot be maintained until there has been a judgment, such relief is clearly equitable in its nature, unless there is some statute especially providing for the winding up of corporations.

The third topic of which the bill treats is a claim that the corporation be wound up because its main business was that of conducting "bucket shops," which it is said is of a fraudulent character. Passing by the question whether a corporation can be wound up for any reason of that nature unless a statute of the state of its creation especially provides therefor, this topic is also one purely for equitable consideration. Therefore, aside from the fact that, even where there is an adequate remedy at law, the right to exclude the complainant from the chancery may be waived when the topic is of an equitable character, as complainant says was done here, it is clear that the whole subject-matter of this bill was purely equitable, and, therefore, in no event could a motion be sustained of the character we have described. Indeed, we may go further and remark that, inasmuch as the claim for the canceling of the releases in question was properly suable in equity, a motion to dismiss would not lie, even if the entire burden of the bill aside from that was not anywhere cognizable, because even in that event the respondent's remedy would not be by a motion to dismiss, or by a general demurrer, but by a demurrer to the parts of the bill which were demurrable and an answer or plea to the rest.

The remaining errors assigned, except the seventeenth, and except the objection based on the fact that a receiver was appointed without notice, are either clearly frivolous or relate to rulings as to which the record is not sufficient to show that they could be prejudicial, even if they were erroneous. The seventeenth assignment concerns exceptions to the rulings of the master. The master's report was summarily filed without any submission to the parties of a draft as required in equity, so that there was no opportunity to file exceptions before him, and, consequently, no explanations by him which would enable this court to understand the relations of the exceptions to the facts of the case. Neither were the proofs brought in by the master. The parties have not referred us to the order appointing the master, and we have not found it. It was said in the opinion of the learned judge of the Circuit Court, and also by counsel for the complainant, that this order did not require him to return the proofs into court. We are unable, therefore, to discover enough in the record to assist us in determining whether his rulings objected to were material or prejudicial, even if erroneous.

In fact, inasmuch as the reference to the master of the issues raised by the bill and answer, at the stage of the case when it was made, was irregular under equity rules 67 et seq., to which we have referred, and under the decisions in Kimberly v. Arms, 129 U. S. 512, 524, 9 Sup. Ct. 355, 32 L. Ed. 764, and Davis v. Schwartz, 155 U. S. 631, 636, 637, 15 Sup. Ct. 237, 39 L. Ed. 289, unless made by the consent of the parties, we are unable with this defective record to divest his report in any particular of the peculiar force which, according to the decisions we have cited, must be given it. While we are not able to ascertain from the record that the reference was by the express consent of the parties, yet, as otherwise it would have been irregular, and was not objected to so far as the record shows, we must conclude that it had their implied consent if not an express one. In any view, however, there is not enough before us to enable us to review any of the findings excepted to. The decree appealed from conformed strictly to the findings, so that it follows that we cannot review it adversely in any particular.

We have been asked to pass on 48 distinct propositions. We think we have explained fully our views on all the topics to which our attention has been at all carefully called; and, there are so many objections, the court cannot be expected to run out for itself any questions with regard to which it has been addressed only in a general manner.

One topic of an interlocutory character remains to be considered. As we have said, a receiver of the assets of the respondent corporation was appointed immediately on the filing of the bill, without notice to it, on the giving of a bond, with a surety, in the penalty of $10,000. The fact that a receiver was so appointed makes the burden of a very considerable number of the errors assigned. Appointing a general receiver of the assets of a corporation, or a copartnership, or an individual, carrying on an active business, in which the maintenance of the credit of the respondent is a necessary element, is quite equivalent to the issue of an execution before judgment, and means, ordinarily, financial ruin. Therefore, in Joseph Dry Goods Co. v. Hecht, 120 Fed. 760, 764, 57 C. C. A. 64, the opinion rendered in behalf of the Circuit Court of Appeals for the Fifth Circuit well said:

"Notice should be given and the defendant furnished an opportunity to be heard, except in cases of imperious necessity, requiring immediate action by the court, and where protection can be afforded the plaintiff in no other way."

Consequently, in that case the decree of the Circuit Court appointing a receiver was reversed on an appeal taken within the period of statutory limitation. The receiver here was appointed on May 8, 1905. The act now in force is that of April 14, 1906 (34 Stat. 116, c. 1627), which has not changed the law so far as any question before us is concerned. The law in force on May 8, 1905, was that of June 6, 1900 (31 Stat. 660, c. 803 [U. S. Comp. St. 1901, p. 551]). Under the last-named statute the respondent might immediately have appealed from the decree appointing the receiver; and it was settled, in accordance with plain rules of interpretation, in Joseph Dry Goods Co. v. Hecht, just cited, that an appeal would lie notwithstanding the order appointing the receiver was ex parte.

The time limit for an appeal under the statute of 1900 was, as is well known, 30 days. It has never been decided by the Supreme Court whether that statute, or other statutes of that class, still permit appeals from the interlocutory orders to which they relate to be taken after final decrees and after the expiration of more than 30 days. It would not be an unusual or an unjust construction to hold that they do not, because, as in the present case, if the appeal from an interlocutory order appointing a receiver is delayed as it was prior to this class of statutes, the appellate tribunal is left to deal often with mere wreckage; and, as in the present case, ordinarily no advantage comes from a reversal. In view of this last fact, we are quite content that the record shows beyond question that the respondent acquiesced in the appointment of the interlocutory receiver promptly after it was made. While it is true that the terms of the agreement relating thereto, signed by the counsel for the parties and filed in court, and on the same day put into the form of an interlocutory order or decree, did not in express language state that the parties acquiesced in the receivership, yet they were of so radical a character that in equity the respondent cannot deny an implied, if not an express, consent.

Both the agreement and the interlocutory order contained a provision that the powers of the receiver should be those of a permanent receiver until the final determination of the cause; and, what is an emphatic feature, they provided that the bond to which we have referred should be canceled and all liability thereunder terminated. All this is inconsistent in equity with any proposition that the order, or decree, appointing the receiver can now be reversed.

Perhaps we should observe that one of the errors assigned complained that creditors were allowed to intervene and to obtain relief concurrently with the original complainant. This is based on the propositions that the intervening petitioners had filed no proper, sufficient, or legal petitions, pleadings, or statements of claims, and that they had in no way established their right to be made parties. So far as the last branch of these objections is concerned, they did establish their claims before the master to his satisfaction; and, as we have shown, we cannot on this appeal revise the master's doings. The respondent's brief is practically a nullity beyond restating this assignment in general language, and it contains no references to the record required by our rules. All we have been able to find through our own investigation is a motion by the respondent for specifications by the intervening creditors, without anything to show that it was ever brought to the attention of the court. For this and other reasons, the record is insufficient to call on us to review the case so far as this topic is concerned.

The decree of the Circuit Court is affirmed, and the appellees recover their costs of appeal.

NORTHERN PAC. RY. CO. v. WENDEL.

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

No. 1,426.

1. MASTER AND SERVANT—ACTION FOR INJURY TO SERVANT—EVIDENCE.
In an action by an employé to recover for an injury resulting from the breaking of a belt used to run a planing machine, the alleged negligence of defendant being the use of a belt which was decayed and defective by reason of its age, it was not error to admit evidence offered by plaintiff to show that the knives of the machine were dull at the time, and the gauge inaccurate, not to establish an independent and different act of negligence, but as showing conditions likely to be met with and affecting the strain on the belt.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 920.]

2. SAME—QUESTIONS FOR JURY.
In an action by an employé to recover for an injury resulting from the breaking of a belt alleged to have been due to its age and defective condition, evidence that the breaking might have been due to other causes *held* insufficient to entitle defendant to the direction of a verdict.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1089–1132.]

3. SAME—ASSUMPTION OF RISK.
A workman, who was injured by the breaking of a belt used to run a machine, due to its weakness from age and from a recent splicing, although he had operated the machine for some years, cannot be held to have assumed the risk from such danger, where it is not shown that he knew the age of the belt, or what the life of such a belt was, or that the splicing would increase its tendency to break.

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

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

4. SAME—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.
Where the evidence on an issue of contributory negligence, in an action by an employé to recover for an injury, is conflicting, the question is one for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1089–1132.]

5. SAME—ASSUMPTION OF RISK.
A servant engaged in operating a machine by standing at its side, instead of behind it, where its construction contemplated that the operator should stand, did not thereby assume the risk of injury from the breaking of a belt which was greater there than at the rear of the machine, where there was no obvious danger in the position taken, and in fact no danger at all if the appliances were sound, while the position behind the machine was obviously dangerous from other causes, and it was customary for all operators to stand at the side.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 560.]

6. SAME—DAMAGES—EVIDENCE—EARNING CAPACITY.
In an action by a servant employed as a car repairer to recover from the master for a personal injury, where it was shown that he was a carpenter by trade, on the question of damages, evidence of his disability caused by the injury was not limited to the effect on his earning capacity

as a car repairer, but it was competent to show the effect on his capacity to earn wages as a carpenter.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 490.]

7. MASTER AND SERVANT—INJURIES TO SERVANT—INSTRUCTIONS—EFFECT OF CONTRIBUTORY NEGLIGENCE.

In an action by a servant against the master to recover damages for a personal injury, an instruction that plaintiff's contributory negligence would not preclude his recovery, unless without it the defendant's negligence could not have caused the injury, was not erroneous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 796.]

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

The defendant in error was the plaintiff in the court below in an action against the plaintiff in error to recover damages resulting from personal injury. He alleged in his complaint that, while employed as a car repairer for the plaintiff in error and operating a planing machine driven by a belt, his right arm was broken by the parting of the belt; that the cause of the breaking of the belt was that it was old, decayed, and defective; that the plaintiff in error had negligently allowed it to remain so, and had negligently failed to box it. The answer denied the alleged negligence, and pleaded contributory negligence, and averred that, as to the unboxed belt, the defendant in error had assumed the risk. On the trial it was shown that the defendant in error was a carpenter of 34 years' experience. For six or seven years he had worked as car repairer in wood and iron in the shops of the plaintiff in error. It was his duty to operate the planing machine, which was the only machine of that kind in the shops, and the one he had always operated, and which he used some times every day and at other times every second or third day. The belt had never been boxed. Just how long the belt had been in use was not proven, but there was evidence that it had been used at least 12 years before the time of the accident, and that it had turned black from age. It had been spliced a short time before the accident, when a piece had been cut off one or both ends, and a new piece had been inserted to restore it to its former length. There was evidence that a belt is weakened by splicing, and that its weakest part is at the point of lacing. It was proven that the life of a belt used under the conditions which attended the use of the belt in question is ordinarily from six to seven years.

Wallace & Donnelly (William Wallace, Jr., of counsel), for plaintiff in error.

Walsh & Nolan and T. J. Walsh (T. J. Walsh and C. B. Nolan, of counsel), for defendant in error.

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

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

It is assigned as error that the court admitted testimony that the knives of the planing machine were dull at the time when the defendant in error sustained his injury, and that the machine did not cut exactly as indicated by the gauge. The argument is that since the only specification of negligence in the complaint was that the belt was old, decayed, and defective, and that it should have been boxed, it was a variation from the cause of action alleged to permit the defendant in error to prove that the knives of the planer were dull, or that the gauge was inaccurate, and that, if the belt was good enough to stand the

strain of operation when the knives were properly sharpened, or when all the other parts of the machine were as they ought to be, then the duty of the plaintiff in error as to the belt was fully performed. It is true that, in actions for negligence, the rule applies, as in other cases, that the proofs must conform to the pleadings, and that recovery cannot be had on proof of negligent acts other than those specifically alleged, or, in other words, a plaintiff will not be allowed to plead one kind of negligence and prove another. But we do not see that that rule has been violated in the present case. There was proof tending to sustain the allegation that the belt was old, decayed, and defective. There was evidence that it had been in use long after the term of the usual life of such a belt; that it was run at great speed, was subjected to considerable pressure, and had been spliced shortly before the time of the accident; and that the splicing of itself tended to increase the strain. The evidence that the knives were dull was neither offered nor received as proof of negligence, but as proof of one of the conditions attending the use of the belt and the machine. There is nothing to show that the dulling of the knives was not one of the usual or occasional conditions to be reckoned with in the use of such a machine. That the knives were likely to become dull by use would appear to have been a fact to be dealt with in measuring the strength of a belt and in furnishing the defendant in error safe machinery with which to work. It may be true that, if the knives had been kept perfectly sharp, the belt would not have parted. But that fact would not relieve the plaintiff in error of responsibility for not furnishing a belt of sufficient strength to meet the usual and ordinary strain of the work which the defendant in error was called upon to do.

Some of the foregoing considerations are applicable also to the assignment of error that the court denied the motion of plaintiff in error to direct a verdict in its favor at the close of all the evidence. In this connection, the plaintiff in error invokes the doctrine of Patton v. Railroad Company, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361, in which it was said that where the testimony leaves the matter uncertain, and shows that any one of several causes might have brought about the injury, for some of which the employer is responsible, and for others of which he is not, it is not for the jury to guess between these causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion; and it is argued that in the present case there were three possible causes of the breaking of the belt, first, its own weakness, second, too great a strain due to dull knives, and, third, too great a strain due to too deep a cutting resulting from the inaccuracy of the gauge indicator, and that the evidence leaves it uncertain which of these was the producing cause. Whatever may be said of the force of the evidence, we think it is clear that the case was not one to be taken from the jury. As to the age of the belt and its weakness, there was testimony sufficient to go to the jury. Concerning the relation which the gauge bore to the strain which produced the accident, the evidence was conflicting. The defendant in error expressly denied that at the time when the belt parted he was making too deep a cut on the board, or placing an unusual strain on the machine. The question whether or not through a

defective gauge, or otherwise, the defendant in error was making a cut deeper than ought to have been made, was for the jury to answer. As to the dullness of the knives, there is nothing to show that in the use of such a machine the contingency of their dullness was not one of the usual incidents attending the use of a planing machine, and that the strain thereby produced was not to be expected and provided for. In instructing the jury, the court properly confined their attention to the question whether or not the plaintiff in error was negligent in omitting to use due care to provide a reasonably safe belt, and instructed them that if they found that the belt broke because it was old, decayed, or defective, the defendant in error would not be entitled to recover unless the plaintiff in error, through its agents, knew, or in the exercise of reasonable diligence ought to have discovered, that it was old, decayed, or defective, considering the work which it was expected to accomplish and the strain that might be put on it. There was evidence that the belt parted by tearing out the holes where it was laced in splicing, and the court instructed the jury that the burden was upon the plaintiff in the action to show by a preponderance of the evidence that the belt parted or broke because of the tearing out of the holes, rather than the breaking of the lacing.

One of the grounds on which it is said that the court should have directed the jury to return a verdict for the plaintiff in error is that the defendant in error assumed the risk, and that he had had long experience in operating the machine and knew how to loosen the belt by means of the feed lever and thereby relieve the strain. To this it is to be said that there is no evidence whatever that the plaintiff in error knew how long the belt had been in use, or what the life of such a belt was, or what strain it would sustain, or that the splicing of the belt would increase its tendency to break. If he had knowledge of these things, it was for the plaintiff in error to produce the evidence thereof. It will not be presumed that he knew, and the trial court would not have been justified in ruling that the defendant in error assumed such risk.

But it is said that the case should have been taken from the jury on the ground that the evidence showed the defendant in error to have been guilty of contributory negligence, in that he tried to make too deep a cut with the planer, and that he stood beside, instead of behind, the machine. The defendant in error testified that the plank was a little over two inches thick, and that to reduce it to an inch and three-quarters he divided it into two cuts, but that he did not remember what thickness of cutting he set the gauge for on the particular cutting which was being made when the belt broke. He testified further:

"I don't think that a quarter of an inch or an eighth of an inch, or even half an inch, would bring about a strain on the machine if it was in good order. If it was hard wood, it would be harder to plane if the thickness was increased. As a rule, the strain is the same in taking off a sixteenth of an inch or an eighth of an inch or a quarter of an inch. There is no difference to speak of."

One of the witnesses for the defendant in error testified that a fair cut upon a machine of that kind would, on that particular width of timber, be an eighth of an inch. Another testified that similar ma-

chines cut to the depth of five-eighths of an inch, and that one-half an inch is very common. A witness testified that he measured the thickness of the particular cut which was being made at the time of the accident, and found it to be a quarter of an inch. Another testified that he measured the cut and found it was five-sixteenths of an inch. Surely, in view of this conflict in the testimony, there was no question of law presented to the trial court as to the contributory negligence of the defendant in error in setting the machine to make too deep a cut.

As to the position in which the defendant in error stood while operating the machine, he testified that it was more dangerous to stand behind the machine than at its side, and one witness, a machinist, testified that "a man would be a fool" to stand behind the machine when it is in motion. There was competent evidence that the men in the shop operating the planer always stood at the side of the machine. In Prosser v. Montana Central Ry. Co., 17 Mont. 372, 43 Pac. 81, 30 L. R. A. 814, it was said:

"But when it does not appear that the act is positively negligent, we are of opinion that it is competent to show the usage or custom of competent and prudent persons in performing the act. In the case at bar, it did not appear that the act of plaintiff was negligence per se. He carefully performed his duties with the means supplied him for their performance, and we think it was competent to show, under those circumstances, that persons experienced in the performance of the same act, under the same circumstances, performed it as did the plaintiff."

But it is urged that the defendant in error did not stand in the position which the construction of the machine contemplated that he should stand; that he chose a different place, and thereby created a hazard of being struck by the broken belt; and that his selection of a position by the side of the machine could not be justified, either by the fact that others had done so before him, or that the hazards of of the position at the rear of the machine, though different, were greater than those at the side. In support of this argument, Demers v. Deering, 93 Me. 272, 44 Atl. 922, is cited. In that case it was held that the relative rights and duties of master and servant arise from the contract of employment, and that if a servant worked in a place not appointed by the master, and so not within the purview of the contract, the latter did not owe the former any duty with respect to that place, for the servant took whatever risks there were, and, if the occupation were apparently hazardous, he would be guilty of contributory negligence, and could not recover if his own negligence contributed to the injury. The court said:

"But the plaintiff contends that the place where he stood was the usual place that men had stood in before that time, doing the same work; that the defendant knew it was the usual customary place; and that, by setting the plaintiff to work without instructions, the latter had a right to assume that he was expected to work where those before him had worked. * * * But, assume it to be so. The plaintiff even then assumed, not only the risks naturally incident to the business, but also the obvious risks of working in that place. * * * And it seems to us obvious that a man standing between the rolls along which all the products of the rotary saw must be pushed, as this machinery was situated, was likely to be struck by it."

That decision was made with reference to the facts of the case before the court, in which it appeared that the plaintiff had been injured by a plank pushed along the rolls which carried the product of a rotary saw. The movement of the product of the saw was referred to as an obvious risk visible and apparent to the operative. In the present case, there was no such obvious risk. There was no risk at all, so far as the evidence goes, if the appliances of the plaintiff in error had been sound and such as they should have been. On the other hand, the position behind the machine was a dangerous one, and attended with obvious risks. It was in evidence that the defendant in error had once been standing there when a plank which was being planed flew back and injured him so seriously that he was not able to work for a year, and there was evidence that, in the position behind the machine, an operative would have been obliged to stand close by a rapidly revolving shaft, and would have been in peril of having his clothing caught therein. In view of the fact that there was no obvious or apparent risk in the position which the defendant in error and the other operatives of the mill occupied when using the planing machine, we think that it was not only permissible for the defendant in error to choose the position which appeared the least hazardous, but that it was his duty to do so in the exercise of ordinary and reasonable care for his own safety.

It is contended that the court erred in admitting testimony as to the impairment of the capacity of the defendant in error to work as a carpenter at his trade, by reason of the injury which he sustained. The objection to this testimony was that the only impairment of the capacity of defendant in error to labor which had been pleaded was as to his capacity as a car repairer. The evidence so admitted was that of a witness, who testified that, after the defendant in error was hurt, he could not earn carpenter's wages. The testimony, as we regard it, was offered as evidence of physical disability resulting from the injury. It had been shown that he was a carpenter by trade. It is true that when injured he was working as a car repairer, but that may be regarded as a branch of carpenter's work. The complaint did not allege loss of capacity as car repairer, or of any particular capacity, but alleged damages in general. It was not error therefore to admit the evidence so objected to.

Error is assigned to the refusal of the court to instruct the jury that if the defendant in error was at fault in any manner, however slight, he could not recover, and it is contended that the instruction which the court gave to the effect that, despite his contributory negligence, the plaintiff could recover, unless without it the defendant's negligence could not have caused the injury, is the declaration of a doctrine of comparative negligence, which, while recognized in some states, is denied in Montana, and generally in the states of the Union. In answer to this, it is sufficient to say that the instruction so given was entirely in harmony with the doctrine approved in Delaware, etc., Co. v. Converse, 139 U. S. 469, 11 Sup. Ct. 569, 35 L. Ed. 213, and Railroad Co. v. Jones, 95 U. S. 439, 24 L. Ed. 506, and it is not contrary to the decision in Wastl v. M. U. Ry. Co., 24 Mont. 160, 61 Pac. 9, cited by the plaintiff in error.

The judgment is affirmed.

KATAHDIN PULP & PAPER CO. v. PELTOMAA.

(Circuit Court of Appeals, First Circuit. October 1, 1907.)

No. 697.

1. DAMAGES—PLEADING AND PROOF—PERSONAL INJURIES.
Under a declaration, in an action for personal injury, which describes the wounds received by plaintiff, evidence is admissible, under the settled rules stated in Chitty on Pleading, 411–414, with respect to injuries not described, but which naturally resulted from such wounds, as affecting the amount of damages recoverable.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 441, 442.]

2. APPEAL AND ERROR—RESERVATION OF GROUNDS OF REVIEW—EXCEPTIONS.
An exception by a defendant to testimony brought out by him on cross-examination of a witness for plaintiff, and a motion to strike out such testimony, are insufficient under the circumstances according to the practice of the federal courts to raise any question for review by the appellate court, where the record does not show that any grounds for either were given or any reason shown why the testimony was improper.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1141.]

3. TRIAL—INSTRUCTIONS—CONSTRUCTION OF CHARGE AS A WHOLE.
In an action by a servant against the master to recover for a personal injury alleged to have been caused by a defective appliance furnished by the defendant, expressions used by the court, in its charge, that, under the circumstances, it was the duty of defendant to furnish and maintain reasonably safe appliances, are not ground for reversal, where the duty of defendant was elsewhere explained as not being absolute, and where at defendant's request the jury were specifically instructed at the close of the charge that it was the duty of the defendant only to use reasonable and ordinary care.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 703–717.]

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

For opinion below, see 149 Fed. 282.

George E. Bird (E. C. Ryder and William M. Bradley, on the brief), for plaintiff in error.

William A. Pew, Jr. (William H. Gulliver, on the brief), for defendant in error.

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

PUTNAM, Circuit Judge. Throughout we will speak of the plaintiff below and the defendant below as the plaintiff and defendant. This case was tried to a jury with a verdict for the plaintiff. It was claimed that the plaintiff was employed by the defendant, and, while in that employment, was using a derrick which was supplied by the defendant as a complete derrick, and that one of the guys was weak through age, and therefore broke, so that the derrick fell on the plaintiff and injured him. The court having properly instructed the jury on the question whether this derrick was to be regarded as a completed structure furnished as such by the defendant, the verdict obviated all questions

except such as arose out of the conditions by virtue of which it was so to be regarded. Six alleged errors were assigned, but only three are brought to our attention.

The allegations in the declaration of the damages suffered by the plaintiff are as follows:

"That by reason of the said falling of said derrick the said plaintiff was greatly injured on the head and shoulders, by the infliction of a deep and painful wound, his left arm was broken in two places, and he was otherwise greatly injured in other parts of his arms, legs, and sides, and that the said plaintiff suffered great pain in body and mind as the result of said injuries, and is permanently injured, and is unable to perform any manual labor, and is deformed and crippled for life, and has been put to great expense for medical attendance, nursing, and medicine, to the damage of the plaintiff in the sum of $10,000, which shall then and there be made to appear with other due damages."

There was no allegation of a nervous disturbance, or of any injury to the nervous system. Evidence was offered, and admitted against the objection of the defendant, tending to show that the external wounds described in the declaration were the cause of certain nervous disturbances and of other internal injuries. Exception was duly saved, but the exception clearly is not sustainable according to the decisions of the courts in Maine, which state composes the district in which the injury was suffered and the judgment rendered. There was enough in what the declaration contained to be equivalent to the ordinary alia enormia; and, without that, inasmuch as the injuries to which the evidence objected to related not only resulted from the wounds described, but naturally resulted therefrom, the thoroughly settled rules of the common law, which are also fully accepted in Maine, determine that no specific description thereof was required. Chitty on Pleading, 411* to 414*.

While the plaintiff was endeavoring to prove that one King, who was employed by the defendant, was a vice principal, and not a fellow servant, a question was put on that topic referring to a date later than that of the injury. This was objected to as irrelevant, and as having a tendency to confuse the jury by reflected light on the question of King's relations to the defendant at the essential time. This evidence was apparently irrelevant; but it could not have been at all injurious, because the case so shaped itself that it was wholly nonessential whether King was a fellow servant in the ordinary sense of the word, or a vice principal in the ordinary sense of that word. Under the law as ruled in the federal courts, this could not have been an important question in the present aspect of the case. Baltimore & Ohio Railroad Company v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772; Central Railroad Company v. Keegan, 160 U. S. 259, 16 Sup. Ct. 269, 40 L. Ed. 418; McPeck v. Central Vermont Railroad Company, 79 Fed. 590, 25 C. C. A. 110, decided by us on March 23, 1897; Stevens v. Chamberlain, 100 Fed. 378, 40 C. C. A. 421, decided by us on February 2, 1900.

Another proposition brought to our attention is that the testimony of one of the plaintiff's witnesses, brought out on the cross-examination by the defendant, in regard to the number of guys suitable for a derrick, should have been stricken out on a motion which the defend-

ant made for that purpose. The record shows that an exception was taken, but it does not show any reason given to the court by the defendant why he claimed that the evidence should be stricken out; nor does it state the grounds of the exception. Therefore the record does not disclose that it was shown to the Circuit Court that in any aspect of the case the evidence would have been improper even if put in by the plaintiff. The objection and the exception are insufficient under our practice, and all the more so in view of the fact that the evidence was put in by the defendant itself, so that the question whether it should be stricken out or not was prima facie one for the the discretion of the court at nisi prius.

The remaining question relates to the law as to the nature and extent of the care required from the defendant, growing out of the fact that the derrick was furnished by it to the plaintiff and his fellow workmen as a completed structure for use by them. There is no doubt as to the rule of the federal courts on this topic. It has been rehearsed again and again, and as correctly as anywhere in Hough v. Railway Company, 100 U. S. 213, 218, 25 L. Ed. 612, as follows:

"To guard against misapplication of these principles, we should say that the corporation is not to be held as guaranteeing or warranting the absolute safety, under all circumstances, or the perfection in all of its parts, of the machinery or apparatus which may be provided for the use of employés. Its duty in that respect to its employés is discharged when, but only when, its agents whose business it is to supply such instrumentalities exercise due care as well in their purchase originally, as in keeping and maintaining them in such condition as to be reasonably and adequately safe for use by employés."

There is no claim that this rule was not given by the learned judge of the Circuit Court, and the question before us arises out of the fact that he dropped into an expression which the defendant says is not consistent with the rule, so that it also says that the whole tended to confuse the jury. Thus the defendant seeks to bring itself within Bank of Metropolis v. New England Bank, 6 How. 212, 226, 12 L. Ed. 409, to the effect that, where the instructions are involved, a new trial will be ordered; and, also, within Armour & Co. v. Russell, 144 Fed. 614, 615, 75 C. C. A. 239, decided by the Circuit Court of Appeals for the Eighth Circuit on March 21, 1906, where it is stated that the vice of a wrong rule in a charge is not extracted by the fact that the right rule is also given, "because," as the court says, "it is impossible to tell by which rule the jury was governed."

This objection, however, melts away on a careful examination of the record. The defendant admits that the correct rule was given five times, while it claims that the alleged incorrect rule was also given six times. It will be found, however, that what the defendant claims to be the incorrect rule was accompanied every time with what is admitted to be the true rule, and that finally the true rule was given absolutely and unqualified by anything else. We will give the first example of what the defendant rests on in this connection. It gives undoubtedly the most plausible support to the defendant's position of any extract which can be made from the charge. It is as follows:

"Now, the master, the employer of laborers, has a duty upon him to see that a reasonable place is given to the laborer in which to work. He is not an

insurer of that place, but it is his duty to give him a reasonably safe place in which to work. It is his duty, also, to give him reasonably safe appliances with which to work. In this he is not an insurer. A reasonably safe appliance may break, but it is the duty of the employer, the master, to provide the servant, the employé, with reasonably safe appliances, and the place of work and the appliances must be reasonably safe when you take into consideration the nature of the work, the character of the occupation. It is not sufficient for the plaintiff, the employé, who sues the master, to show that an accident happened. He must show that it happened through the neglect of the employer, through his failure to exercise reasonable care in furnishing a suitable place or a suitable appliance; that either a suitable place was not furnished; or that by reason of such want of reasonable care he, the employé, the servant, suffered."

If this stood alone, it might perhaps be held to be subject to the criticisms of the cases we have cited. The next instance on which the defendant relies is as follows:

"Now, starting with the instructions which I have given you as to your duty, if he has satisfied your mind on that proposition, that the defendant company had not reasonably met that duty of providing a suitable appliance, namely, a suitable rope to the derrick, and that, through its neglect to provide that, the plaintiff has suffered, so far he may recover, so far as that proposition is concerned."

This is fairly subject to the same observations as the first extract we have given. Subsequently to the above, the court said:

"It is the duty of the defendant company, and of any person employing men, to provide reasonably suitable appliances; as I have said, they are held to reasonable care in this behalf."

This exhibits in a succinct form the features in the charge to which the defendant objects. The following extract, however, which succeeds in the charge all we have stated, must be held, of course, to supersede what the court had already said, and fairly exhibits the extent to which the defendant's criticisms can be applied:

"I instruct you that, from the testimony in the case, you are justified in finding that Mr. Jones was the general manager of the defendant company; that he had general charge of the company's business. Among other things, he had the duty of seeing that a reasonably safe working place was maintained for its employés and servants, and that reasonably safe appliances were furnished them, for their work. In the performance of this duty as general manager he was not a fellow servant of the plaintiff, but was a vice principal and representative of the defendant company. If he was negligent in the exercise of these duties, the jury is justified in finding defendant liable. If the general manager, the vice principal of the defendant, knew, or from the nature of the case ought to have known, that the guy line of the derrick was not reasonably safe for use, and, knowing such condition of the guy line, he did not have such line removed, or if he negligently sanctioned its use under circumstances when the guy was likely to break and cause injury to the employés of the defendant company, and if the jury finds that he was guilty of negligence in this behalf, they are justified in finding such negligence to be the negligence of the defendant company. If the injury happened through the breaking of a guy, and if that guy was defective and unsafe, and if its appearance was such that the defect might have been discovered by the exercise of reasonable care on the part of the general manager, the vice principal of the company, and if he failed to discover the defect in the guy or to remedy the same, such failure the jury may take into consideration as evidence tending to show negligence on the part of the defendant company itself."

While the first extract we have given from the charge might be subject to the criticism found in Bank of Metropolis v. Union Bank, this full and careful explanation to the jury is not; but, if subject to any criticism, it is to that found in Armour & Co. v. Russell, on the point that inconsistent rules were given. The defendant rests on the proposition that the word "duty" was so used as to leave the jury an opportunity of understanding that the duty is not a qualified one; but this is not the fair interpretation to be put on this method of expression. It is impossible for either courts, or any human agency, dealing with the English language, to use words or terms which in all respects qualify and limit their application as they should be qualified and limited, without additional expressions intended so to qualify and limit. When the learned judge used the word "duty," it was used in a general sense, covering both qualified and unqualified obligations; and immediately, and almost in the same breath, he went on to explain to the jury that the duty is not unqualified, but is qualified in the way in which he explained. In this respect the court followed an ordinary method of expression among men using common phrases, and, also, with men of the highest literary exactness. The Supreme Court proceeded in the same way in which the learned judge proceeded in Union Pacific Railroad v. Daniels, 152 U. S. 684, 689, 14 Sup. Ct. 756, 38 L. Ed. 597. At the middle of page 689 of 152 U. S., of page 758 of 14 Sup. Ct. (38 L. Ed. 597), the opinion quoted the words "owes a positive duty," without any qualification whatever. And, again, at the foot of the page, it used equally positive language of a generic character.

At bar, after the judge completed his charge, the counsel for the defendant said to the court as follows:

"We would ask, if your honor please, that you charge the jury that it is only the duty of the defendant to use reasonable and ordinary care to provide a reasonably safe place and a reasonably safe appliance."

The court replied as follows:

"I give you that instruction, gentlemen. I repeat, I give it to you coupled with what I have already said."

It is, perhaps, true that, under the circumstances, the defendant was entitled to the instruction clean, without any addition, or any reference to what the court had previously said. Nevertheless, it is not clear what the court meant by that reference. The defendant maintains that it referred to the previous expressions which the defendant contends indicated that there was an absolute duty on the part of the defendant. The plaintiff says it referred to that part of the charge which immediately preceded the request made by the defendant, and which related to the question whether or not the derrick was a completed structure furnished as such by the defendant. To this time, however, there had been no exception taken to the charge. One was taken here, and that was limited, and limited in a way which we do not understand. It was as follows:

"We would like to object to that portion of the charge just now given in which it is stated that the instructions heretofore given this morning are the same as just now given as to the duty of the master to employ reasonable and ordinary care to provide reasonably safe appliances for the workmen."

We do not find that the court anywhere stated as said in that exception. We do not understand the exception, and we presume the court did not understand it. However, the matter seems to have been fully cleared up subsequently. The objection was restated by the defendant as follows:

"We would like, if your honor please, to have an instruction to the effect that it is only the lack on the part of this defendant to use ordinary and reasonable care to discover the defect that can render it liable; not that it is an insurer; not that it is a guarantor; but that it must from time to time, from day to day, exercise reasonable care to discover defects."

Thereupon the court said as follows:

"I told you [meaning undoubtedly the jury], in terms, that the defendant company was not an insurer of the appliance, but that it should use ordinary care in supplying a suitable appliance; that, if defects occurred, it should use ordinary care in discovering those defects; and that it is responsible only for ordinary care in that behalf."

Here we have finally the precise rule of the law and the precise rule claimed by the defendant, whatever suggestions may be made as to what preceded. The court thus met the requirements of Livingston v. Maryland Insurance Company, 7 Cranch, 506, 544, 3 L. Ed. 421, and Canney v. Walkeine, 113 Fed. 66, 68, 51 C. C. A. 53, 58 L. R. A. 33. We do not see how the jury could have misunderstood this, or how, after this, it can be said that there was any error in the charge of the court; and we perceive no error in the record in any particular to which our attention has been called.

The judgment of the Circuit Court is affirmed, with interest, and the defendant in error recovers his costs of appeal.

MISSEL v. LENNOX et al.

(Circuit Court of Appeals, First Circuit. October 1, 1907.)

No. 703.

LANDLORD AND TENANT—NEGLIGENCE—DANGEROUS ELEVATOR IN BUILDING—INJURY TO TRESPASSER.

Defendants were the owners of a building consisting of several floors leased to tenants engaged in the manufacture of shoes. There were two stairways reaching to the several floors from different sides of the building, and on another side was a freight elevator, the entrance to which opened on the street. There was no stairway from said entrance, and there was a sign on the elevator shaft reading, "For freight only." Plaintiff was a shoe workman, and, seeing a sign on that side of the building that vampers were wanted, asked a teamster the way into the building, and the teamster, who was going up with some leather, took plaintiff with him in the freight elevator. Plaintiff was told to return the next day, which he did, going down and coming back with some one who was using the elevator. On the second day, not having been employed, when he wished to go down, there was no one at the elevator, but the door of the shaft was open, and he stepped in upon a trapdoor, which he supposed was the elevator. In a moment the elevator ascended, opening the trapdoor, and plaintiff was caught and injured. By the provisions of the leases, the operation of the elevator was left entirely to the tenants, who kept no one in charge, but each used it when occasion required. It was rarely used except by some one bringing up or taking down freight. *Held*,

that plaintiff was not in the elevator by invitation of defendants or their tenants, either express or implied, and therefore defendants owed him no duty of care, and were not liable for his injury.

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

Sherman L. Whipple (Alexander Lincoln and Whipple, Sears & Ogden, on the brief), for plaintiff in error.

Romney Spring (Mathews, Thompson & Spring, on the brief), for defendants in error.

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

COLT, Circuit Judge. This is an action of tort to recover for personal injuries, and the case is now before this court on writ of error. At the conclusion of the evidence, the court below directed a verdict for the defendants, and the assignments of error all relate to this ruling.

The plaintiff, while seeking employment, was injured by stepping on the hatches of a freight elevator well in a building owned by the defendants, but which was leased to several tenants engaged in the manufacture of shoes.

The building is located in the city of Lynn, and is shaped like a blunted V, with the front on Liberty Square, one side on Broad street and the other side on Union street.

The entrance to the elevator shaft in which the accident happened was on Broad street. In the entrance there were no stairs leading to rooms on the upper floors, and no doors leading to rooms on the first floor. It was simply an entrance to the freight elevator. There were, however, front stairs on Liberty Square leading to the top of the building and back stairs near the engine room in the rear of the building.

Inside the entrance to the elevator, and close to it, was the sign, "For freight only." There was testimony that on the outside of the building near this entrance was a signboard, on which was placed a sign, "Vampers Wanted."

The leases contained the provision, "including the space on this floor used for stairways, halls and elevators," and also the following provisions:

"The lessee shall have the use of the stairways, hallways and elevators in common with the other tenants of said building. * * * The lessors agree to furnish heat and power at all times during the continuance of this lease, excepting nights, Sundays, and legal holidays, and except in case of fire, unavoidable casualty, accidents, strikes, and twenty-four hours each year for inspection and cleaning out of boilers, to properly heat demised premises, and to properly run the elevators and whatever shafting it may be desired to run in said premises."

The elevator well was inclosed by a sheathing, with doors on two sides on each floor. The elevator itself was merely a platform without sides, with a bar overhead, from which the elevator was supported. Trapdoors, or hatches, were placed on every floor, which were opened by an iron hoop over the top of the elevator as it ascended, and by arms on its sides as the elevator descended. There were signal bells for the elevator on each floor. These bells were not automatic, but would ring

when a button was pushed. There was also evidence that the noise made by opening and closing of the hatches, as the elevator ascended or descended, could be heard for at least two floors.

The inspector of public buildings testified that when this elevator was put in use he inspected it and approved of it, and that it was equipped in the same manner at the time of the accident. There was further testimony that elevators constructed in the same way were common in the city of Lynn. The plaintiff contended, however, that the elevator was defective in its original construction, in that it was not equipped with such devices as were required by section 27 of chapter 104 of the Revised Laws of Massachusetts:

"Elevators used for carrying freight shall be equipped with a suitable device which shall act as a danger signal to warn people of the approach of the elevator. * * * All the above construction work and devices shall be approved by the inspectors of factories and public buildings, except that in the city of Boston they shall be approved by the building commissioner, and in other cities by the inspector of buildings; but, upon the approval of said commissioner, or inspector of buildings, or inspector of factories and public buildings, any elevator may be used without any or all of such appliances or devices if the nature of the business is such that the necessity for the same will not warrant the expense."

The plaintiff was a Russian, and a vamper by trade. According to his story, on the day before the accident he was passing along Broad street, accompanied by his brother-in-law, when they noticed the sign, "Vampers Wanted," on the outside of the building. The plaintiff thereupon asked a teamster how to get upstairs. The teamster said:

"Wait; I am going to take up some leather, and I will take you upstairs on the elevator."

The teamster stopped the elevator at the third floor, and knocked on the door, and somebody opened the door. The plaintiff went out and asked where the stitching room was, and saw the forewoman of the stitching room, who told him to wait a few minutes until she got a machine ready for him; so he sat down and waited about half an hour. Then she came up to him and told him that she was very busy, that the machine required some repairing, and to come the next day. So he went to the elevator again and saw a man who was taking down some cases of shoes, and they went down together.

The next day, about 9 or 10 o'clock, he went back alone to the same place. When he got to the elevator he found nobody there, but waited until a boy came, who was going upstairs, and who took him up two flights, when he got out of the elevator and went to the stitching room. There he saw the woman in charge of the room, who told him that the machine did not run, and said: "Therefore, I have no work for you."

When the plaintiff came to the place where the elevator ran, he found the door open, and went in, thinking he was entering the elevator. It was dark inside, and the trapdoors on which he stepped looked just like the floor of the elevator. Before he stepped in he heard no bell or signal of warning that the elevator was approaching.

As soon as he entered, the doors from below began to open. At first he thought that the elevator was beginning to go up. Then, as the doors kept rising, he fell and was caught with one leg between the door and the wall of the elevator, and in consequence his leg was crushed.

The elevator did not open into the stitching room, but into the cutting room. To get from the elevator to the stitching room it was necessary to go through the door from the cutting room to the stock fitting room, and through another door from the stock fitting room to the stitching room. There was, however, an entrance to the stitching room from Liberty Square by means of stairs.

With respect to the use of the elevator, Francis A. Cummings, a witness in the employ of Randall-Adams Company, one of the tenants, and called by the plaintiff, testified as follows:

"He had seen using the elevator anybody who had business on it, like expressmen or people going after shipments of goods above him, or anything like that; that he had seen them coming up there after bags of leather and bags of rags and sometimes shoes and shipments of shoes; that there had been times when boys and men went up there to go into the different departments of the factory; that he had seen people coming up bringing bundles, packages, and things; that he would see such people using the elevator and coming from it on to the floor every day; that while he was there he never saw any one in charge of the elevator and operating it or running it regularly who was hired for that purpose."

From the foregoing evidence, it appears that when the defendants leased this building to the several tenants they intended that this elevator should be used exclusively for freight, and not for passengers or persons seeking employment. This is evident from its construction, equipment, and from the notice, "For freight only." It further appears that the building was provided with suitable means of ingress and egress in the form of front and back stairs leading to all the floors.

We also think it clear that under the provisions of the leases the control of the elevator was left with the tenants, and that at the time of the accident the Randall-Adams Company, who occupied the entire third floor, were in the possession of the doors leading to the elevator and of the hatches upon which the plaintiff was injured. The plaintiff, however, does not view this question of control as material upon the ground that the particular defect of which he complains, and of which, as he contends, there was evidence to go to the jury, was in the original construction of the elevator, and that for such a defect the responsibility always rests with the owners, notwithstanding they may have leased the entire building and thereby parted with all control of the elevators. Larue v. Farren Hotel Company, 116 Mass. 67; Shipley v. Fifty Associates, 106 Mass. 194, 8 Am. Rep. 318; Dalay v. Savage, 145 Mass. 38, 12 N. E. 841, 1 Am. St. Rep. 429; Shepard v. Creamer, 160 Mass. 496, 36 N. E. 475.

But, aside from and independently of these considerations, it is conceded that, in order to maintain this action, the plaintiff must show either an express or implied invitation extended to him by the defendants to use the elevator at the time he was injured, since, in the absence of any such invitation, the defendants owed the plaintiff no duty with respect to the construction and condition of the elevator, and cannot therefore be chargeable with negligence. Sweeny v. Old Colony & Newport Railroad Company, 10 Allen, 368, 87 Am. Dec. 644.

We have to determine therefore, whether there was any substantial evidence upon which the jury might have found either an express or implied invitation by the defendants.

The only evidence of an express invitation is that the woman in charge of the stitching room told the plaintiff to come the next day. While this may be regarded as an express invitation by the tenant, authorized by the defendants, to visit the building by the usual means of ingress and egress provided, namely, the stairways, it cannot be held to be an invitation to use the freight elevator for such a purpose. In this connection, it may also be observed that there were stairs leading to the street which were directly connected with this stitching room, and that in order to reach the freight elevator from this room it was necessary to pass through the stock fitting room to the cutting room.

It remains to consider whether there was evidence which should have been submitted to the jury of an implied invitation arising (1) from the general use of the elevator for purposes other than freight, and (2) from the situation and appearance of the premises.

If the evidence had tended to show an open, general, and well-known use of the elevator for passengers, it might have been presumed that this was done with the knowledge, acquiescence, and consent of the defendants. But the proofs fail to support any such proposition. The entire evidence on this point is contained in the testimony of Cummings, which is cited above. This testimony, at most, shows that there may have been a casual use of the elevator for purposes other than freight. It is also significant in this connection to note that the first time the plaintiff went up in the elevator it was with a teamster who was taking up some leather, and that when he came down on the elevator on this occasion it was with a man taking down some cases of shoes; and, further, that the next day, when he came back, he waited until a boy came who was going upstairs and who took him up to the third floor.

As to an implied invitation arising from the situation and appearance of the premises, the plaintiff relies, first, upon the fact that there were no means of access to the different floors in or near the freight elevator entrance other than the freight elevator; the stairs being located on another street or in the rear of the building. Since this was a freight elevator, with the proper notice that it was to be used for freight only, we do not consider the circumstance that the stairs were located at some distance on another side of the building has any bearing on the question of an implied invitation by these defendants to use this elevator for ordinary passenger service.

The plaintiff also relies upon the evidence of a signboard with a sign, "Vampers Wanted," on the outside of the building near the entrance to the elevator, as tending to prove an implied invitation. Upon this point it may be said, first, that there was no evidence that the defendants had any knowledge that this notice or similar notices were ever placed on the building near the elevator entrance.

Again, if we assume that some of the tenants had placed this notice on the outside of the building, this circumstance would not be sufficient, upon the whole state of facts presented in this case, to charge the owners of the building with an implied invitation to persons seeking employment of the tenants to make use of this elevator as the proper means of ingress and egress to and from the building.

Upon full consideration of the whole evidence, we find no error in the ruling of the Circuit Court.

The judgment of the Circuit Court is affirmed, and the defendants in error recover costs in this court.

GREEN v. DAVIS.

(Circuit Court of Appeals, Sixth Circuit. October 28, 1907.)

No. 1,663.

EJECTMENT—SUFFICIENCY OF PETITION—DESCRIPTION OF LAND.

It is permissible for a petition in ejectment to describe the land sought to be recovered as all of a certain tract, except portions thereof embraced in prior grants and patents from the state; but in such case, to support a judgment for the plaintiff, the parts excluded must be accurately described.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Ejectment, §§ 158-164.]

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

W. O. Harris, for plaintiff in error.

Lewis Edelen, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. This was an action in ejectment to recover from George Green and numerous other defendants certain lands embraced within the exterior boundaries of a patent issued by the state of Kentucky, September 25, 1845, on a survey dated March 3, 1845, to Ledford, Skidmore & Smith, which called for 86,000 acres. This land was situated in the southeastern part of Kentucky. Its boundaries were defined by this court in the case of Bramblett v. Davis, 141 Fed. 776, 72 C. C. A. 204. They include a parallelogram about 25 or 26 miles long and 5 or 6 miles wide. The present suit was brought to eject those persons who now wrongfully occupy the part of the original patented tract which still belongs to Davis, as trustee, under conveyance from the original patentees. The petition alleged that Davis, as trustee, was the owner and entitled to the possession of the original tract of 86,000 acres, describing it by the boundaries set forth in the patent, with the following exceptions:

"But excepting therefrom such portions thereof as are embraced within the valid surveys or patents made or issued prior to March 3, 1845, and further excepting therefrom such portions as are embraced within" certain deeds described in the petition—some made by Ledford, Skidmore & Smith, and some by Naomi Lawton Davis.

The defendant Green moved the court to require the plaintiff to make the petition more definite and certain by describing the part or parts within the exterior bounds of the patent set out in the petition which were claimed and sought to be recovered by the plaintiff. He also filed a special demurrer on the ground that the petition did not state that the matter in controversy between the plaintiff and him ex-

ceeded the sum or value of $2,000, and, finally, a general demurrer on the ground that the petition did not state facts to constitute a cause of action. These objections were overruled, an order was made continuing the cause, there having been an order of survey made, and then an amendment to the petition was filed which reads as follows:

"Comes now the complainant, Charles Henry Davis, trustee, etc., and by leave of court amends his petition herein, and for amendment states: That the tracts of land excluded from the exterior boundaries of the Ledford, Smith & Skidmore 86,000-acre patent described in the petition for which patents have been issued prior to the date of that patent are so numerous that they could not reasonably be set out in the body of this amendment without great prolixity. For this reason, and for the greater convenience of the court and of the parties to this suit and all concerned, the complainant files herewith as part hereof an exhibit, marked 'X-9,' to which he refers and makes it part hereof as fully as if the same were herein set out, which exhibit shows the patents senior to the aforesaid Ledford, Smith & Skidmore patent, which conflict in whole or in part with that patent, so far as the complainant has been able to ascertain. Complainant says he cannot state with certainty that each of the patents contained in the said exhibit does actually conflict with the said Ledford, Smith & Skidmore patent; but from the best information he has on the subject, in the absence of an actual survey of said patent, he believes that each of them does to some extent conflict with said patent. It is impossible, though, for the complainant to state positively or accurately to what extent the said patents do so conflict, or that all of them conflict at all, without an actual survey of the said 86,000-acre tract, such as has been ordered to be made in this case, for the reasons, amongst others, that many of the aforesaid senior patents described in said exhibit will be found to conflict with each other, in some cases as many as three of said patents will be found to overlap each other to a greater or less extent, and others of them are so indefinite in their descriptions that they will be held to be utterly void and not valid as supporting title senior to the title of the complainant for any land whatever; but to what extent and in what numbers the said senior patents contained in the aforesaid exhibit do overlap each other, and to what extent and in what number they will be found to be void for uncertainty in the description, the complainant is unable to state positively until after the completion of the survey which has been ordered by the court in this case. The complainant alleges, therefore, that the patents referred to and described in the aforesaid exhibit are all the senior patents which he has been able to find, believing them to be located in whole or in part within the said 86,000-acre patent, and it may turn out by the survey that he is mistaken in thinking that all the patents contained in said exhibit are located within the 86,000 acres aforesaid; and the complainant alleges that he files the aforesaid exhibit as containing to the best of his knowledge, information, and belief a true list of the tracts of land which were meant and referred to as exclusions from the complainant's title to the said 86,000-acre tract, but there may be other tracts not described in said exhibit which will turn out to be found located within the 86,000-acre tract that are superior to it, or it may turn out that some of those described in the exhibit as senior will be found not to be senior or superior to the title of the complainant. The said exhibit also contains the full descriptions of all tracts of land referred to in the petition in this case as having been conveyed by complainant and by his predecessors in title, back to and including the patentees, Ledford, Smith & Skidmore. Wherefore the complainant prays that this amendment may be read and considered as part of his original petition, and he prays for the relief therein prayed for."

A package, marked "Exhibit X-9," filed with the amendment to the petition, which contained copies of 434 patents granted prior to the Ledford, Skidmore & Smith patent of 1845, and therefore senior thereto, had upon it the following indorsement:

"This package contains copies of patents senior to the Ledford, Skidmore & Smith patent No. 6,975; also descriptions of deeds excepted in original deed

to Edward M. Davis from Noble Smith, Henry Skidmore, and James T. Loyd, and of deeds made by the Davis family to others, so far as I have been able to determine them without actual survey. It must be understood however: (1) That it is not positively known that all of these patents are inside of Ledford, Skidmore & Smith patent No. 6,975. (2) That there may be others not known to me which upon an actual survey may be found inside. (3) The exact areas, boundaries, or locations of these patents cannot be determined without actual survey made upon the ground. The list is the best which can be produced from our present knowledge, but Mr. Davis will not be held bound for the completeness or accuracy of the list, or the areas excluded thereby.

"Will Ward Duffield."

Following the filing of the amendment to the petition, the defendant Green demurred on the ground the petition did not describe the land sued for so it could be identified, and also on general grounds, and moved the court to require the plaintiff to make his petition more definite and certain by describing the land claimed so that it might be identified. This demurrer and motion were overruled. The defendant Green, declining to plead, moved the court to enter judgment, which was overruled, and then moved the court to require the plaintiff to elect either to proceed to judgment or dismiss the petition. This motion was sustained, and the plaintiff elected to ask for judgment in accordance with the petition as amended. Such judgment was entered for the ownership and immediate possession of the original tract patented to Ledford, Skidmore & Smith, as described in the original petition, "but excluding therefrom the following described tracts described in the plaintiff's petition and amended petition, to wit." Then follows the conveyances and patents set out in the petition and amendment to the petition and superior to the title of plaintiff. The errors assigned are the overruling of the general demurrer and the motion to require the plaintiff to make the petition more specific and certain, and the rendition of the judgment.

The difficulty in this case arises not so much from the allegations of the petition as from those of the amendment subsequently filed. The petition states that the plaintiff was the owner and entitled to the possession of the tract of land granted by Kentucky, on September 25, 1845, to Ledford, Skidmore & Smith, "except the exceptions hereinafter named," and then describes the original patent, and adds:

"But excepting therefrom such portions thereof as are embraced in the valid surveys or patents made or issued prior to March 3, 1845, and further excepting therefrom such portions thereof as are embraced within" certain deeds which are described.

The petition further alleged that each of the defendants had wrongfully and unlawfully and without right entered upon a portion or portions of the land so claimed and owned by plaintiff, and hereinbefore described as embraced within the boundaries of said 86,000-acre tract—

"not lying within any of the exclusions therefrom aforesaid, and without right detained the same, the boundaries of which portion or portions of said lands so entered upon and detained by said respective defendants being unknown to the plaintiff."

From all this it clearly appears that the portion of the original Ledford patent which is claimed by the plaintiff and sought to be recovered must be reached by the method of exclusion. This court has al-

ready determined the boundaries of this patent; but a large portion of the tract is covered by patents and conveyances, patents made before the Ledford patent, and conveyances made since by Ledford and his associates and successors. No question is made but that the conveyances made subsequent to the patent are sufficiently described. The prior patents were originally described in the petition in a general way, thus:

"But excepting therefrom such portions thereof as are embraced within valid surveys or patents made or issued prior to March 3, 1845."

We are relieved from considering whether this would have been a sufficient description, because the plaintiff, of his own accord, filed an amendment which made this general averment specific by including in an exhibit, which was made a part of the petition, all the prior patents which conflicted in whole or in part with the Ledford patents, so far as he had been able to ascertain them. The question, therefore, now is whether the petition as thus amended is sufficient. It must be remembered that the only land claimed by the petitioner, the only land which he claims the defendants had wrongfully and unlawfully and without right entered upon and detained, is land "not lying within any of the exclusions therefrom aforesaid," and therefore it is necessary to know what the exclusions are. The land he seeks to recover is land lying within the Ledford patent, but outside of the exclusions; that is, outside of all the prior patents. Now, in the amendment he states, as we have indicated, that he has included in the exhibit all the prior conflicting patents so far as he has been able to ascertain. But he goes on to scatter doubt by saying:

"Complainant says he cannot state with certainty that each of the patents contained in the said exhibit does actually conflict with the said Ledford, Smith & Skidmore patent; but from the best information he has, in the absence of an actual survey, he believes each of them does to some extent conflict with such patent. It is impossible * * * to state positively or accurately to what extent the said patents do so conflict, or that all of them conflict at all, without an actual survey, * * * such has been ordered * * * in this case, for 'these' reasons: That many of the * * * senior patents described in said exhibit 'are' found to conflict with each other, in some cases as many as three * * * will be found to overlap each other, and others are so indefinite in their descriptions that they will be held to be utterly void and not valid as supporting title senior to the title of the complainant; * * * but to what extent and in what numbers the senior patents * * * overlap each other, and to what extent and in what numbers they will be found to be void for uncertainty in the description, the complainant is unable to state positively until after the completion of the survey which has been ordered by the court in this case."

The amendment further states that the plaintiff files the exhibit as containing, to the best of his knowledge, information, and belief, a true list of the tracts of land which were meant and referred to as exclusions from the complainant's title to the said 86,000-acre tract; but there may be other tracts, not described in said exhibit, which will turn out to be found located within the 86,000-acre tract that are superior to it, or it may turn out that some of those described in the exhibit as senior will be found not to be senior or superior to the title of the

complainant. The indorsement by the plaintiff on the package of the prior patents, says:

"It must be understood however: (1) That it is not positively known that all of these patents are inside of Ledford, Skidmore & Smith patent No. 6,975. (2) That there may be others not known to me which upon an actual survey may be found inside. (3) The exact areas, boundaries, or locations of these patents cannot be determined without actual survey made upon the ground. The list is the best which can be produced from our present knowledge, but Mr. Davis will not be held bound for the completeness or accuracy of the list, or the areas excluded thereby."

We understand that the stringency of the old rule is somewhat relaxed, and "certum est quod certum reddi potest" (Glacier Mountain Silver Min. Co. v. Willis, 127 U. S. 471, 480, 8 Sup. Ct. 1214, 32 L. Ed. 172); but the trouble is that this amendment not only does not furnish the required information, but fails to point us where to get it. The natural method, in an action of ejectment, would have been to describe by metes and bounds the portion of the original patent which was sought to be recovered; but this could not be done without a survey, and no survey had been made. Therefore the method of exclusion was used. This was proper enough. Maxwell Land Grant Co. v. Dawson, 151 U. S. 586, 605, 14 Sup. Ct. 458, 38 L. Ed. 279, and the cases cited on the latter page. But, to locate definitely by the process of exclusion, it is necessary to describe accurately the exclusions. This cannot be done by the information contained in the amendment. The exhibit does not assume to set out a complete and accurate list of all the prior patents. It states that some may be missing, that others may be invalid, and that others may overlap, and it does not point out the patents to which these statements refer. The defendants are therefore left in doubt as to the extent of the exceptions, and, since the plaintiff seeks to recover all of the original patents outside of the exceptions, the petition as amended does not inform them of what the plaintiff charges them with wrongfully detaining and seeks to recover. Moreover, this lack of information leaves to the marshal or executive officer of the court, under the judgment, the need and power of determining a complete list of the prior patents, with their validity and location. He may determine whether a patent is within the boundaries of the original patent, whether it was prior and superior, whether it is valid, and the location of the land described by it. We do not believe that, under the law of Kentucky, such judicial power should be vested in the marshal. Farmer & Arnold v. Samuel, 4 Litt. 187, 193, 14 Am. Dec. 106. Therefore we hold the court erred in not requiring the petition, with the amendment, to be made more definite and certain.

The judgment of the lower court is reversed.

SHINE et al. v. FOX BROS. MFG. CO.

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

INJUNCTION—GROUNDS—BOYCOTT BY LABOR UNIONS OF PRODUCT OF NONUNION FACTORY.

Complainant company operated a factory for the manufacture of sash, doors, and other articles of "trim" for buildings in St. Louis, employing from 50 to 75 men. It conducted its factory on the open shop principle, employing union and nonunion men without discrimination; but all of its workmen were in fact nonunion. Defendants were labor unions, and their representatives comprising carpenters and members of the building trades. They appointed a committee for the purpose of unionizing complainant's and other nonunion shops, which committee did not attempt to induce complainant's employés to join the union, but tried to induce complainant to employ only union men and to discharge all employés who did not join the union. When complainant refused, they issued circulars giving a list of all union shops in the city engaged in the same business, and stating that union carpenters would not be permitted to work upon building materials not the product of a union shop, which they sent to building contractors and owners, and by threatening, and in some instances calling, strikes of their union workmen, they compelled a number of contractors who had been customers of complainant to sign agreements not to buy from it in the future, and in other ways undertook to make it impossible for complainant to do business unless it acceded to their demands. *Held*, that their concert of action and their acts constituted an unlawful interference with complainant's business, which entitled it to an injunction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 174.]

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

George H. Shields and Shepard Barclay (Thomas T. Fauntleroy and Cornelius H. Fauntleroy, on the brief), for appellants.

Herbert R. Marlatt and F. H. Sullivan, for appellees.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

HOOK, Circuit Judge. This is an appeal from an order temporarily enjoining certain labor organizations and their officers from boycotting the manufacturing company and the product of its factory. The action of the trial court was in view of the following facts: The complainant, the manufacturing company, is engaged in the manufacture of sash, doors, blinds, and other articles used in the construction of buildings. Its factory is located in St. Louis, Mo., and is what is known as an "open shop"; that is to say, the complainant did not discriminate between union and nonunion labor, but left that matter to the voluntary choice of its employés. So far as complainant was concerned, workmen of both classes could obtain employment there. In fact, however, its employés, numbering from 50 to 75, were nonunion. The rules of the union labor organizations did not permit their members to work in an open shop except in special cases and for specific purposes. There were 23 open shop factories in St. Louis like complainant's, and their product, which was commonly called "trim," was about 80 per cent. of the total amount used annually in the building operations in that city. The employés in these factories, about 1,000

in number, were nonunion, excepting perhaps 3 or 4. By far the greater proportion, probably upward of 90 per cent., of the carpenters engaged in the erection of buildings in St. Louis belonged to union labor organizations. In this state of affairs, a representative of the national organization known as the "United Brotherhood of Carpenters and Joiners of America" came from New York to St. Louis for the purpose of organizing the open shop factories in St. Louis into closed or union shops. He took charge of and directed the course of the defendants to accomplish that end. Although action was taken against some of the other open shop factories, it is quite clear from the evidence that complainant was selected for especial attention. There seemed to be in its case more persistent and concentrated efforts. The defendants did not go about it by approaching complainant's employés and persuading them to join the union labor organizations, but they endeavored to make it impossible for complainant to continue its business unless it would adjust the wages and hours of labor to the union scale and require its employés to join the unions or leave its service. The defendants did not seek the assent or co-operation of the nonunion employés. Their efforts were not solicited by those employés, nor did the complainant invite their intervention. The relations between complainant and its employés were mutually satisfactory. There was no strike, and no controversy about wages, hours, or other conditions of service. The defendants sought to accomplish their purpose in this way: Upon the arrival of the organizer, a committee known as the "trim committee" was appointed by the central governing body of the defendant organizations. The organizer was ex officio a member of this committee. To them was committed the active duty of organizing the open shops. They caused to be printed circulars giving lists of the factories which were run as closed shops, and delivered them to contracting builders and architects of St. Louis, who would have to do with the preparation of plans and specifications and the construction of buildings. They also gave them to owners of property who were about to improve the same. They watched the records of building permits to learn as early as possible of projected building enterprises. The list of closed shops implied that all those not named in the list were, to use the expression employed, "unfair." The circulars contained a warning that union carpenters would not be permitted to work upon any building materials not the product of a closed shop. They kept track of the output of complainant's factory and where it was delivered for use in building. Some contractors who had been customers of complainant for many years were required to sign a contract which put an end to this patronage. Building operations in which the product was used were suspended by strikes of union workmen which were ordered by the defendants. In some instances the union carpenters did not desire to cease work, but they were required to do so by threats of discipline at the hands of the organizations, which meant fines and ultimate expulsion. In one instance, union workmen, upon a building in which complainant's product was used, were fined by their organizations for refusing to cease work at the direction of individual defendants, and the contractor who employed them, though not a member of any union, was also fined and required to pay a sum

of money as a condition to his being allowed to continue work with the use of union labor. In most instances where obligations had been incurred by builders requiring them to use the product of complainant's factory, they were allowed to continue with union labor upon the condition that a contract be executed, wherein the builder agreed that in the future he would not use such material. The defendant organizations also had what is known as a "we don't patronize" list. This was applied to a brewing association which had allowed nonunion "trim" to be used in the construction of one of its buildings. When the brewing company learned that its product was being boycotted, it canceled its contract for the use of the nonunion product, and the organizer sent forth a statement that the concern was no longer unfair to union labor. It does not appear, however, that this method was employed against the complainant.

We are of the opinion that the combination and concert of action of the defendants and the character of the active measures taken against the complainant, its product and its customers, including the enforced signing of contracts by such customers putting an end to future business relations with the complainant, and the notices and warnings to those who might become customers in the future, make the case indistinguishable from that of Hopkins v. Oxley Stave Co., 83 Fed. 912, 28 C. C. A. 99.

Much evidence offered by both parties which was germane to the comprehensive charges made in the bill was excluded at the hearing and does not appear in the record. The proper practice, even though the admissibility of the evidence was doubtful, is shown in Blease v. Garlington, 92 U. S. 1, 23 L. Ed. 521, and Dowagiac Mfg. Co. v. Lochren, 143 Fed. 211, 74 C. C. A. 341.

The order of the Circuit Court is affirmed.

GRAND TRUNK RY. CO. OF CANADA v. FLAGG.

(Circuit Court of Appeals, First Circuit. October 24, 1907.)

No. 735.

1. RAILROADS—ACTION FOR INJURY TO PERSON ON TRACK—PROOF OF SUFFERING.
A child five years old was struck by a railroad engine, so as to break in his skull, exposing and crushing parts of the brain. He breathed for three-quarters of an hour after, and at times moaned. *Held*, that in a common-law action by his administrator to recover damages for his suffering resulting from his injury, which right of action survived to plaintiff by statute, evidence of such facts was insufficient to show that the child in fact suffered or to authorize a recovery.

2. SAME—INJURY TO TRESPASSER—EVIDENCE OF WANTON NEGLIGENCE.
A railroad company owes no duty of care to a trespasser on its track, except to refrain from his willful or wanton injury, and cannot be held liable for the injury of a child so trespassing, where the engineer of the train which struck him testified that he came upon the track so short a distance ahead of the engine that it was impossible to stop the train before striking him, and where the engineer's testimony was uncontradicted, except by evidence which at most could no more than raise a probability that the child had walked for some distance on the track.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1238, 1239, 1359–1361.]

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

Leroy L. Hight (Clarence A. Hight, on the brief), for plaintiff in error.

Henry W. Oakes (Oakes, Pulsifer & Ludden, on the brief), for defendant in error.

Before COLT, PUTNAM, and LOWELL, Circuit Judges.

LOWELL, Circuit Judge. Ernest Flagg, the plaintiff's intestate, a child five years old, was struck by the defendant's engine, and died, as will hereinafter be set out more fully. In so far as the suffering caused him by the injury complained of gave a right of action to the child in his lifetime, this action survived to the plaintiff, by virtue of the statutes of Maine, and the plaintiff thereupon sued the defendant at law, and recovered judgment upon the verdict of a jury. At the trial the defendant seasonably moved the Circuit Court to direct a verdict in its favor, and it duly excepted to the court's refusal. The motion was urged upon two grounds, which sufficiently appear from the record as a whole.

1. That there was no evidence of the child's suffering. The action was based upon a right recognized by the common law, apart from statute. The plaintiff's right, thus sued on, gave him damages only for the suffering of his intestate, not for his intestate's death. If the child did not suffer, his administrator cannot recover in this action. The defendant's engine struck the child's forehead, so as to break in the skull and to force back the top of it, exposing and crushing parts of the brain. The child breathed for three-quarters of an hour. As evidence of his suffering during this time, the plaintiff relied upon his moans, the motions of his lips, and certain sounds which his father took to be the words "Papa" and "Mamma." The child was congenitally deaf, and therefore almost dumb. Momentary consciousness of suffering, incidental to death, and at law inseparable from it, may not be excluded by this evidence; but we hold that the plaintiff offered no proof of that suffering, for which alone the law in its practical administration can award damages. The Corsair, 145 U. S. 335, 348, 12 Sup. Ct. 949, 36 L. Ed. 727. It follows that the learned judge below erred in refusing to direct a verdict for the defendant.

2. As additional evidence of the child's suffering may be introduced at the next trial, we are obliged to examine also the other ground upon which the defendant rested its motion for a verdict. It contended that there was no evidence of the negligence of its engineer, the defendant's servant alleged to be in fault. When struck, the child was a trespasser upon the railroad track. As to him, the engineer was required only to refrain from willful or wanton injury. The engineer testified that the child sprang upon the track when the train was but 15 or 20 rods away. To stop the train within that distance was impossible. There was evidence that the child was seen walking down the track just before the engine struck him. The plaintiff contended that the jury might infer the child's longer presence on the track from the fact that the private way, by which the child probably entered the railroad location, crossed

it 78 feet from the place of the accident, and so that the child had probably walked along the track for that distance. As the track was straight, and the view unobstructed, the plaintiff further contended that the engineer must have seen him for some time before the accident, and therefore must have run over him recklessly. But to rely upon these mere probabilities is to disregard direct evidence for conjecture. The probabilities are too slight to warrant a verdict for the plaintiff. The circumstances of the case are too little known. There is no evidence in the record to show that the engineer saw the child while it was possible to stop the train. Unless he did, the defendant corporation was not at fault toward a trespasser. On this ground, also, the jury should have been directed to return a verdict for the defendant.

The judgment of the Circuit Court is reversed, and the case is remanded to that court, with directions to set aside the verdict and for further proceedings not inconsistent with this opinion; and the plaintiff in error recovers its costs of appeal.

PUGET SOUND NAVIGATION CO. v. LAVENDAR et al.

(Circuit Court of Appeals, Ninth Circuit. October 14, 1907.)

No. 1,425.

1. COURTS—FEDERAL COURTS—DETERMINATION OF QUESTIONS OF JURISDICTION.
   A Circuit Court of Appeals is bound to inquire, first, as to its own jurisdiction of a cause brought before it by appeal or writ of error, and, second, as to the jurisdiction of the court from which the record comes, even though the question is not raised by the parties.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 1103.
   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. APPEAL AND ERROR—REVERSAL FOR JURISDICTIONAL DEFECTS—DISPOSITION OF CAUSE.
   Where a Circuit Court was without jurisdiction of a cause because of the absence from the complaint of necessary jurisdictional allegations, the appellate court, in reversing the judgment therein for that reason, may properly remand the cause and direct that plaintiff be permitted to amend the complaint in that respect, especially where the question of jurisdiction was not raised in the trial court.

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

Ira Bronson and D. B. Trefethen, for plaintiff in error.

Byers & Byers (Clay Allen, of counsel), for defendants in error.

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

GILBERT, Circuit Judge. Mary R. Lavendar, as plaintiff, brought this action to recover damages against the plaintiff in error and Charles Stanley and Samuel Barlo, as defendants. The complaint shows no jurisdiction on the ground of diversity of citizenship. It alleges the citizenship of the plaintiff in error, but makes no allegation whatever as to the citizenship of the other parties to the action. No other ground of jurisdiction is suggested. This court is bound to inquire, first, as to

its own jurisdiction, and, second, as to the jurisdiction of the court from which the record comes, and this even when the question is not raised by the parties to the action. M. C. & L. M. Ry. Co. v. Swan, 111 U. S. 379, 4 Sup. Ct. 510, 28 L. Ed. 462.

The judgment must therefore be reversed for want of jurisdiction in the Circuit Court.

But, while reversing the judgment, this court may properly direct that the plaintiff in the action be permitted to amend the complaint so as to show diverse citizenship. Robertson v. Cease, 97 U. S. 646, 24 L. Ed. 1057; Morgan v. Gay, 19 Wall. 82, 22 L. Ed. 100; Johnson v. Christian, 125 U. S. 645, 8 Sup. Ct. 1135, 31 L. Ed. 820; Stuart v. City of Easton, 156 U. S. 46, 15 Sup. Ct. 268, 39 L. Ed. 341; Rondot v. Township of Rogers, 79 Fed. 677, 25 C. C. A. 145.

In Robertson v. Cease, it is said:

"Such a course is peculiarly proper in this case in view of the failure of the plaintiff in error to make in the court below the precise question of jurisdiction which he urges upon our consideration."

In Rondot v. Township of Rogers, Judge Taft said:

"It is doubtless true that the plaintiff in error can amend his declaration so as affirmatively to show his alienage, and thus that the same questions will probably be presented on a new trial as now arise upon the record. It would shorten the litigation, therefore, were we now to pass upon the questions raised, but the Supreme Court has not deemed it proper to take such a course in a case like this. Robertson v. Cease, 97 U. S. 647, 24 L. Ed. 1057."

The judgment of the Circuit Court is reversed, with costs to the plaintiff in error, and the cause is remanded to the Circuit Court, with leave to apply for amendment, and for further proceedings.

INTERNATIONAL POSTAL SUPPLY CO. OF NEW YORK v. AMERICAN POSTAL MACHINES CO.

(Circuit Court of Appeals, First Circuit. October 9, 1907.)

No. 664.

1. PATENTS—INFRINGEMENT—STAMP CANCELING MACHINES.
   The Laass and Hey patent, No. 388,366, and the Hey patent, No. 632,527, for stamp canceling machines of the type in which the letter actuates the printing mechanism, construed, and *held* not infringed.

2. SAME.
   Bates v. Keith, 84 Fed. 1014, 28 C. C. A. 638, as to implements of universal use, applied, and decision of the Circuit Court of Appeals for the Second Circuit in Groth v. International Postal Co., 61 Fed. 284, 288, 9 C. C. A. 507, followed.

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

For opinion below, see 141 Fed. 969.

Arthur E. Parsons and Benjamin Phillips (Alfred H. Hildreth, on the brief), for appellant.

William K. Richardson (Alexander D. Salinger, on the brief), for appellee.

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

PUTNAM, Circuit Judge. This is a bill in equity for the alleged infringement of three patents, as follows: The first, issued on May 4, 1886, to George W. Hey and Emil Laass, on an application filed February 26, 1884, No. 341,380; the second, issued on August 21, 1888, to George W. Hey and Emil Laass on an application filed on June 2, 1884, No. 388,366; the third, issued on September 5, 1899, to George W. Hey, on an application filed on September 17, 1884, No. 632,527. The Circuit Court dismissed the bill, and the plaintiff appealed to us, limiting its appeal to the second and third patents, namely, No. 388,366 and No. 632,527.

The specification of the first patent states that it is for "improvement in marking and stamping apparatus," and that the object of the invention was to mark or stamp mail matter and analogous articles in an expeditious manner, and that, to this end, the invention consisted of novel means for automatically applying the stamp. There were 18 claims in all. The only one we need now notice is the following:

"4. In combination with a letter-supporting bed, a carrier for moving the letter over the bed, a stamp or marker, and a mechanical engaging-finger to engage the moving letter and transmit motion to the stamp or marker, substantially as described."

The application for the second patent—that is, No. 388,366—contains the following:

"Our invention relates to improvements in stamping apparatus of the character set forth and fully described in our application for letters patent filed February 26, 1884, patented May 4, 1886, No. 341,380; and it has for its object the production of an apparatus with which letters and mail-matter generally may be automatically stamped while the said letters or mail-matter are in transit on a letter-supporting bed, over which the aforesaid mail-matter is moved; and the invention consists, essentially, in the combination, with the letter-supporting feed-bed, of a stamp normally out of the path of movement of the mail-matter and a stamp tripper or releaser normally in said path."

The application then proceeds to state some further details to which the patent relates. At the close the following appears:

"We do not claim, broadly, the combination with a letter-supporting feed-bed, of a movably-supported marking-roller, held intermittently in the letter-path; neither do we claim, broadly, the combination, with a letter-feed, of a marking-roller and a contact-finger connected to operate the marking-roller without stopping the letter to control the registry of the marking die thereon, the same forming the subject-matter of a separate pending application in favor of George W. Hey."

It is apparent that these extracts from the application for patent No. 388,366 were not completed when the application was filed, because the first one refers to a subsequent date of May 4, 1886. The second one is confused, but, probably, it refers not only to the application for patent No. 341,380, but, also, to the application for patent No. 632,527, which was filed between the time the application for patent No. 388,366 was filed and the time of its issuance. These topics, however, will not prove of consequence.

Patent No. 388,366 contains five claims, of which the only ones we need notice are as follows:

"1. In a machine for stamping or marking mail-matter, the combination, with the supporting-feed bed, of a stamp normally out of the path of move-

ment of the mail-matter, and a stamp tripper or releaser normally in said path.

"2. In a machine for marking mail-matter, the combination of an oscillating frame carrying a marking-roller, and a lever provided with a catch for engaging the oscillating frame and extending into the path of the moving mail-matter."

The specification of the third patent states that it relates to machines for automatic stamp-canceling, and that such machines had not been successful in practical operation for lack of proper registration. The specification is very long, covering many details to which apparently the patent relates; and there are 69 claims. We need repeat only claim 4:

"4. In a mail-marking machine for automatically marking mail-matter, the combination with a feed member and a marking member having a die; of means for controlling the registration of the die upon the mail-matter."

The underlying feature of all these three patents is that, in some manner, the series of mechanical events which results in stamping the letter is set in motion by contact with the letter itself. It seems to be admitted that the patent which first issued, No. 341,380, was the first in the art in which this important feaure was developed. Notwithstanding all that is said to the contrary, we cannot deny that, looking at this feature broadly, it is an essential element in the respondent's machine. If, therefore, we had to deal with any patent belonging to the complainant in which the claims covered this broad feature, we might be compelled to doubt the conclusion reached by the Circuit Court; but, as the case stands, and as we are not dealing with the first patent to Laass and Hey, we must affirm it.

The record here is very voluminous, containing over 3,000 pages. The opinion of the learned judge of the Circuit Court was evidently elaborated with great care. It fully explains all the facts necessary for an understanding of the case as it appears before us. The questions involved are such that, probably, no future case will present the same conditions, so that it would be of no benefit to either the bench or the profession to extend this opinion by restating generally what has been already fully set out.

The complainant contends that the first claim of the second patent, No. 388,366, is so broad that it covers "every kind of a stamp normally out of the path of the moving mail-matter, and every kind of a tripper or releaser for the stamp normally in said path." It necessarily rests its case on this proposition. The opinion of the learned judge of the Circuit Court has met this fully in detail, and we need not go so much into it as he has done. It is enough for us to say that the first patent to Laass and Hey, which, as we have said, is not now in issue, exhibited one method by which stamping a letter is accomplished by a stamp "normally out of the path of movement of the mail-matter," made effective by the result of a contact between the letter and something normally in its path; so that what appears in patent No. 388,366, if invention at all, is simply for an improvement on what was described by the earlier one.

Claim 1 of patent No. 388,366 substituted as a connecting link between the letter and the stamp or die a series of mechanical devices in lieu of an electric current shown in patent No. 341,380. In the

state of the art as it now exists, and as it existed when these patents were applied for, the making of such a substitution was prima facie within the rules as to equivalents. If the respondent is correct in stating its position, the direction of activity was reversed between the machines of the earlier and the later patents; but this, also, in the state of the art, was prima facie within the rules as to equivalents. There are no other differences. Therefore it is clear that claim 1 of the second patent must have been purely for improvements in details, as stated in what we have quoted from the specification; and, as the learned judge of the Circuit Court has well said, in substance, claim 2 of the second patent is more clearly subject to the same observation. The details in the respondent's machine vary from patent No. 388,366 at least as widely as No. 388,366 varies from the one which preceded it. This, also, was the substantial conclusion of the Circuit Court of Appeals for the Second Circuit in Groth v. International Postal Supply Co., 61 Fed. 284, 288, 9 C. C. A. 507; so that, not only because our own investigations lead to the same result as that reached by the Circuit Court, but to one in harmony with an earlier decision of the Circuit Court of Appeals for another circuit, we hold that the appeal, so far as patent No. 388,366 is concerned, cannot avail.

Coming to patent No. 632,527, which we have said relates so far as we are concerned to registration, the learned judge of the Circuit Court observed, in effect, that it was impossible that the respondent's device assimilated with the complainant's, because in the complainant's machine we start with a die normally at rest, while in the respondent's we start with a die which is always rotating. Therefore the problem of the complainant's machine must be solved by controlling the die, while that of the respondent's must be solved by controlling the feed. We may also add that, in the state of the art, registration is a matter of such universal use and application that mechanism providing therefor is usually matter of detail. As with guides, moulding tools, and other implements of universal use, every mechanic enjoys the public right to organize methods of registration to meet the peculiarities of his own mechanism. Bates v. Keith (C. C.) 82 Fed. 100, 103; Id., 84 Fed. 1014, 28 C. C. A. 638. Consequently, as we approve the distinctions made by the learned judge of the Circuit Court, we must accept his conclusion as correct; and thus the appeal is entirely disposed of.

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

WEISSENTHANNER v. DODGE METALLIC CAP CO.

(Circuit Court, D. New Jersey. October 26, 1907.)

PATENTS—ANTICIPATION—BOTTLE STOPPERS.

The Weissenthanner patent, No. 801,281, for a sheet metal stopper for bottles, etc., having a securing flange provided with a tongue, and being weakened by slits adjacent to said tongue so that it may readily be ruptured and removed by means of the tongue, is void for lack of novelty and invention, having been anticipated by the Calleson patent, No. 708,528; the two devices differing, if at all, only in the degree to which the slits are extended.

In Equity. On final hearing.

Mastick & Jones (Charles S. Jones, of counsel), for complainant.
Howson & Howson (Hubert Howson, of counsel), for defendant.

CROSS, District Judge. The complainant, by its bill of complaint, charges the defendant with infringement of claims 4, 14, and 21 of patent No. 801,281, issued to him October 10, 1905, for a sheet-metal closure for bottles, jars, etc. The claims involved in this controversy are as follows:

"A sheet-metal stopper having a circumferentially-integral flange adapted to secure the stopper to a receptacle; said flange being weakened in a vertical direction and also weakened in a direction extending circumferentially thereof, whereby when the flange is ruptured the stopper may be readily removed from the receptacle."

"A sheet-metal stopper having a circumferentially-integral securing-flange adapted to be bent into locking relation with a suitable shoulder on a receptacle; said flange being provided with a tongue and being weakened in a vertical direction adjacent to said tongue, whereby the flange may be ruptured and released from the locking-shoulder by means of the tongue, and said flange being weakened in a direction extending circumferentially thereof adjacent to said tongue, whereby when the flange is ruptured the stopper may be readily removed from the receptacle."

"A sheet-metal stopper having a circumferentially-integral securing-flange and a detaching-tongue integral therewith and forming a part thereof; said tongue being detachably connected with the adjacent parts of said flange, and said flange having a weakened line extending circumferentially thereof adjacent to said tongue, whereby the flange may be easily ruptured by the tongue and the stopper readily removed from the receptacle."

The patentee, in speaking of the prior art, and of the merits of his invention, uses the following language:

"As heretofore constructed, sheet-metal stoppers have been provided with continuous flanges having detachable connections; the intention being to form the stoppers of sufficiently thin material to enable them to be readily removed when the connecting portions of the flange are separated and to so dispose a detaching-tongue that a force applied to the tongue will release the flange and permit the stopper to be removed. These stoppers, however, have failed for two principal reasons: In the first place, in none of the prior devices is the construction such that the flange may be readily released by a pull on the tongue and the detachable connections thereof at the same time strong enough to effectively hold the contents of the vessel under pressure. In the second place, in none of the prior devices is the construction such that the stopper may be readily detached from the bottle, even when the connected portions of the flange are separated.

"My invention has for an object to provide a construction whereby the stopper may be readily removed from the vessel by the ordinary user without special care or skill. More particularly, the objects of the invention are to provide in a tongued and flanged stopper a construction whereby a comparatively slight force applied to the tongue may release a portion of the flange from the shoulder of the bottle, so that the stopper may be readily removed from the vessel. Other objects of the invention will more fully appear from the following description:

"I have found that by weakening the flange of the stopper in a vertical direction, so that the flange may be easily ruptured, and weakening the flange also in a circumferential direction adjacent to the point where it is weakened vertically, the stopper may not only be easily released from its locking relation, but it may also be readily removed from the receptacle."

There are certain constructive features common to the above claims, namely, a circumferentially-integral securing-flange, which is vertical-

ly and circumferentially weakened by slots, whereby when the flange is ruptured the stopper may be readily removed from the receptacle. A rupture of the stopper flange is therefore an essential feature of its operation. It is unnecessary to consider the prior art at length, since the defendant rests its claim of anticipation upon patent No. 708,528, issued September 9, 1902, to one Christian A. Calleson, for a metal cap for bottles or jars, and more particularly upon the constructions shown in figures 5 and 6 of that patent. In speaking of his invention, Calleson says:

"The invention consists, essentially, in the novel means employed for severing the flange or side wall of the cap, whereby the same is loosened from its locking engagement with the bottle or jar neck, and to that end a tongue is formed either within the body of the cap or projecting from its side wall or flange, the base of which is located within the said side wall or flange, and one or more slits extended to the base of the tongue, thus leaving the flange severed, except at the base of the tongue, which portion is readily broken at will by bending the tongue outward away from the body of the cap."

And, again, with reference to the modifications shown in figures 5 and 6, he adds:

"Fig. 5 is a view of a cap-blank, showing the additional slits near the base of the tongue, as flaring away from each other to insure a wide break in the cap-flange or side wall. Fig. 6 is a side view of the cap formed from the blank shown in Fig. 5. * * *

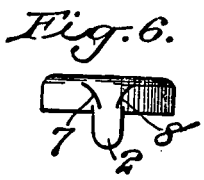
"In the form shown in Figs. 5 and 6, the additional slits are denoted by 7 and 8, which slits are cut through the flange of the cap of an angle to each other so as to weaken a larger portion of the side wall or flange of the cap than where the parallel slits 5 and 6 are used. * * *

"A very strong but sufficiently brittle metal can be utilized where the breaking of the metal at the base of the tongue separates the side wall or flange of the cap, and it requires a very slight force to release a cap of this character.

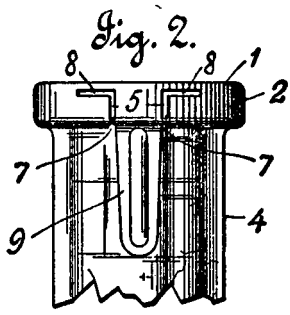
"It is understood that the tongues and slits may be made in different shapes and sizes to suit different requirements, and that any number of tongues may be employed with their corresponding intermediate slits."

A drawing of figure 6 of the Calleson patent, as just referred to, and of figure 2 of the patent in suit, are given below:

Calleson.



Weissenthanner.



A cursory glance shows not only their close similarity, but substantial identity. The complainant's claim to novelty consists largely in a weakening slot in the flange, extending circumferentially thereof. That this is true will be seen by the following quotation from the testimony of the complainant's expert.

"The Calleson patent fails to disclose the subject-matter of claims 4, 14, and 21 of the patent in suit, in that it neither shows nor describes the weakening of the flange of the stopper in a direction extending circumferentially thereof, so that the stopper may be readily removed from the receptacle when the flange is ruptured, which forms an essential feature of each of the said claims."

It is true that the complainant's expert also claims that there is a difference in their mode of rupturing the flange, but I do not think this view can be maintained. The office of the tongue in rupturing the weakened flange is essentially the same in either case. In both patents, it is clearly provided that the necks of metal intervening the tongue and the slots shall be broken so as to sever the flange, and that result, which is the declared purpose of both patents, is obtained in each in substantially the same way. The only distinguishing difference therefore, if any, between the two patents, will be found in the circumferential weakening of the flange as described in the patent in suit. When the complainant's application was pending in the Patent Office, the Calleson patent was cited as an anticipation. The complainant's solicitor, who, by the way, was his expert at the hearing of the case at bar, endeavored to avoid that reference by amending some of his claims, as follows: "The flange being weakened in a direction and to such extent as to permit the easy removal of the stopper"—and again: "To such extent that the stopper may be readily removed from the receptacle." With these and other like amendments, the solicitor claimed that his invention was clearly distinguishable from the Calleson patent. In his argument before the examiner, however, he used the following language:

"In the Calleson patent, the flange of the stopper is not weakened in a lateral or circumferential direction to such extent as to enable the stopper to be removed from the receptacle without the aid of a tool or implement. The only hint in the Calleson patent of a weakening of the flange in a lateral direction is found in the inclined slots 7 and 8 of Figs. 5 and 6. These slots, however, will not permit the stopper to be removed from the receptacle by the fingers."

Apparently, therefore, the imperfection that the complainant saw in the Calleson patent was that the weakening of the flange, which, by the way, he admits was in a lateral or circumferential direction, was insufficient in extent to enable the stopper to be readily removed; but the objection thus made, and which was the main, if not the only, distinguishing difference between it and the pending application, was clearly one of degree, and one for which a remedy by elongation of the slits would suggest itself to any practical man. The complainant having admitted to the patent examiner that the Calleson flange was weakened circumferentially, it does not lie in his mouth at this time to gainsay such admission. He argued that the Calleson flange was not sufficiently weakened in a lateral or circumferential direction to be efficient, but he did not, and could not, maintain that it was not thus weakened. Calleson, however, as already stated, in referring to figures 5 and 6 of his patent, says that the slits are shown as flaring away from each other to insure a wide break in the cap-flange; and, again, it is understood that the tongues and slits may be made in different

shapes and sizes to suit different requirements. It is perhaps true that the Calleson slits are not circumferential to the extent that the Weissenthanner slits are, but, if so, the difference is unimportant, it is not one of substance, but of degree or proportion, and one for which a remedy would apparently suggest itself to anybody, and which, as a matter of fact, was suggested by Calleson himself, as has already been shown. Upon this point the defendant's expert says:

"I am decidedly of opinion that this increase in extent or length of the circumferential or longitudinal weakening slits of the construction shown in the Weissenthanner patent does not constitute or involve any substantial mechanical novelty whatever, but merely a variation in degree or amount of the weakening which is provided for in the Calleson patent, and the degree or amount of which will depend upon the judgment of the constructor, or may be determined by test for the purpose of ascertaining what length or extent is most desirable in practice, if a construction of this character should be adopted."

Furthermore, in anwering the complainant's argument, in support of the above amendments to his claims, the examiner said:

"In applying the reference (Calleson) to the claims, the examiner considers the curved cuts of the reference as the equivalent of either a horizontal or a vertical cut, or both combined."

It is obvious, I think, that the Calleson slits are circumferential; but, if not, they are, as the examiner said, an equivalent of the slits of the patent in suit. Moreover, it is manifest that, if they were extended as Calleson himself suggested they might be in order to secure a wider break, they must be extended circumferentially, since to extend them upwardly would not only not insure a wider break, but would of necessity absolutely destroy the cap as a cap, for in that case the slits would extend on and over the top of the cap, and the cap would no longer be a stopper, or discharge the function of a stopper. Notwithstanding the above views of the examiner, he subsequently, after a personal interview with the complainant's solicitor, allowed the patent; in doing so, however, he apparently either reversed himself, or became confused over the meaning of the words "extending circumferentially thereof," as applied to the slits in the flange, and incorporated in the amended claims. I think the complainant's patent must be held invalid for want of novelty and invention.

In the view I have taken, it is unnecessary to consider the question of infringement. It is sufficient to say, in this connection, that the defendant is manufacturing under the protection of patent No. 829,856, issued to one William H. Dodge, which patent, in my opinion, does not infringe complainant's, but far more closely follows the Weissenthanner patent, No. 663,480.

The bill will be dismissed, with costs.

BUFFALO GAS CO. v. CITY OF BUFFALO et al.

(Circuit Court, W. D. New York. October 7, 1907.)

No. 319.

INJUNCTION—PRELIMINARY INJUNCTION—GROUNDS.

A court of equity may properly grant a preliminary injunction on application of a gas company against the mayor of a city in New York to restrain him from enforcing an order made by the state commissioners of gas and electricity pending a suit to determine the constitutionality of such order which is alleged to be confiscatory, and to permit complainant to render bills to customers at the old rate, and may also extend such injunction to the city when made a party where it is a customer of complainant and affected by the order, provision being made for impounding the difference between the amount paid by any consumer and that fixed by the commission, the complainant being otherwise subject to irreparable injury, and without remedy at law by reason of the state statute, which makes it a complete defense to an action to collect for gas that the rate charged is higher than that fixed by the commission.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, §§ 14–17, 305, 306.]

In Equity. On motion for preliminary injunction.

Rogers, Locke & Babcock (Louis L. Babcock, of counsel), for complainant.

Louis E. Desbecker, for defendants.

HAZEL, District Judge. The bill alleges that under the provisions of chapter 737, p. 2092, Laws 1905 of the state of New York, the commissioners of gas and electricity appointed under said act upon complaint of the mayor of the city of Buffalo made an order on June 30, 1907, that on and after the 1st day of September, 1907, the maximum price for gas which should be charged to consumers by the complainant, the Buffalo Gas Company, in the city of Buffalo, be fixed at 95 cents per 1,000 cubic feet; such amount being a reduction of 5 cents from the price then charged to individual consumers. The bill charges that the price so established by the commission is repugnant to the federal Constitution, in that it will not admit of a reasonable increment to the owners of the capital stock upon the actual value of the property invested in the manufacture of gas, and therefore the effect of such lowering of the price of gas is to disregard the right of contract in violation of subdivision 1 of section 10 of article 1 of the fourteenth amendment thereto. An injunction is sought restraining the city of Buffalo and its mayor from enforcing the order, and for an order permitting the gas company to collect from its customers the price charged prior to September 1, 1907—i. e., the sum of $1 per 1,000 cubic feet, instead of 95 cents—the difference to be impounded and to await the result of this action. The bill discloses that the price for gas to the city of Buffalo eo nomine has not in fact been established or fixed by the commission; that the gas company has sold gas to the city for street lighting and other uses for more than five years past at a fraction less than 75 cents per 1,000 cubic feet; that, because of competition, it will be necessary for the gas company to supply gas to the city of Buffalo at

a less amount than the cost of manufacture. The defendants have filed a demurrer on the single ground that the gas company is not entitled to the relief sought against the defendants. The corporation counsel argues that the reduction in question does not affect the city, and urges that proper parties are not before the court. Of course, the material allegations of fact in the bill, namely, that by enforcing the act and order of the commission a practical confiscation of complainant's property would result and moreover it would be exposed to a multiplicity of suits, must be regarded as admitted by the demurrer.

The point contended by the corporation counsel is thought unavailing, as the contract with the city has expired, and has not been renewed, although the complainant continues to supply gas to the city for municipal lighting, and the latter without doubt will be required to pay for the same. In the absence of a contract or special statute fixing the price of gas to the city, the latter occupies no different relation to the gas company than the individual consumer. Counsel for defendants further contends that neither the city nor the inhabitants can be restrained in this suit under the doctrine announced by Judge Lacombe in Consolidated Gas Company v. Mayer et al. (C. C.) 146 Fed. 150, and later approved by Judge Laughlin in Richman v. Consolidated Gas Company, 114 App. Div. 216, 100 N. Y. Supp. 81. In the former case the court dealt with the provisions of a special act of the Legislature applicable to New York City fixing the price of gas sold to the city at 75 cents per 1,000 cubic feet. For failure to comply with its provisions, a penalty is prescribed in the act which the Attorney General or the district attorney is empowered to collect under section 1962 of the Code of Civil Procedure. For reasons stated in the opinion, the court, in the Mayer Case, declined to enjoin the city of New York. Such reasons, however, are not wholly applicable to this controversy, for here admittedly the city of Buffalo and its mayor threatens to compel the enforcement of Act 1905, p. 2100, c. 739, which provides under section 20 that the commission or any person, corporation, or municipality interested in the enforcement of such order may apply to the Supreme Court for a writ of mandamus to compel compliance with such order. This court is therefore persuaded that the city of New York was not enjoined by Judge Lacombe because in that case the Attorney General and the district attorney, who were parties, were charged with the responsibility of recovering the specified penalty for noncompliance with the statute, and also because the price for gas to the city of New York was fixed by the Legislature at a less sum than that charged consumers, while in this case the city of Buffalo, in the absence of a contract providing for a less price, probably is liable for an amount equal to that charged the individual consumer. In any event, the action of the commission declares what shall be the maximum price to consumers of gas, and concededly the city is one of complainant's customers.

By section 21 of chapter 737, p. 2100, Laws 1905, it is provided that, if the gas company should demand a price in excess of that fixed by the commission, the fact of such demand in any action brought by the gas company for the collection of the price charged would, if it appear that

excessive charge had been made, be a complete defense. The severity of this provision will at once be apparent when it is understood that if the gas company were to deliver bills to its customers for the amount which it claims to be entitled to charge or receive—i. e., $1 per 1,000 cubic feet—in an action brought by such company against the consumer to recover such amount, the latter may successfully oppose the payment of any portion of his indebtedness on the ground that a sum has been charged in excess of that established by the commission. Under the circumstances, it manifestly would seem fairer to maintain the status quo until this action or at least until the test action now pending in the Circuit Court for the Southern District (Consolidated Gas Company v. Mayer et al.) is finally determined. If this court of equity were to refuse the request of the gas company, irreparable loss would unquestionably be sustained by it, and I conceive that it would be impracticable for the company to proceed at law to collect the charge for gas consumption. Although the difference in the price of gas between the amount charged and the amount fixed by the commission is small, yet in the aggregate a large sum is involved much of which would be lost to the company on account of removals from the city by consumers or otherwise unless the gas company is given its day in a court of equity, and in a suit such as this.

The question of whether the statute is illegal and void as in contravention of the fourteenth amendment to the Constitution of the United States is not now before me for decision, nor is the right disputed of this court to enjoin proper defendants from attempting to enforce the statute pendente lite. Although chapter 737, p. 2092, Laws 1905, has in terms been repealed, substantial re-enactments of its provisions are found in the public service commissions law, passed in 1907. Therefore, under the provisions of the statutory construction law, the statute under consideration, assuming its validity, it is thought may nevertheless be enforceable. The relief sought is simply preventive in its nature to preserve the status of the parties until their rights are adjudicated. Undoubtedly the mayor of the city and the municipality are interested in the litigation—the mayor in the sense that he is the conservator of the welfare of the community, but as a general rule an injunction is not allowable unless the parties against whom it is sought are before the court, or unless they are dispensed with by order of the court under equity rule 48. Even though it appears that the defendants in a sense acted as the agents of the community, the latter, if not parties, should not be enjoined in a proceeding such as this. Osborn v. United States Bank, 9 Wheat. 738, 6 L. Ed. 204; Consolidated Gas Company v. Mayer et al., supra; Richman v. Consolidated Gas Company, supra, affirmed on appeal, 186 N. Y. 209, 78 N. E. 871. In the protection of its property the gas company asks leave of the court to issue to its customers bills or demands for gas consumed each month at the rate of $1 per 1,000 feet, the difference between such sum if paid by the customer and the amount fixed by the commission to be impounded until the controversy may be determined. To this request, following the order in the Mayer Case, there can be no reasonable objection, though it must not be assumed that by this order the customer is bound to pay the higher rate. The order should provide that the

customer may have the option of paying the higher or lower rate, and, if he should be willing to pay the higher rate, it should contain provisions for the conservation of the fund and for the protection of the consumer in the repayment to him of the five cent difference should the action ultimately be decided in favor of the defendants.

The demurrer is overruled. An order may be drawn restraining the defendants in accordance with the views herein expressed. The terms thereof may be agreed upon by counsel, and, failing to agree, they will be settled by the court.

THE RANZA.

(District Court, E. D. Pennsylvania. October 15, 1907.)

No. 36 of 1905.

SHIPPING—INJURY TO STEVEDORE—LIABILITY OF VESSEL.

Where libelant, who was an experienced stevedore, was sent with three others to cover a hatchway in a vessel preparatory to unloading cargo from the between decks, and, being unable to find fore and afters which fitted, they used others which were too long, placing them cornerwise, and when libelant stepped upon the cover it gave way, causing him to fall through and resulting in his injury, the accident was due to his own negligence and that of his fellow workmen, and neither the vessel nor her owners were liable for the injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, §§ 349-351.]

In Admiralty. Suit for personal injuries. On final hearing.

William J. Conlen and Jasper Yeates Brinton, for libelant.

Convers & Kirlin and Henry R. Edmunds, for respondent.

HOLLAND, District Judge. On September 25, 1905, Patrick Mulherin filed his libel against the steamship Ranza to recover damages for personal injuries sustained on the afternoon of August 31, 1905, while working as a stevedore upon the vessel. On November 28, 1905, he died, and subsequently, on January 12, 1906, his widow and administratrix, upon petition filed, was substituted as party libelant. The deceased, a stevedore in the employ of Grace Bros., was one of the gang of men assigned to discharge a cargo of iron ore as soon as the Ranza was berthed at Girard Point on the Delaware river. He was directed, with other men, to open hatch No. 3 on the main deck in order to unload the ore then stored in the between decks. Mulherin and three other men were assigned to do this work. They removed the covers from the main deck hatch, but it was necessary that the between deck's hatch of hatch No. 3 should be covered to enable them to remove the part of the cargo stored between decks. They proceeded to place covers upon the hatch, and had covered the aft opening of the hatch when the accident occurred. Hatch No. 3, at which the accident happened, is divided into three sections by two iron athwart ship beams built with the ship, in which were places for nine wooden fore and afters, three to each section. The hatch covers were of wood, and ran athwart ship the full width of the hatch, 12 feet in length.

There is a conflict of evidence as to whether or not the two after covers in the after section of the hatch were in place when the men descended to the between decks, but the weight of the evidence is to the effect that these covers were not in place and that they were put on by Mulherin and the men themselves. They were unable to find fore and afters of the proper length, and went to the upper deck and secured a number which would not fit, and they placed them "catacornered under the hatch covers." After placing the after covers upon the hatch, Mulherin stepped upon one of them, and it gave way, and he went through the hatch, a distance of about 6 feet. The cargo, consisting of ore, was placed in the hold in a cone shape, the top of which he struck in his descent, and slid down near the bottom of the vessel, a distance of some 20 feet. He received some slight injuries, and was taken to a hospital, where he remained a few days. The cause of his death does not appear in the evidence.

If, as claimed, these men had been set to work at a hatch defectively constructed, or constructed of material too weak to hold the weight of the men in the performance of the work required to be done upon it, and a personal injury resulted, the libelant would be entitled to recover, because a vessel is required to maintain decks and covered hatches in such a condition as to avoid personal injury to those who are required to use them, and to exercise ordinary care in inspecting the combings, carlings, and hatch covers, and is chargeable with the responsibility of furnishing covers for hatches and appliances in a proper condition to bear the weight imposed upon them. But in this case Mulherin and his fellow workmen proceeded to cover the hatch with fore and afters and a hatch cover which did not fit. They used this defective material with knowledge of the fact that the fore and afters were too long, and they placed the hatch which precipitated Mulherin into the hold of the vessel. Mulherin and those working with him were obliged to exercise ordinary care in placing these hatches, and, as they were doing the work themselves, it was Mulherin's duty to know whether the covering was safe before he stepped upon it. He was an experienced stevedore, and was not placed at work with which he was unacquainted.

The evidence establishes the fact that Mulherin, with the other men assigned to do this work, was responsible for the dangerous condition of the hatch, which was the cause of his injury. Neither the owners nor the vessel is responsible for the negligent act of Mulherin or his co-laborers, and the petition should therefore be dismissed; and it is so ordered.

THE CHICAGO (two cases).

(District Court, W. D. New York. August 12, 1907.)

1. SHIPPING—INJURY OF STEVEDORE—LIABILITY OF VESSEL.

The owners of a vessel owe a personal duty to stevedores employed to load or unload the same to provide reasonable security against injury and also to warn them of any latent danger caused by the vessel for which the latter is responsible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, § 350.]

2. SAME—DEFECTIVE CONSTRUCTION OF VESSEL.

While libelants were working as stevedores in the hold of a vessel, the bottom of a skid suspended vertically in the hatchway was accidentally struck, and it fell, causing their injury. *Held*, that such facts were sufficient to cast the burden upon the vessel to prove that the skid was reasonably well secured at the top, and that a finding by the commissioner that it was not so secured because of the inferior quality of the iron used in the hinges by which it was suspended was sustained by the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, § 335.]

In Admiralty. Suits for personal injuries. Application for decree on report of commissioner.

Frederick G. Bagley and Thomas A. Sullivan, for libelants.
Pooley & Spratt, for respondent.

HAZEL, District Judge. The issues in the above-entitled cases were referred by me, pursuant to stipulation of the parties, to Hon. George Clinton, under admiralty rule 44, to hear, try, and determine, and render his decision, with an opinion, to this court. The report of the commissioner is that the primary cause of the injury to libelants was the use by the steam vessel Chicago of too brittle cast-iron hinges, which were attached to the hatch combings, and upon which were suspended skids weighing about one-half a ton. He further reported that such hinges were of such low resistance to strains and shocks that they were insufficient for the purpose for which they were used. It was proven that libelants, while at work as stevedores in the hold of the vessel, incidentally struck the skid, which was fastened at its lower end to the bulkhead by a chain; the result being that the hinges on top broke, and the skid, which was suspended vertically, fell down, causing it to injure the libelants, Larkin and Higgins.

The principal point argued by proctors for respondent is that the commissioner erred in applying to the facts the rule of ipsa loquitur, and the case of The Allison White (D. C.) 131 Fed. 991, was cited as an authority to show that said principle is inapplicable. In that case the court found the evidence so unsatisfactory that he felt disinclined to put the burden of explaining the accident upon the vessel. In the case at bar it appears that the hinges on the skid were unsound, and were broken simply because the libelants came in slight contact with the skid while they were at work. In the circumstances presented by the record, I think the burden was upon the vessel to explain the accident, and by countervailing proof overcome the case of the libelants. The law is well settled that owners of vessels owe a personal duty to the stevedores employed to load or unload vessels to provide reasonable security against injury, and also to warn them of any latent danger caused by the vessel for which the latter is responsible. The Rheola (C. C.) 19 Fed. 926; The Thomas (D. C.) 81 Fed. 578; The Sidney (C. C.) 27 Fed. 119; Frederick Leyland & Co. v. Holmes (C. C. A.) 153 Fed. 557.

I have carefully considered the opinion of the referee, and examined the record sufficiently to satisfy myself that no reason exists for reversing or qualifying his action. His conclusions upon the facts and

law are accepted by me, and therefore the exceptions filed are overruled, and a decree, with costs, in favor of each of the above-named libelants, may be entered.

UNITED STATES v. IRVINE et al.

(District Court, D. Oregon. September 30, 1907.)

No. 4,941.

POST OFFICE—OFFENSES AGAINST POSTAL LAWS—INDICTMENT.

An indictment under Rev. St. § 3894 [U. S. Comp. St. 1901, p. 2659], for sending through the mails a newspaper containing an advertisement of a lottery or gift enterprise, or a complete or partial list of prizes awarded at the drawing of a lottery or gift enterprise, must aver, either specifically or by necessary intendment, the existence of a lottery or gift enterprise.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Post Office, § 71. Nonmailable matter, see note to Timmons v. United States, 30 C. C. A. 79.]

On Demurrer to Indictment.

James Cole, Asst. U. S. Atty.
Martin L. Pipes, for defendants.

WOLVERTON, District Judge. Defendants have interposed a demurrer to an indictment preferred under section 3894 of the Revised Statutes [U. S. Comp. St. 1901, p. 2659], inhibiting the depositing in the post office, or sending through the mails, of any newspaper containing any advertisement of any lottery or gift enterprise of any kind, offering prizes dependent upon lot or chance, or containing any list of prizes awarded at the drawing of any such lottery or gift enterprise, whether said list is of any part or of all the drawing.

The indictment charges a deposit in the post office, and a sending through and by means of the United States mails, of a certain newspaper known as "The Corvallis Times," which said newspaper then and there contained an advertisement of a lottery and gift enterprise offering prizes dependent upon lot and chance, and which said advertisement contained a list of prizes awarded at a drawing of said lottery and gift enterprise, and is in words and figures as follows, to wit: 'No. 243 took the $8 suit case. O. B. Connor, Carrier R. F. D. No. 2, held the lucky number. We have a few summer suits left which we are offering at 20 per cent. discount. A great bargain. Don't miss it. A. K. Russ, Corvallis, Oregon. The only exclusive dealer in men's furnishings.'"

Two points are made challenging the indictment, but it is only necessary at this time to notice one of them, as it determines the matter at issue. This one is that the indictment does not allege, either specifically or by necessary intendment, the existence of any lottery or gift enterprise. I think the point is well taken, and is fatal in its consequences. The case of United States v. Bailey (C. C.) 47 Fed. 117, is decisive of the question. I need but quote from that case:

"I do not think this indictment defective for failing to show how and in what manner the circulars set forth in the several counts concern a lottery.

It is sufficient, in my opinion, to charge in the words of the statute the fact that they do concern a lottery, without setting forth the evidence going to show that fact. But I think the indictment defective, because it fails to aver the existence of any lottery, or of an intention to hold any lottery or drawing for prizes to which the circulars set forth relate. The circulars upon their face do not show that they concern or in any way relate to a lottery. In such a case, the existence of a lottery, or of a scheme for a lottery, or of an intention to hold some lottery or drawing for prizes, to which the circulars relate, must be proved by other evidence than the circulars themselves. The fact should therefore be averred."

As a general rule, indictments or informations charging misdemeanors only are sufficient if drawn in the language of the statute. But there can be no advertisement of a lottery or gift enterprise such as is contemplated by the statute unless such a device or scheme exists. It is essential therefore that the existence must be alleged, as it must be proven to establish the offense. The matter advertised does not bear upon its face the essential fact, while it appears quite probable that it concerns or has relation to such a device or scheme.

Bishop defines a lottery as "any scheme whereby one, on paying money or other valuable thing to another, becomes entitled to receive from him such a return in value, or nothing, as some formula of chance may determine." Bishop, Statutory Cr. (2d Ed.) § 952. And for a critical discussion of the subject, see Quatsoe v. Eggleston, 42 Or. 315, 71 Pac. 66.

But, however the relationship may appear, I am of the opinion that the existence should be set forth by apt allegations. True, the mailing of a publication containing an advertisement of a list of prizes awarded, or any part of such list, is a violation of the statute. But the scheme must have been in existence, as without this there can be no list succeeding the drawing.

The demurrer will be sustained.

In re MINARD.

(District Court, D. Oregon. October 14, 1907.)

No. 990.

BANKRUPTCY—ACTS OF BANKRUPTCY—TRANSFER OF PROPERTY WITH INTENT TO DEFRAUD CREDITOR.

Evidence that an alleged bankrupt, when insolvent within a few days, sold and transferred practically all of his property, receiving considerable sums of money, which he wholly fails to account for, together with his claim that he has neither money nor property remaining, is sufficient to establish an act of bankruptcy by a transfer of property with intent to defraud his creditors.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, §§ 69-80.]

In Bankruptcy.

Beach & Simon and Woodcock & Potter, for creditors.

Thompson & Hardy and Platt & Platt, for bankrupt.

WOLVERTON, District Judge. This is a proceeding on petition praying that L. R. Minard be adjudged a bankrupt. Two principal

transactions are relied upon as constituting acts of bankruptcy, namely: First, that Minard, while insolvent, transferred, assigned, and set over to Mrs. M. M. Johnson a sum due him, in amount $500, for loss under a certain fire insurance policy; and, second, that, while so insolvent, he transferred and conveyed certain saloon fixtures, all for the purpose and with the intent of defrauding his creditors.

The proofs show that on October 4, 1905, Minard assigned the amount due under the insurance policy aforesaid to Mrs. Johnson, under a contract whereby he purchased from her certain mining stock at the agreed value of $1,750, and the policy was accepted by her as part payment upon the mining stock. The certificate of stock was withheld by Mrs. Johnson as security for the balance of the purchase price, which Minard agreed to pay on or before six months from the date of sale. This was probably a bona fide transaction on the part of Mrs. Johnson. A few days later—four or five days, or a week—Minard sold his saloon fixtures to one Alf. Walker for the consideration of $1,100; Walker paying him $600 in a check and cash, and assuming the payment of a chattel mortgage on the fixtures, in favor of the Salem Brewing Company, for $500. Beyond this, as showing the general character of Minard's business dealings, it was proven that on October 7th he sold and delivered to W. G. Scott, of Harrisburg, Or., certain slot machines—five in number—for which he was paid $300, and about the same time he collected $400 on a judgment.

Minard now asserts that he has no property whatever, money or otherwise, except the contract which he holds with Mrs. Johnson for the purchase of the mining stock. Through the course of a rigid examination, he professes to be wholly unable to tell what he has done with any considerable amount of the money paid him; and insists that he does not remember the amount of his indebtedness, and to whom owing, except that he named three firms, one being W. J. Van Schuyver & Co., the petitioners. He neither produced nor exhibited any books of account showing his indebtedness or any business transactions involved by the inquiry, and was apparently not altogether candid in his testimony. From a survey of the whole case, one cannot doubt that it was Minard's purpose in making all these transfers to put his property beyond the reach of his creditors; and that he was insolvent at the time—that is, when the property transferred is excluded—is beyond question.

Minard was and is therefore a bankrupt, and such will be the judgment of the court.

THE CIMBRIA.

(District Court, D. Massachusetts. April 25, 1907.)

No. 1,798.

1. MARITIME LIENS—STATUTORY LIEN—EFFECT OF DELAY IN ENFORCING.

A statutory maritime lien for supplies, good by the terms of the statute for two years, *held* not lost before expiration of the two years by delay in enforcing it, though postponed under the circumstances in favor of later

liens, and no interest allowed upon it prior to the filing of a petition to enforce it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Maritime Liens, § 122.]

2. SAME—SUPPLIES—LIEN UNDER GENERAL MARITIME LAW.

No lien is given by the maritime law for supplies and repairs not furnished directly to the vessel by the materialman, but delivered by him at a distant port to a carrier, though such delivery was by order of the owner, and the goods were consigned to the vessel or to her owner.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Maritime Liens, § 7.]

3. SAME—STATUTORY LIEN.

Equipment and repairs for a vessel lying in her home port in Maine were ordered by her owner from places in other states to be there delivered to carriers for shipment to such port. It was the common understanding of the parties that they were for such vessel, and they were received and used on her in accordance with such understanding. *Held*, that under the statute of Maine, which gives a lien for such equipment furnished to a domestic vessel, without any requirement that it shall be furnished within the state, those furnishing the same were entitled to a lien for the purchase price enforceable in a court of admiralty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Maritime Liens, §§ 42, 43.

Created by state laws, see note to The Electron, 21 C. C. A. 21.]

4. SAME—GENERAL MARITIME LAW.

A steamboat company leased the right to use a wharf, with privilege of using the ticket office and waiting room for a certain term at an agreed rental, and also agreed to pay for electric lights and water, and to protect the lessor by insurance. No particular vessel was mentioned, and the lessee operated a steamer of its own and another, both of which used the wharf and other facilities. *Held*, that the lessor was not entitled to a lien upon the lessee's vessel for the unpaid rental, or any part thereof, as wharfage; such rental being payable without regard to the use made of the leased property, or whether it was used at all.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Maritime Liens, § 44.]

5. SAME.

A maritime lien cannot be claimed on a vessel owned by a steamboat company running a line of boats during the summer season between Boston and Nahant for money which the company contracted to pay for the services of a band at the latter place, nor for repairs to the wharf there.

6. SAME—SUPPLIES ORDERED BY OWNER.

A vessel owned by a Maine corporation, and whose home port was in Maine, was taken by the owner to Boston, where she was operated during the summer season as a passenger boat between that port and Nahant. The president and manager of the company went to Boston and maintained an office there during all of such time, and all supplies for the vessel were furnished on his order, and not that of the master. *Held*, that there was no maritime lien on the vessel for such supplies, in the absence of a proof of a common understanding for such lien.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Maritime Liens, § 46.]

7. SEAMEN—LIEN FOR WAGES.

The master of a steamer, who, on being paid off, was requested by the owner to take her to a wharf, where she was to be laid up and to remain in charge until something was done, which he did, remaining on board after the crew was discharged and until her seizure, two days

later, was entitled to a lien for his wages for such two days at the rate previously paid him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Seamen, § 158.]

In Admiralty. On the intervening petitions of S. P. Blackburn & Co., Staples Coal Company, D. Kahnweiler's Sons, Almy Water Tube Boiler Company, Bass Point Company, Penobscot Machinery Company, Snow & Nealley Company, Maine Coast Transportation Company, P. Ahern, C. H. Buck & Co., Thomas F. Gallagher, Hunter & Brander, W. M. Crosby, and E. & I. K. Stetson.

Duff & Livermore, for libelant.

Benjamin Thompson, Russell & Russell, Carver & Blodgett, Howard D. Nash, Hamilton Tirrell, William T. Atwood, Henry C. Stetson, Frank Keezer, Ernest J. Sanderson, and Montague & Keyes, for intervening petitioners.

Bingham, Smith & Hill, for mortgagee.

DODGE, District Judge. The original libel against the Cimbria was filed by the Lockwood Manufacturing Company on September 11, 1906. No one appeared to claim the vessel, and on September 24, 1906, a decree was entered, upon default, in the libelant's favor, for $371.42, with costs. A warrant for the sale of the steamer issued on the same day, the sale took place October 5, 1906, and the net proceeds thereof, amounting to $3,403.40, were paid into court October 15, 1906. The intervening petitions, above referred to, claiming liens against the proceeds, have been filed at various dates subsequent to the libel. They are named above in the order in which they were filed. All but three of them, as will appear below, are contested by the Veazie National Bank of Bangor, Me., the holder of a mortgage upon the steamer, by virtue of which it claims whatever balance of proceeds may remain after satisfying all liens superior to its own as mortgagee. Upon each petition there has now been a hearing, at which not only the mortgagee, but any other petitioner who desired, has been heard in opposition. The following findings are made upon the evidence introduced at these hearings. The facts material upon the various questions raised, will be stated as nearly as may be in the order of their occurrence.

1. The Cimbria was owned by the Bangor & Bar Harbor Steamboat Company, a corporation existing under the laws of Maine and located at Bangor in that state. She was registered at Bangor and hailed from that port. Prior to June 6, 1906, she ran as a passenger steamer between Bangor and Bar Harbor, or other places in Penobscot Bay and the adjacent waters, remaining at Bangor when not engaged in active employment.

2. In the spring or early summer of 1906, the company which owned her made arrangements to employ her in running as a passenger steamer between Boston and Nahant in this district. She left Bangor to enter upon this employment June 6, 1906, under the command of W. M. Crosby as master; his name being duly indorsed as master on her papers. Henry W. Barbour, president, treasurer, and general manager of the company, came to Boston at the same time, and thereafter remained in or near Boston, taking personal charge of her busi-

ness affairs, as will more fully appear below. He had been master of the steamer while she ran on the Bar Harbor route.

3. On June 6, 1906, when the Cimbria left Bangor for Boston, as above, money was due to certain of the petitioners for articles which they had furnished to her or on her account before that date. These petitioners were Thomas F. Gallagher, Penobscot Machinery Company, Snow & Nealley Company, E. & I. K. Stetson, all of Bangor, David Kahnweiler's Sons, of New York, and Almy Water Tube Boiler Company, of Providence, R. I. The claims of these petitioners will be first dealt with.

4. There was due Thomas F. Gallagher, for supplies furnished to the Cimbria at Bangor:

In October, November, and December, 1904	$ 358 56
Between May, 1905, and December, 1905	1,337 60
In April, May, and June, 1906	208 76
In all	$1,904 92

Interest was also due on the bills for these supplies, amounting, when the petition was filed, to $102.02.

I find that these supplies were of such character and were furnished under such circumstances as to give the petitioner a lien for the above amounts due, under Rev. St. Me. 1903, c. 93, § 7. The petitioner had had abundant opportunity to enforce his claim before the steamer came to Boston in June, 1906, of which he had not availed himself. But so far as any express provisions of the Maine statute are concerned, the lien given by it continues for two years; and in view of this fact I find nothing in the evidence which requires the conclusion that the petitioners' lien has been lost by the delay in asserting it, even for the supplies furnished during the seasons of 1904 and 1905. The lien for what was furnished during those seasons, however, though valid, may be postponed, if it becomes necessary, in favor of competing liens of more recent date. But no interest should, under these circumstances, be allowed prior to the filing of the petition.

5. There was due Penobscot Machinery Company, of Bangor, $100 for two sets of three-inch davits ordered May 11, 1906, and furnished to the Cimbria May 31, 1906; the amount mentioned being the agreed price therefor. This petitioner had a valid lien for said amount under the Maine statute above cited.

There was due Snow & Nealley Company, of Bangor, $72.34 for the supplies described in its petition, furnished by it to the Cimbria May 12 and 15 and June 1, 1906. This petitioner had a valid lien under the same statute for that amount.

There was due E. & I. K. Stetson, of Bangor, $100.92 for repairs made upon and materials furnished to the Cimbria in May, 1906. These petitioners had a valid lien under the same statute for that amount. The three last-mentioned claims were not contested.

6. There was due the firm of D. Kahnweiler's Sons, of New York, N. Y., $100, being the agreed price of a 20-foot metallic lifeboat ordered from them May 14, 1906, by the owner of the Cimbria. It was ordered by telegram and letter from Bangor to be shipped "f. o. b. New York," and it was so shipped by said firm, which did business at

New York. It was shipped to and received by the Cimbria's owner, at Bangor, and was placed on board her at that port. It was thereafter used on board her as a part of her equipment.

In ordering the lifeboat, the Cimbria had not been specifically mentioned or referred to, but at that time her owner owned no other vessel, and this the petitioners knew. It was an article of such character as to be necessarily used as equipment on board some steamer or vessel. It was intended for the Cimbria's use when ordered by Henry W. Barbour, above referred to, who was the person who acted on the company's behalf in ordering it. When he thus ordered the lifeboat, Barbour was master of the Cimbria, besides being the president, treasurer, and general manager of the company to which she belonged, and he was engaged in equipping her to come to Boston and begin her intended employment upon the Boston-Nahant route. The petitioners, so far as their own intent is concerned, gave credit to the Cimbria for the price of the lifeboat, and did not rely on the sole personal credit of her owner.

There was also due the Almy Water Tube Boiler Company, a corporation established at Providence under the laws of Rhode Island, $208.16, for repair parts and fire brick furnished by it for the Cimbria's boiler in May, 1906. These repair parts were ordered by letter from Bangor dated May 10, 1906. The letter asked to have them sent to Bangor by Eastern Steamship Company from Boston. The petitioner shipped them, accordingly, from Providence, May 14, 1906, by rail to Boston, addressed to the owner of the Cimbria at Bangor. The petitioner is the only maker of repair parts for such boilers as the Cimbria's, which was an Almy patent boiler. Such parts can be had from the petitioner only. They were necessary, they were ordered by Barbour on the owner's behalf, his authority to represent the owner is undisputed, the order sent stated that they were for the Cimbria, they were in fact intended for her by both parties, and after reaching Bangor they were accepted and used on board her. They were furnished, so far as the petitioner's intent is concerned, like the lifeboat on the credit of the vessel.

Neither of these petitioners can be held to have acquired any lien under the general maritime law. There are two reasons, either of which would be sufficient. The petitioners did not furnish these supplies to the vessel in the sense of the maritime law. The property in the goods passed to the owner of the vessel in New York and in Providence. Delivering goods to a carrier in New York or in Providence for transportation to a vessel in Bangor is not furnishing the goods to the vessel. "There can be no delivery to the ship in the maritime sense, whether of supplies or cargo, so as to bind the ship in rem, until the goods are either actually put on board the ship, or else are brought within the immediate presence or control of the officers of the ship." The Vigilancia (D. C.) 58 Fed. 698, 700. And, in the next place, though the petitioners parted with their goods at their places of residence, New York and Providence, in which ports the vessel, if present, would have been foreign, she was in fact in Bangor, her home port, at the time. No lien can be acquired for supplies upon a vessel in her home port, unless one is given by the local law. If the petition-

ers had taken the lifeboat or the boiler parts to Bangor themselves, and there delivered them on board the Cimbria, or had furnished them through a local agent at Bangor, they would have acquired no lien under the general maritime law. The Eliza Jane, 1 Sprague, 152, Fed. Cas. No. 4,363; The Sarah J. Weed, 2 Low. 555, 561, Fed. Cas. No. 12,350; The Mary McCabe (D. C.) 22 Fed. 750. The place where the vessel is when the supplies reach her is the test. The Vigilancia (D. C.) 58 Fed. 698, 700. If that is her home port, the only lien which can arise is that given by the state law.

The petitioners therefore can have no claim upon the proceeds unless liens are established in their favor under the Maine statute which has been cited. All the express requirements of that statute are satisfied in the case of each petitioner. A debt due to each was contracted by the owner of the vessel, it was contracted for materials or supplies necessary for her employment, and it remains due. Nothing more is required, so far as the express terms of the statute are concerned. Upon these facts, without more, the statute subjects the vessel to a lien to secure payment of the debt. There is no express requirement, as there is in the lien law of Massachusetts (Rev. Laws Mass. c. 198, § 14), that the materials or supplies shall have been furnished within the state.

It is argued, however, that, unless the materials or supplies were furnished in Maine, there can be no lien by virtue of the statute, because a state statute cannot give a lien for materials or supplies furnished elsewhere than within the state. Upon a domestic vessel while outside the state to which she belongs, as upon a foreign vessel while within that state, no lien can be acquired by virtue of the local law. Such cases are governed by the general maritime law, the administration of which is beyond the control of state legislation. The Roanoke, 189 U. S. 185, 23 Sup. Ct. 491, 47 L. Ed. 770; The New Brunswick, 129 Fed. 893, 896, 64 C. C. A. 325; The Golden Rod, 151 Fed. 6, 80 C. C. A. 246. But, upon a domestic vessel within the state to which she belongs, the state has unrestricted power to create liens, under such limitations as it may determine, and liens so created may be enforced in admiralty, if only the conditions of the statute which assumes to give them are complied with, and whether or not those conditions conform in all details to the general rules of the maritime law. The Iris, 100 Fed. 104, 40 C. C. A. 301. Although, therefore, these petitioners did not "furnish" these materials and supplies to the vessel, in the sense of the maritime law, within the state of Maine, but made delivery of them to a carrier outside its limits, yet, in view of the facts that the owner received them in Maine, where the vessel was, upon the understanding that they were for her, that they were immediately made part of her equipment according to that understanding, that they have ever since remained in use on board her, and that the agreed price remains due, I see no reason why the terms of the statute may not have their full effect, and the vessel be held subject to a lien to secure the debt. It may well be that no lien would arise upon a mere delivery of these goods in New York to the owner, or to the carrier for him, if the sale and purchase had been entirely without reference to the Cimbria. Tyler v. Currier, 13 Gray (Mass.) 134. A mere purchase and sale of

these articles in New York without reference to any vessel would not be a maritime contract, and no lien enforceable in admiralty could arise from it. But in regard to these articles the parties dealt upon the common understanding that they were for the Cimbria, and their understanding was carried into effect.

7. The Cimbria made her first trip between Boston and Nahant June 7, 1906. She continued to run on that route, making one or more trips daily, until September 9, 1906. Her place of arrival and departure in Boston was Lincoln's Wharf. At Nahant a wharf was used which belonged to the Bass Point Company. The owners of both wharves have unpaid claims against the owner of the Cimbria, and both assert liens upon the steamer herself.

The Maine Coast Transportation Company controlled Lincoln's Wharf as lessee. By a written agreement executed June 12, 1906, it let the privilege of using the water front of the wharf at all times, the use of the waiting room thereon in common, the exclusive use of the ticket office thereon, and reasonable facilities for handling freight and express matter to the Bangor & Bar Harbor Steamboat Company, from June 9 to September 30, 1906, inclusive, for $2,000. The lessee was to observe certain conditions specified in the agreement. Among other things, it was to keep the lessor insured against loss or claim for damage to persons or property in the sum of $10,000. It was to pay for electric lights and for water at the same rate as the lessor, or else install its own lighting plant and its separate water meter. The $2,000 was to be paid in eight installments of $250 each, on specified dates throughout the season about 14 days apart. There was no mention of or reference to the Cimbria in the contract, nor to any other steamer. The lessee was free to bring to the wharf any vessel or vessels which it might be operating during the term of the agreement.

The lessee company made some payments during the season, but failed to pay all that was due from it. At the expiration of the agreed term it owed the petitioner $810.46. Its payments on account fell short of the $2,000 due for use of the wharf, waiting room, and ticket office privileges granted it by $486.75. $323.71 more was due for water, electric light, and cost of insurance.

That neither the cost of insurance nor the cost of electric light supplied to the wharf can, in any event, constitute a lien upon the Cimbria, is obvious without further remark. As to water, there is no proof that any was furnished to her, nor how much, if any. So far as the claim is for wharfage, the Cimbria was not the only steamer which made use of the wharf under the agreement of June 12th. The steamboat company operated another steamer, the Adelaide, on the same route between July 3d and September 1st, during which time she made alternate trips with those made by the Cimbria, and made the same use, when she was at Boston, of the privileges at Lincoln's Wharf which had been granted to the steamboat company under its contract with the petitioner. It was contended that the unpaid balance of the agreed rent was due for wharfage, that it might be apportioned between the two boats which used the wharf under the agreement, and that the Cimbria's part should constitute a lien upon her. It was claimed on the evidence that the Adelaide used the wharf one-third as

much as the Cimbria. This division between the two boats seems to me to rest on little more than guesswork; but, even if the exact length in time of the Cimbria's use of the wharf were ascertained, it would still be impossible to say that a corresponding proportion of the whole agreed rental was payable for wharfage furnished to her. The whole rental was to be paid, whether any steamer used the wharf or not; and what was to be furnished in return for it included much besides wharfage for the boat or boats which came there or had the right to come there. It would be wholly impossible to say what was due for wharfage, as distinct from what was due for the other accommodation to be furnished. These considerations would prevent a finding that the Cimbria became liable for any wharfage, even if the facts that the agreement contemplates no lien, so far as its terms show, and was an agreement made by the owner, then present in Boston, by its president and general manager, were not enough to prevent any such finding. The Advance (D. C.) 60 Fed. 766; The James T. Furber (D. C.) 129 Fed. 808; Steamboat Company v. Blake, 2 App. D. C. 51. This petition must be dismissed; the evidence failing to establish any lien upon the Cimbria in the petitioners' favor.

In the petition of the Bass Point Company, which, besides its wharf at Nahant, owned or controlled a hotel there, a lien is claimed for: (1) $1,000, "cash advanced for music for steamer Cimbria"; (2) "repairs to wharf for steamer Cimbria, $350"; (3) 350 life preservers and 150 camp stools, in all $387.50. The evidence is that the Cimbria's owner did agree, through Barbour, as a part of the arrangements made at the beginning of the season for running her between Nahant and Boston, to contribute the sum of $1,000 in 10 installments of $100 each, toward the cost of a band employed and paid by the petitioner to play on shore at the head of its wharf. The money is due according to the agreement, but it is too plain for argument that the Cimbria cannot in any event be held for it. Nothing was furnished to her for which a maritime lien could arise. The same is true of the cost of repairing the petitioner's wharf so as to make it safe for the Cimbria or the Adelaide to land or embark passengers there. As to the camp stools and life preservers, I find that Barbour, among his other dealings with the petitioner, bought these articles from it; that they were delivered to her June 14, 1906, at Nahant; that they were necessary for her equipment, and have never been paid for; and that the amount claimed is due for them. In regard to them, however, this petitioner stands in the same position as do the other petitioners who dealt with Barbour at Boston and furnished articles on his orders. Their claims are more fully discussed below. These dealings were dealings with the owner of the boat. There is no evidence upon which I can find that the minds of the parties ever met upon any common understanding that the Cimbria's credit was pledged for them. They were not dealings with the master in a foreign port where the owner was not present. The petitioner must be considered as having trusted to the expectation of being paid for these articles, as for the music and the wharf, out of the proceeds of the season's business. It has no right to charge the Cimbria with any part of its claim.

8. At various times during her employment upon the route between

Boston and Nahant, the Cimbria was supplied by the petitioners below named with necessaries of one kind or another, and to those petitioners various amounts remain due for what was so supplied.

S. P. Blackburn & Co., of Boston, ship chandlers, furnished her with articles of ship chandlery, at different times in June, July, August, and September, 1906, to the amount of $259.20 in all. $150 was paid on account, leaving $109.20 due.

Staples Coal Company, of Boston, furnished her with coal as required from time to time, at a rate of $4 per ton agreed upon when she first arrived in Boston at the beginning of the season, between Barbour, whose relation to the vessel has already been described, and the petitioner's representative. The coal furnished in June, July, and part of August has been paid for. For what was furnished during the remainder of August and in September $287.56 is due.

P. Ahern & Co., of Boston, furnished her with groceries and provisions in August and September, 1906, for which $103.60 remains due them.

C. H. Buck & Co., of Boston, printers, furnished her in July and August, 1906, with printed tickets and folders, which I find to have been necessary for her use in the passenger business wherein she was at the time engaged, for which $53.60 remains due them.

Hunter & Brander, of Boston, repaired her electrical equipment in June, and again in August, 1906, supplying the necessary material, and for the work so done $22.10 remains due them.

When the articles furnished and work done by the five petitioners last above mentioned were contracted for, and also when the articles were delivered to or the work done upon the vessel, she was, in every instance, in a foreign port, so that the question whether the petitioners, or any of them, became entitled to a lien upon her, is to be settled by the maritime law and without regard to any state statute. The contract for what was delivered to or done upon the vessel was in no case with her master. It was in each case with H. W. Barbour, who had come to Boston on board her, and who throughout the time during which she continued to run on the Nahant route devoted himself to the business of maintaining steamboat service on that route. The ticket office on Lincoln's Wharf, above mentioned, he occupied as his office, and he was, generally speaking, to be found on shore during the day. He usually slept on board the Cimbria; but he did not, so far as appears, exercise on board her any of the powers or perform on board her any of the duties of a master. These were left to Capt. Crosby. Crosby commanded her on her trip from Bangor to Boston, as has been stated, and thereafter so long as she continued to run from there. He attended to her navigation and safe-keeping, also to her custom house business, which, indeed, could be transacted by him only, as he appeared on her papers as master. He does not appear to have taken any part whatever in ordering any supplies or repairs for her. These matters, and in general all matters on shore relating to her, to which a master in a foreign port where no owner was present would be expected to attend, were looked after by Barbour alone.

It follows therefore that, although each of these five petitioners has supplied necessaries to a vessel in a foreign port, there is no one of

them who has done so upon the order of the master in the owner's absence; on the contrary, in each case the owner was present in the foreign port, and the dealings were with him. The Maine corporation which owned the Cimbria was transacting its business, throughout the time of these dealings, where Barbour, its president, treasurer, and general manager, was, and he was all the time at Boston. If the petitioners did not know this to be the fact, the means of knowledge were so readily accessible to them as to make it impossible to hold that they are not chargeable with such knowledge. The fact was that they did not inquire. Under these circumstances, they cannot rely upon the mere fact that they have supplied the vessel in a foreign port, as they might have done had they dealt with her master in the owner's absence. The presumption is that they have relied solely on the credit of the corporation to which the Cimbria belonged; a presumption only to be overcome by proof of a common understanding with Barbour that they should have a lien upon the Cimbria for what they furnished. The Iris, 100 Fed. 104, 106, 40 C. C. A. 301; Cuddy et al. v. Clement et al., 113 Fed. 454, 51 C. C. A. 288; Id., 115 Fed. 301, 53 C. C. A. 94. I am unable to find in the evidence anything sufficient to prove such a common understanding in the case of any of them. No doubt, each and every one of them gave credit to the Cimbria so far as his own intentions were concerned, and would not have furnished what he did furnish unless he had believed he was acquiring a lien for it, and it is true that they all, or all who kept books, charged what they furnished in the usual way to the "Cimbria" or "Cimbria and owners"; but this, as is well settled, does not help their case. There is no evidence that in their dealings with Barbour the question of lien was ever raised or referred to either expressly or by implication, except in the case of the Staples Coal Company. A representative of this company, in a conversation about the amount due it, told Barbour, on August 31st, that unless they got their money they would have to enforce their lien. But there was no assent by Barbour to the claim that they had a lien save by silence, and, as he then made a payment on account, there was no further talk about the matter. A small portion only of the coal furnished was delivered after this conversation, and I am unable to regard what was then said as establishing, even as to that portion, an agreement by the owner that it should be furnished on the vessel's credit. See Whitcomb v. Metropolitan Coal Co., 122 Fed. 941, 59 C. C. A. 465.

The payment then made to the coal company on account was by check on a Boston trust company, signed by Barbour as treasurer of the Bangor & Bar Harbor Steamboat Company. The same petitioner had previously accepted from Barbour several similar checks. Similar checks were also accepted at various times during the season, from Barbour, by the other petitioners, Blackburn & Co., Buck & Co., and Ahern & Co. These checks afford further ground for the conclusion that the petitioners knew, or must be considered as having known, that they were dealing with the owner, and that they cannot claim the rights which belong only to those who deal with the vessel in the owner's absence.

9. The Almy Water Tube Boiler Company, already mentioned above, furnished fire brick for the front of the Cimbria's boiler, and side sections for the boiler, for which is due in all $98.16. These articles were ordered by letters from Boston dated July 16 and August 13, 1906. The letters were written under the direction of H. W. Barbour by George H. Barbour, his brother. Like the articles ordered from the same petitioner in May, while the vessel was at Bangor, these articles were shipped by Barbour's direction from Providence by rail. They were received by Barbour in Boston on behalf of the Cimbria's owner, were at once put in position on board her at Boston, and thereafter used on board her. The understanding of both parties was that the articles were destined for and to be used on the Cimbria, and they were necessary supplies for her. In one of the letters referred to, the petitioners were directed to charge the articles ordered to the steamboat company. They were, however, charged to the "Cimbria and owners."

The articles referred to cannot, in my opinion, be regarded as having been "furnished" to the Cimbria in the sense of the maritime law, either at Providence or at Boston. The question has been discussed above, in connection with the other articles sent by this petitioner to Bangor. But, even if they can be so regarded, this petitioner stands no better than do the other petitioners who furnished supplies at Boston so far as a lien is concerned. It must be regarded as having dealt with the owner, not as having relied on the credit of the vessel. This part of its claim is therefore not secured by a lien upon the vessel.

10. Capt. W. M. Crosby, who commanded the vessel, as has been stated, was paid off as master on September 9, 1906, for all services to and including that day. On the following day, the steamer was taken to Lockwood's Wharf and laid up. On the same day (September 10) the crew left her. On September 11th she was arrested upon the warrant issued in this case. During the two days September 10th and 11th until the marshal assumed charge, Crosby was the responsible person in charge. Barbour requested him to take her to Lockwood's Wharf, and told him to stay aboard her until something was done. His claim that he piloted her to Lockwood's Wharf, and attended to making her fast there, and her safety while there, is not disputed. He claims $6.66, which is at the same rate as his pay while master before September 9th. I think I am justified in regarding these services, preceding, as they did, the final laying up of the boat, as maritime, and in holding that his claim for them is good against the vessel.

The result is that decrees are to be entered in the amounts below stated in favor of the petitioners below named: D. Kahnweiler's Sons, $100; Almy Water Tube Boiler Company, $208.16; Penobscot Machinery Company, $100; Snow & Nealley Company, $72.34; Thomas F. Gallagher, $1,904.92; W. M. Crosby, $6.66; E. & I. K. Stetson, $100.92. The above petitioners are also to recover interest on the above amounts from the date of filing of their respective petitions to the date of the sale of the Cimbria, but not after that date, in view of the fact that no interest has been accruing upon the proceeds in court. They are also to recover their taxable costs. If, after satisfying the

decree in favor of the original libelant, the proceeds remaining in court are insufficient to satisfy the decrees in favor of all said petitioners in full, all said decrees, except that in favor of Thomas F. Gallagher, are to be first satisfied in full, and the proceeds then remaining are to be applied toward satisfying the decree in his favor. If, after satisfying in full all the decrees in favor of all said petitioners, including said Gallagher, there shall remain any balance of said proceeds, such balance is to be paid over to the Veazie National Bank of Bangor, mortgagee of said steamer Cimbria. All the other petitions filed against said proceeds, viz., those of S. P. Blackburn & Co., Staples Coal Co., Bass Point Co., Maine Coast Transportation Co., P. Ahern, C. H. Buck & Co., and Hunter & Brander, are to be dismissed.

BURROWS v. INTERBOROUGH METROPOLITAN CO. et al.

(Circuit Court, S. D. New York. July 9, 1907.)

1. MONOPOLIES—STATUTES PROHIBITING—"MONOPOLY" DEFINED.

In statutes prohibiting contracts or combinations creating monopolies, the word "monopoly" is not used in a strict legal sense, as including the power to legally exclude all others from the field monopolized, since such a monopoly cannot be created by a contract or combination, but only by sovereign power; but it is used in a different, but equally well-understood. sense as meaning the obtaining of a substantially complete control of a particular business or article of trade.

2. SAME—CORPORATIONS—PURCHASE OF STOCK OF OTHER CORPORATIONS—LEGALITY UNDER NEW YORK STATUTE.

Section 40 of the stock corporations law of New York (Laws 1892, p. 1834, c. 688), which authorized a corporation to acquire and own the stock of other corporations, if so provided in its certificate of incorporation, is qualified by section 7 of the same law (Laws 1897, p. 313, c. 384), which provides that "no domestic stock corporation and no foreign corporation doing business in this state shall combine with any other corporation or person for the creation of a monopoly or the unlawful restraint of trade, or for the prevention of competition in any necessary of life"; and the acquisition by one corporation of the stock of another, which was unauthorized prior to the enactment of such law, was not thereby made lawful, where the effect would be a combination in violation of said section 7.

[Ed. Note.—Acquisition by corporation of stock of other corporation, see note to Anglo-American Land, M. & A. Co. v. Lombard, 68 C. C. A. 120.]

3. SAME—HOLDING CORPORATIONS—COMBINATION OF STREET RAILROAD COMPANIES.

The acquisition by a corporation of a controlling interest in the stock of the corporations owning or controlling and operating all of the street railway lines in the boroughs of Manhattan and the Bronx in New York City, including the underground, elevated, and surface lines, is unlawful, as creating a practical monopoly of the means for transportation of passengers in the city, in violation of section 7 of the stock corporations law of the state (Laws 1897, p. 313, c. 384).

4. SAME—CORPORATIONS—SUIT BY STOCKHOLDER—DEFENSES.

In a suit by a stockholder in a corporation to set aside a transfer of a controlling interest in its stock to a holding corporation on the ground that the purpose and effect of such transfer is to create an unlawful monopoly in violation of a state statute, the question whether or not the corporation of which complainant is a stockholder has been guilty of a

violation of the same statute is not in issue, and such violation, if it exists, is not a defense to the suit.

5. CORPORATIONS—SUIT BY STOCKHOLDER IN CORPORATE NAME—PLEADING.

A bill by a stockholder against the corporation and others in a federal court *held* to sufficiently comply with equity rule 94 by showing that the suit was not collusive and that any application to the officers of the corporation to bring the suit would have been futile.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 816, 817.]

6. MONOPOLIES — COMBINATION OF CORPORATIONS — REMEDIES — DEFENSES — LACHES.

Where application was made to the Attorney General of the state to bring a suit to dissolve an alleged illegal combination between corporations, a stockholder of one of such corporations was not chargeable with laches in waiting until such application was denied before bringing suit in his own behalf and that of the other stockholders similarly situated.

In Equity. On demurrers to bill.

Coudert Bros. (Wilson, Moore & McIlvaine, of counsel), for complainant.

Davies, Stone & Auerbach, Strong & Cadwalader, Henry A. Robinson, Cravath, Henderson & De Gersdorff, and Nicoll, Anable & Lindsay (Julien T. Davies, Geo. W. Wickersham, Joseph P. Cotton, Jr., and De Lancey Nicoll, of counsel), for defendants.

HOLT, District Judge. The questions presented in this case arise upon several demurrers filed by different defendants to the complainant's bill. The demurrers are substantially alike. The principal ground of demurrer is want of equity; that is, that the bill states no cause of action. The object of the suit is to obtain an adjudication declaring that the transfer of certain stock of the defendant the Metropolitan Securities Company to the defendant the Interborough Metropolitan Company was illegal and void, and setting aside such transfer.

The substantial facts alleged in the bill or stated in the exhibits annexed to it are as follows: That the complainant, Burrows, is a citizen of Illinois, residing at Chicago, and the owner of 1,400 shares of the stock of the Metropolitan Securities Company. That he sues in behalf of himself and of any other stockholders who may come in and contribute to the expense of the suit. That, prior to the organization of the defendant the Interborough Metropolitan Company, the defendant the Interborough Rapid Transit Company was engaged in the maintenance and operation of the underground railway commonly called the "Subway," in the city of New York. That prior to January, 1903, the Manhattan Railway Company was engaged in the maintenance and operation of the elevated railways in the city of New York, and in January, 1903, leased its entire railroad property to the said Interborough Rapid Transit Company, which has since operated said elevated roads. That prior to February, 1902, the defendant the Metropolitan Street Railway Company became, by merger, lease, purchase of stock, or other means, in control of a large number of the street surface railways in the boroughs of Manhattan

and the Bronx. That in February, 1902, the defendant, the New York City Railway, a corporation originally organized under the name of the Interurban Street Railway Company, became the lessee of the railroads of the Metropolitan Street Railway Company. That thereafter the Metropolitan Securities Company was organized and became the owner of all the stock of the New York City Railway Company. That as a result of these operations, in December, 1905, the Interborough Rapid Transit Company controlled and was operating the subway and the elevated railroads, and the Manhattan Securities Company held all the stock of the New York City Railway Company, which controlled and was operating all the street surface railways in the boroughs of Manhattan and the Bronx, the total length of such street surface roads being about 512 miles. That the defendant August Belmont and his business associates controlled the management and business policy of the Interborough Rapid Transit Company. That the defendant Thomas F. Ryan and his associate stockholders owned or controlled a majority of the stock of the Metropolitan Street Railway Company and the Metropolitan Securities Company. That under these circumstances Messrs. Belmont and Ryan, each in behalf of his respective corporations, entered into an agreement to effect a combination and merger of all of said railroads. That for that purpose they caused to be organized, in January, 1906, the defendant the Interborough Metropolitan Company with $55,000,000 of preferred stock, $100,000,000 of common stock, and the power to issue $70,000,000 of collateral trust gold bonds. That thereupon the Interborough Metropolitan Company, in January, 1906, entered into an agreement with the defendant Belmont to purchase from said Belmont all the capital stock of said Interborough Rapid Transit Company, said Metropolitan Street Railway Company, and said Metropolitan Securities Company, or so much thereof as said Belmont might acquire. That thereafter said Belmont acquired and transferred to the Interborough Metropolitan Company about 96 per cent. of the stock of the Interborough Rapid Transit Company, about 81 per cent. of the stock of the Metropolitan Street Railway Company, and about 96 per cent. of the stock of the Metropolitan Securities Company. That the total capitalization of said three companies was $117,000,000, as against the total issue of stock and bonds of the new company of $225,000,000. That in exchange for the stock of said three companies the Interborough Metropolitan Company issued its own securities in the following proportions: For each share of stock of the Interborough Rapid Transit Company, $200 par value of bonds and $99 par value of common stock; for each share of stock of the Metropolitan Street Railway Company, $100 par value of preferred stock and $55 par value of common stock; and for each share of stock of the Metropolitan Securities Company ($75 per share paid up), $93.50 par value of common stock. That the result of these transfers of the stock of said three companies to the Interborough Metropolitan Company was to destroy competition and create a monopoly in the business of the transportation of passengers in the city of New York, and was illegal and void, as being in violation of section 7 of the stock

corporations law of New York (Laws 1897, p. 313, c. 384) and of section 168 of the Penal Code of New York.

The complainant's counsel have not relied, in their oral argument or in their brief filed, on the alleged violation of section 168 of the Penal Code; and, in my opinion, the facts alleged in the bill do not constitute a violation of that section. Section 7 of the stock corporations law of New York is as follows:

"Sec. 7. Combinations Abolished. No domestic stock corporation and no foreign corporation doing business in this state shall combine with any other corporation or person for the creation of a monopoly or the unlawful restraint of trade or for the prevention of competition in any necessary of life."

The principal question in this case is whether the facts alleged in the bill constituted a violation of this section. The defendants' counsel asserts that by the acts alleged in the bill there was no creation of a monopoly, because the essential quality of monopoly is the power to exclude all others from the field monopolized. This is, of course, the strict legal meaning of the term. A patent or copyright in this country, or such exclusive privileges as Elizabeth and James I. were accustomed to confer upon individuals, which gave rise to the great historic controversy in England over monopolies, resulting in the decisions of the courts that they were void at common law, and the act of Parliament declaring that the king had no power to grant them, are monopolies in their strict legal sense. But the word has a different, but a commoner and equally well understood, meaning. When a person or persons have, in fact, obtained a substantially complete control of a particular business or article of trade, they are said to have a monopoly, although they have no legal power to prevent others from competing or attempting to compete with them. I think there can be no doubt that the monopoly prohibited in section 7 of the stock corporations act is of the latter kind. No corporation can, by combining with any other corporation or person, create that kind of monopoly by which they can legally exclude any one else from attempting at least to enter into the same business. Nothing but sovereign power can do that. The monopoly contemplated by section 7 of the stock corporations law is one created merely by contract, and is therefore not, in its legal essence, exclusive. But on the facts alleged in the bill, which the demurrer admits, it is difficult to see how the monopoly shown by them could be more complete. By it every surface street railroad and every elevated railroad and every subway railroad in the boroughs of Manhattan and the Bronx are combined in one management and control. No one can go up or down town in New York without using one of these roads, unless he takes a carriage or walks. It is as absolute a monopoly of the means of the transportation of passengers in New York as can be imagined which is not legally exclusive.

The defendants' counsel claims that section 40 of the stock corporations law authorized the transfer of the securities to the Interborough Metropolitan Company complained of. The part of that section relied on is as follows:

"Any stock corporation, domestic or foreign, now existing or hereafter organized, except monied corporations, may purchase, acquire, hold and dispose of the stocks, bonds and other evidences of indebtedness of any corporation, domestic or foreign, and issue in exchange therefor its stock, bonds or other obligations, if authorized so to do by a provision in the certificate of incorporation of such stock corporation, or in any certificate amendatory thereof or supplementary thereto, filed in pursuance of law, or if the corporation whose stock is so purchased, acquired, held or disposed of, is engaged in a business similar to that of such stock corporation, or engaged in the manufacture, use or sale of the property, or in the construction or operation of works necessary or useful in the business of such stock corporation, or in which or in connection with which the manufactured articles, product or property of such stock corporation are or may be used, or is a corporation with which such stock corporation is or may be authorized to consolidate." Laws 1892, p. 1834, c. 688.

This provision of the stock corporations law was first adopted in 1892. Before that time the general rule of law had been uniformly upheld in this state that a corporation cannot purchase or deal in the stocks of another corporation, unless expressly authorized by law to do so. Talmadge v. Pell, 7 N. Y. 328; Holmes, etc., Co. v. Holmes, etc., Co., 127 N. Y. 352, 27 N. E. 831, 24 Am. St. Rep. 448. Corporations could take and hold the stock of other corporations as security or in payment for a debt (Kent v. Quicksilver Co., 78 N. Y. 159); but the ordinary purchase and dealing by one corporation in the stock of another was held to be ultra vires and illegal. Many acts of New York providing for the formation of corporations affirmatively prohibited it (General Manufacturing Act 1848, p. 56, c. 40, § 8; General Railroad Law 1850, p. 214, c. 140, § 8; General Building Corporations Law 1853, p. 181, c. 117, § 8; General Stage Coach Corporations Law 1867, p. 2483, c. 974, § 8); and prior to 1892 there was never any general authority in this state for a corporation to purchase and hold the stock of another corporation. In 1892 that policy was reversed by the passage of section 40 of the stock corporations act, which, after remaining in force for 15 years, has apparently been repealed, and the ancient policy of the state readopted by the act recently passed, commonly called the "Public Utilities Bill." That bill provides in section 54 that no railroad corporation shall hereafter purchase or acquire, take, or hold any part of the capital stock of any railroad corporation, unless authorized so to do by the commission created by the act, and that, save when stock shall be transferred or held for the purpose of collateral security only with the consent of such commission, no stock corporation of any description, domestic or foreign, other than a railroad corporation, shall purchase or acquire, take, or hold more than 10 per centum of the total capital stock issued by any railroad corporation or street railroad corporation or other common carrier. The public utilities bill, of course, does not apply to or affect this case, which is to be decided by the law in force when the stocks were transferred to the Interborough Metropolitan Company; but its passage tends to show that the policy of the state adopted in 1892, authorizing corporations to deal in stock of other corporations, has not been entirely satisfactory, and that the old policy of the state prohibiting such dealing is, for the present at least, to be substantially readopted.

The facts alleged in the bill undoubtedly bring the case within the

specific terms of section 40. The certificate of incorporation of the Interborough Metropolitan Company is annexed to the bill as an exhibit. It is stated in it that the company is incorporated under the business corporations law of New York; that the purposes for which it is to be formed are, among others, "to subscribe for, purchase, acquire in any manner, hold as investment and dispose of, bonds and other evidences of indebtedness of and shares of capital stock of, or any interest in shares of capital stock of any corporation or corporations engaged in the transportation of passengers in the city of New York, or its suburbs, or territory adjacent thereto, or of any other corporation, domestic or foreign." The Interborough Metropolitan Company was therefore authorized by its charter to purchase, acquire, and hold the securities which it took. If, therefore, section 40 confers an absolute power on such a corporation to purchase and hold the stock of another corporation, unqualified by section 7, when a case arises to which section 7 applies, the transactions attacked in this suit were authorized by section 40. But can section 40 be construed to be unqualified by section 7? Section 40 was first adopted in 1892. Section 7, in its present form, was first adopted at the same time. Before 1890 there was not, so far as I am aware, in the laws of New York, any statutory prohibition against corporations combining with each other to prevent competition. In the stock corporations law of 1890 the following provision appeared as section 7:

"No stock corporation shall combine with any other corporation for the prevention of competition."

In the revision of the stock corporations act of 1892, section 7 was amended so as to read in its present language, as already quoted. Section 7, therefore, in its present form, and section 40, are to be regarded as substantially new legislation introduced into the same statute at the same time. A fundamental rule in the construction of statutes is that, if a statute contains two or more sections which at first view are apparently inconsistent or contradictory, they are to be harmonized and upheld, if possible; and especially must this rule be followed when the alleged inconsistency is between two amendments of an act introduced and adopted at the same time. But I fail to see any necessary inconsistency in the two sections. There may be many cases in which it is desirable and in all respects unobjectionable for a corporation to purchase and hold some of the stock of another corporation; and it would have been perfectly consistent for the Legislature to have tacked section 7 onto section 40 as a proviso. I think that is the true construction of the legislative meaning as shown by the statute. Corporations were authorized by it to purchase, acquire, and hold the stocks of other corporations, provided they did not thereby combine for the creation of a monopoly or the unlawful restraint of trade, or for the prevention of competition in any necessary of life. So long as such acquisition did not create a monopoly, or restrain trade, or prevent competition in any necessary of life, such a purchase was lawful; as soon as it did, it became unlawful.

The defendants' counsel claims that the laws of New York in respect to railroads, and particularly street railroads, provide an espe-

cially liberal policy for the government of such railroads, and that the rights of street and city railways are governed by special statutes applicable to them alone, and which are not modified or affected by section 7 of the stock corporations act. It is true that the laws of New York have made liberal provisions for the leasing, merger, and consolidation of railroad corporations, and especially street railroad corporations. At a very early period in the history of railroads an act was passed in New York (chapter 218, p. 195, of the Laws of 1839) which provided that it should be lawful for any railroad corporation to contract with any other railroad corporation for the use of their respective roads. This act was held to authorize a lease by one railroad corporation of the road of another, and to apply to both street surface and steam railroads. In the case of Gere v. N. Y. Central, etc., Co., 19 Abb. N. C. (N. Y.) 193, it was held to authorize the lease of the West Shore railroad by the New York Central corporation. The roads in that case were immediately parallel and competing, and it was urged that such a lease would destroy competition and create a monopoly; but the court held that the lease was authorized by the act of 1839. That lease, however, was made before the stock corporations act was passed, and no question, therefore, arose as to the effect on that lease of section 7 of that act. In 1855 an act was passed (Laws 1855, p. 517, c. 302) expressly authorizing a street railroad corporation to contract with another such corporation for the use of their respective roads. In 1890 a railroad law was passed which brought into one act the laws relating to steam and street railways. This act contained various provisions authorizing the lease and merger of railway lines. Section 70 authorized the merger and consolidation of continuous or connecting lines. Laws 1890, c. 565, p. 1103. Section 71 provided that:

"In no case shall the capital stock of the corporation formed by such consolidation exceed the sum of the capital stock of the corporations so consolidated at the par value thereof. Nor shall any bonds or other evidences of debt be issued as a consideration for, or in connection with, such consolidation."

Evidently the consolidation virtually effected in the case at bar could not have been carried out under this statute. In the first place, the lines consolidated were not continuous; and, in the next place, the consolidated company could only have issued stock to the amount of $117,000,000, the aggregate of the stock of the three companies, instead of the $155,000,000 of stock and the $70,000,000 of bonds of the Interborough Metropolitan Company.

Section 80 of the railroad law provides as follows:

"Sec. 80. No railroad corporation or corporations owning or operating railroads whose roads run on parallel or competing lines, except street surface railroad corporations, shall merge or consolidate, or enter into any contract for the use of their respective roads or lease the same the one to the other, unless the board of railroad commissioners of the state or a majority of such board shall consent thereto." Laws 1892, p. 1398, c. 676.

The exception in this section in the case of street surface railroad corporations, together with the other legislation heretofore referred to, is claimed to have authorized parallel and competing street surface railroad companies to consolidate; but obviously the consol-

idation in the case at bar could not have been effected under these provisions, because a part of the roads consolidating were not street surface roads. The consolidation of the elevated roads and the subway with any other roads was prohibited by this section, unless the consent of the board of railroad commissioners was obtained. Moreover, all this legislation took place before 1892, when section 7 of the stock corporations act was adopted. These considerations probably account for the fact that the defendants which were organized as holding companies, the Interborough Metropolitan Company and the Metropolitan Securities Company, were each organized under the business corporations act, while the other corporate defendants were organized under the railway corporations act. At all events, it is clear that the validity of the transfers of stock to the Interborough Metropolitan Company which are involved in this suit must depend upon the provisions of section 40 of the stock corporations act, and not upon any provisions of the railroad law.

It is claimed in behalf of the defendants that the fact that no case has been found in which the courts of this state have set aside such a transfer of stock to a holding company on the ground that it violated section 7 of the stock corporations law affords a strong presumption that that section does not apply to such a case. It is true that since 1892 a great and general movement has taken place in this state, as elsewhere in this country, for the consolidation of railroad and other corporations by means of leases, mergers, consolidations, purchases of stock, holding companies, and other devices; and no case decided in this state has been brought to my attention in which such consolidation has been held illegal as a combination to create a monopoly. The only case which has been cited to me in which the effect of section 7 of the stock corporations law upon a merger has been discussed is the case of Rafferty v. Buffalo City Gas Co., 37 App. Div. 618, 56 N. Y. Supp. 288. In that case, Judge Patterson, after saying that no exclusive monopoly was created, added:

"Nor, in a more restricted use of the word 'monopoly,' is that condition brought about by force of this contract."

Whether a monopoly is created is, of course, in every case, a question of fact. In fact, most of the cases of consolidation did not create an actual monopoly. Moreover, these great consolidations are usually devised, organized, and carried out by men who either own a majority of the stock or control the administration of the corporations, and these consolidations are not only profitable to them, but are also profitable or appear likely to be so to the smaller stockholders. They usually approve, and those who do not approve usually acquiesce, believing in the futility or fearing the expense or annoyance of legal resistance, or apprehending that opposition may cause them injury in other respects. At all events, the fact that such suits do not appear to have been previously brought is only material on the question whether the act relied on applies. If it clearly does apply, the fact that no suit may have been previously brought on it is, of course, immaterial.

The complainant, in addition to the claim that the transactions complained of were a combination to create a monopoly, also asserts that

they were illegal as being a combination for the unlawful restraint of trade or for the prevention of competition in a necessary of life, within the remaining provisions of section 7. I think that something may be said in support of these claims, but I doubt whether a case is made out in the bill sufficient to support them. I prefer to put my decision on the ground that the facts stated in the bill show, in my opinion, a combination to create a monopoly prohibited by section 7.

The case of Northern Securities Co. v. United States, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679, is quite analogous to this case. It involved the construction of a federal statute, the so-called Sherman anti-trust act; while this case involves the construction of the New York statutes cited. But the principles involved are similar, and the reasoning of Mr. Justice Harlan in the prevailing opinion has much application to the facts in the case at bar.

There are various other grounds of demurrer, mostly of a technical kind. One is that the bill is multifarious, because it unites claims in favor of the complainant with other claims in favor of the Metropolitan Securities Company. But I do not see that the complainant sues on any claim in favor of the Metropolitan Securities Company. He sues in behalf of himself and of any other stockholders who may join in the suit. I cannot regard such a bill as multifarious. It is also asserted that the complainant does not come into equity with clean hands. This point is based on the fact that he sues as a stockholder in the Metropolitan Securities Company, which, it is alleged, is a holding company organized to create the same kind of a monopoly in street railroad stocks as the monopoly attacked in this suit. But, in the first place, the combination of all the street railroads in New York did not create such a monopoly as that alleged in the bill. There remained competition between them and the elevated roads and the subway. Moreover, the question whether the taking over of the stock of the New York City Railway by the Metropolitan Securities Company constituted a monopoly is not before the court. When it comes before the court it will be time enough to decide it.

Another ground of demurrer is that the provisions of rule 20 and rule 94 requiring allegations to be inserted in the bill showing what efforts have been made by the complainant to secure action by the officers of the Metropolitan Securities Company, and showing that the suit is not collusive, are not complied with. It would perhaps have been better to have avoided any such objection by inserting the usual allegations in the terms of the rules; but, in my opinion, the facts alleged in the bill sufficiently show that the suit is not collusive, and that any application to the officers of the company to bring this suit would have been futile.

It is also asserted that the complainant is precluded from maintaining this action by his delay in bringing this suit. The Interborough Metropolitan Company was organized in February, 1906. An application was made to the Attorney General of New York to begin an action in the name of the people of the state to declare the proposed combination illegal. Naturally and properly, individual stockholders would await the result of such an application before suing themselves. The Attorney General denied the application, and delivered a

written opinion, which is dated March 1, 1907. The bill in this case was verified in December, 1906. Whether this suit was begun before the Attorney General's decision was announced, or whether his opinion was written after such announcement, I am not informed; but in any point of view I do not think that the complainant was guilty of any laches in beginning his action which would deprive him of the right to prosecute this suit.

I should, perhaps, add that I have read the opinion of the Attorney General. With entire respect for that opinion, I am not able to concur with it.

My conclusion is that each of the demurrers should be overruled, with leave to the defendants to answer within 30 days upon payment of costs.

MUTUAL LIFE INS. CO. OF NEW YORK v. GRIESA et al.

(Circuit Court, D. Kansas, First Division. September 14, 1907.)

No. 8,560.

1. CANCELLATION OF INSTRUMENTS—INSURANCE POLICY—EFFECT OF DEATH OF INSURED.

   A suit in equity cannot be maintained in a federal court for the cancellation of a life insurance policy on the ground that it was obtained by fraud, where the bill is not filed until after the death of the insured.

2. INSURANCE—ACTION ON POLICY—JURISDICTION OF EQUITY.

   The fact that a life insurance policy gives the beneficiaries the option to receive payment in bonds or in cash does not give them the right to a decree for specific performance by delivery of the bonds, so as to render a suit on the policy one of equitable cognizance, nor give the insurer the right to sue in equity for cancellation of the policy after the death of the insured.

3. SAME—PARTIES—ACTION BY EXECUTORS.

   Under Gen. St. Kan. 1905, § 4895, which provides that an executor may bring an action without joining with him the person for whose benefit it is prosecuted, executors may sue on a policy of insurance on the life of their testator, payable to his estate, without joining the heirs or legatees, though the policy is at their option payable in bonds, and such bonds are specifically bequeathed by the will.

4. DISCOVERY—INSPECTION OF INANIMATE OBJECTS.

   Rev. St. § 724 [U. S. Comp. St. 1901, p. 583], provides only for requiring the production of books or writings in the possession of a party, and does not authorize a federal court in an action at law in general to order the production or inspection of inanimate objects.

   [Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Discovery, § 108.]

5. DEAD BODIES—POWER TO ORDER EXHUMATION—RIGHTS OF WIDOW.

   A court has no power to order the exhumation of a dead body in an action at law to which the widow of the deceased, who has the right to control the body, is not a party.

   [Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Dead Bodies, §§ 1, 2.]

6. DISCOVERY—IN EQUITY—SCOPE OF REMEDY.

   A bill of discovery may be maintained in a federal court of equity in aid of a law action either pending or in immediate contemplation.

   [Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Discovery, § 9.]

7. SAME—IN AID OF DEFENSE TO ACTION ON INSURANCE POLICY—EXHUMATION OF BODY.

Where an action at law is pending to recover on a life insurance policy shown to have been obtained under circumstances indicating fraud, and one of the defenses is that the insured committed suicide by poison, which would avoid the policy by its terms, a court of equity has power in aid of such defense to order the body to be exhumed for examination.

[Ed. Note.—Suicide as a defense to a life policy, see notes to Ætna Life Ins. Co. v. Florida, 16 C. C. A. 623; Fidelity & Casualty Co. v. Egbert, 28 C. C. A. 284.]

In Equity. On rehearing.

John S. Dean, Bishop & Mitchell, and Ferry & Doran, for complainant.

Geo. J. Barker, C. F. Hutchings, and S. A. Riggs, for defendants.

SMITH McPHERSON, District Judge. This bill in equity is based largely on the alleged right to cancel a policy of life insurance for $100,000 issued in December, 1906, payable to the estate of Lucius H. Perkins, the insured, who died June 1, 1907. The policy was issued on annual premiums to be paid of $6,900, the first of which was paid to the company in cash by the agent, who took the note of the insured due a few days after his death. At about the same time the insured applied to other companies for other insurance of more than $1,000,000. Part of these applications were refused, and some issued and afterwards canceled, which denials and cancellations were concealed from complainant when the policy in suit was issued. When he died, there were policies apparently in force aggregating $540,000, calling for annual premiums of about $30,000, several times more than his income, and which he could not pay without converting his estate into money, and then only for a few years. About the time he was taking out this policy he was in correspondence with a chemist as to the uses and effects of poisons, learned by some of the companies, which denied the applications, but unknown to this complainant until after the death of the insured. The day of his death he purchased morphine poison, and that evening fell from the roof of his house, and when reached was unconscious, remaining in that condition until his death, a few hours thereafter. This bill of complaint was not filed until after the death of the insured. Many other allegations of fraud are made. Suffice it to say that the agreement of the insured in his application was that the policy was to be void in case of suicide within two years, and aside from that such frauds are alleged as to bring the case within the case of Ritter v. Insurance Company, 169 U. S. 139, 18 Sup. Ct. 300, 42 L. Ed. 693, and which allegations, if true, prevent a recovery. To this bill a demurrer has been interposed, and a plea to the jurisdiction filed mainly on the ground that the case is not cognizable in equity; the contention being that the company has a plain, adequate, and complete remedy at law by defense to an action on the policy.

Whatever the rule may be in the several states and England, the rule now is in the United States courts that where the policy is for the payment of money, and is obtained by fraud, that the cause is not cognizable in equity when the bill is not filed until after the death of

the insured. Cable v. Insurance Co., 191 U. S. 288, 24 Sup. Ct. 74, 48 L. Ed. 188; Riggs v. Insurance Co., 129 Fed. 207, 63 C. C. A. 365. Such a bill in equity can be maintained if brought in the lifetime of the insured, and his subsequent death will not abate the action. Life Insurance Co. v. Blair (C. C.) 130 Fed. 971. It is contended that, as the policy was for the delivery of bonds, the estate has the right to a decree for specific performance of the contract or policy, and that, being an action in equity, the company has the right to have the controversy determined on the equity side of the docket. The policy makes certain recitals on the back thereof of binding effect, one of which is as follows:

"When this contract matures, the beneficiary will be entitled, in lieu of settlement by delivery of the several $1,000.00 bonds herein provided for, to receive either (1) the whole amount in cash, or (2) any part thereof in bonds, and the remainder in cash. Should either of such settlements be made, the amount of cash payable will be computed at $1,305 in lieu of each $1000 bond undelivered."

The answer to this is that the estate does not have the right to coerce the delivery of the bonds by a decree for specific performance. The estate has the right of election to either take the bonds, or, in lieu thereof, money calculated as above stated, as in the policy set forth. But, aside from that, the facts are that the company repudiates the policy, and refuses to deliver the bonds. And when the company refused to deliver the bonds a mere naked money demand was created, if the policy is valid. Such is the recently announced rule by the Supreme Court, after reviewing all the authorities, English and American. Roehm v. Horst, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953. Nearly all the cases upholding the right of specific performance of contracts are with reference to real estate. Hyer v. Richmond Company, 168 U. S. 471, 480, 18 Sup. Ct. 114, 42 L. Ed. 547; City of Memphis v. Brown, 20 Wall. (U. S.) 289, 304, 22 L. Ed. 264; Marble Company v. Ripley, 10 Wall. (U. S.) 339, 356, 19 L. Ed. 955; The Mechanics Bank v. Seton, 1 Pet. (U. S.) 304, 305, 7 L. Ed. 152. And such actions cannot be maintained on contracts relating to personal property, except when such personal property has a value other than a money value, such as an heirloom, family relic, a present from a friend, and the like. But in this case the bonds called for by the policy have no value, and are of no concern other than their money value, the ascertainment of which is a mathematical proposition. And without doubt this company will promptly pay in money any amount adjudged by final judgment. So that the estate has no claim that can be enforced, aside from its money demand for the value of the bonds provided for in the policy, and that money demand is cognizable in an action at law, in which both parties have a plain, adequate, and complete remedy.

The insured left a will, which has been admitted to probate, from which it appears that the 100 bonds provided for by the policy were specifically bequeathed, some to the widow, and the others to the heirs. As this was an assignment of the bonds to the several beneficiaries, the contention is that there will be a multiplicity of suits, which can and should be avoided by a bill in equity. The general rule is that the

executors take the legal title to all personalty, sue for and recover the same, convert the same into money, and make distribution thereof under the will, pursuant to the orders of the probate court. Such is the rule in Kansas as appears from section 4895 of the General Statutes of Kansas (1905 Ed.), which is as follows:

"An executor, administrator, guardian, trustee of an express trust, or a person expressly authorized by statute, may bring an action without joining with him the person for whose benefit it is prosecuted."

So that there can and will be but one action to recover the money called for by the policy. Soon after this bill in equity was filed, the executors herein brought an action at law on the policy; they alone, and properly so, being the only plaintiffs.

The insurance company made application in both cases for an order to exhume the body of the insured. Both applications were heard together on the same evidence. The executors protested against making the order in the action at law for two reasons: (1) Section 724 of the Revised Statutes [U. S. Comp. St. 1901, p. 583] provides only for the production of papers and writings, when such was formerly allowable under the chancery practice. And it is believed that such contention is correct, and that a court of law has no power to order the production or inspection of inanimate objects in the possession or control of a party in advance of the trial. This court is mindful of the statement in the opinion of the Circuit Court of Appeals for this circuit in the case of Penney v. Central Coal Company, 138 Fed. 769, 775, 71 C. C. A. 135. The point was not discussed, and no authorities were cited. It was a mining case. Giving full weight to that decision, it must be limited to mining cases only, and then only, as this court believes, to cases arising in states having statutes providing for such inspection. (2) But, whatever the law is as to the point noticed, there is an insurmountable objection to making the order in the law action in the case now before the court; and that is that the widow is not a party to the law action, and cannot be made a party to the law action. She is a defendant to the action in equity. The widow has the control of the body of her deceased husband, and the executors do not have. Griffith v. Railroad (S. C.) 24 Am. Law Reg. (N. S.) 586, and other cases cited in note; Larson v. Chase, 47 Minn. 307, 50 N. W. 238, 14 L. R. A. 85, 28 Am. St. Rep. 370; Young v. College, 81 Md. 358, 32 Atl. 177, 31 L. R. A. 540; Petigrew v. Petigrew, 207 Pa. 313, 56 Atl. 878, 64 L. R. A. 179, 99 Am. St. Rep. 795. The annotations to these cases show that proposition cannot be in doubt, and counsel herein agree to its correctness; so that, if the order is made, it must be in the action in equity.

In nearly all cases, with but few privileged exceptions, and a few prohibitions, all persons are competent witnesses. And by reason of section 724 of the Revised Statutes, and by reason of interrogatories calling for answer that may be annexed to pleadings, the old-time right of discovery is but occasionally resorted to. But it is not obsolete. And it is not correct to say, as is contended by respondents' counsel, that there can only be a discovery directed to aid an action then pending. It is allowable in an action immediately contemplated, as well as in an action pending. And the law action was not only contemplated,

but under the terms of the policy could not long be delayed, and, in fact, was soon brought. Perkins fell from the roof of his house and from a place he was directed not to go by reason of the danger. He alighted on his feet on soft ground. Apparently no bones were broken. He was unconscious. His eyes gave some evidence of morphine poison, The coroner expressed the opinion that it was suicide. The family physician, who was present a few minutes after the fall, has not been called as a witness, and the company probably cannot call him. No member of the family has been called as a witness. He bought morphine on that day, giving an insufficient reason therefor, and the morphine has not been produced, and counsel for defendants professionally state that it cannot be found. When he accepted the policy, he objected to the suicide clause. He was heavily insured, and for more than he could carry, as disclosed by the evidence now before the court. He had paid no money therefor, and his note for the first premium was about due. Whether he suicided is not now a question for decision; but on such a showing, if the body cannot be exhumed, it is because the court cannot and should not compel the disclosure of the real truth. If such disclosure cannot be made, it is because of the right of one party to disclose the truth, if believed advantageous, and to conceal it if believed harmful, and that ought not to be a rule for the guidance of courts. And the only objection aside from that as to the power of the court is one of sentiment, as if sentiment should control in the administration of justice. In Union Pac. R. Co. v. Botsford, 141 U. S. 250, 11 Sup. Ct. 1000, 35 L. Ed. 734, the Supreme Court held that a physical examination of a party could not be coerced, on the ground that it was equivalent to an assault without lawful authority. The force of that holding is lessened by the later case of Railroad v. Stetson, 177 U. S. 172, 20 Sup. Ct. 617, 44 L. Ed. 721. Although this later case was under a statute, it is not readily perceived how a statute can justify an assault. But those cases were with reference to living persons. And, while the Botsford Case is an authority, it is only so as to a living person. And as to living persons such is not the rule in many states. The following cases sustain the right of a court to compel the exposure of person for a physical examination: Schroeder v. Railroad, 47 Iowa, 375; Railroad v. Childress, 82 Ga. 719, 9 S. E. 602, 3 L. R. A. 808, 14 Am. St. Rep. 189; Shepherd v. Railroad, 85 Mo. 629, 55 Am. Rep. 390; Railroad v. Hill, 90 Ala. 71, 8 South. 90, 9 L. R. A. 442, 24 Am. St. Rep. 764; White v. Railroad, 61 Wis. 536, 21 N. W. 524, 50 Am. Rep. 154; Railroad v. Thul, 29 Kan. 466, 44 Am. Rep. 659; Railroad v. Palmore, 68 Kan. 545, 75 Pac. 509, 64 L. R. A. 90; Sibley v. Smith, 46 Ark. 275, 55 Am. Rep. 584; Miami Co. v. Bailey, 37 Ohio St. 104; Lane v. Railroad, 21 Wash. 119, 57 Pac. 367, 46 L. R. A. 153, 75 Am. St. Rep. 821; Wanek v. Winona, 78 Minn. 98, 80 N. W. 851, 46 L. R. A. 448, 79 Am. St. Rep. 354; Graves v. Battle Creek, 95 Mich. 266, 54 N. W. 757, 19 L. R. A. 641, 35 Am. St. Rep. 561; South Bend v. Turner, 156 Ind. 418, 60 N. E. 271, 54 L. R. A. 396, 83 Am. St. Rep. 200; Brown v. Railroad, 12 N. D. 61, 95 N. W. 153, 102 Am. St. Rep. 564; Railroad v. Huddleston, 151 Ind. 540, 46 N. E. 678, 36 L. R. A. 681, 68 Am. St. Rep. 238; Bell v. Allen (Ky.) 44 S. W. 90. The following authorities deny the right of a

court to order a physical examination of a person: Parker v. Enslow, 102 Ill. 279, 40 Am. Rep. 588; Railroad v. Rice, 144 Ill. 227, 33 N. E. 951; City v. McNally, 227 Ill. 14, 81 N. E. 23; McQuigan v. Delaware, L. & W. R. R. Co., 129 N. Y. 50, 29 N. E. 235, 14 L. R. A. 466, 26 Am. St. Rep. 507; Stack v. Railroad, 177 Mass. 155, 58 N. E. 686, 52 L. R. A. 328, 83 Am. St. Rep. 269; U. P. Co. v. Botsford, 141 U. S. 250, 11 Sup. Ct. 1000, 35 L. Ed. 734; Austin, etc., Railroad v. Cluck, 97 Tex. 172, 77 S. W. 403, 64 L. R. A. 495, 104 Am. St. Rep. 863. These cases contend strongly that a court has not the common-law power to order a physical examination of the body, and that such order cannot be made unless authorized so by statute. Thus it will be seen that the great weight of authority sustains the power of the court to order a physical examination. The Indiana cases were decided later than the Botsford Case. The recent scholarly and timely work on Evidence by Wigmore (sections 2220 et seq.) is to the point, that sentiment and modesty, real or affected, must not stand in the way of the court in compelling parties to disclose the exact truth, and to not allow one party to the litigation to make known the facts, or suppress them, as the interest of such party may suggest. And along the same lines is the Preliminary Treatise on Evidence by Prof. Thayer (1898) of Harvard, and Two Centuries Growth of American Law (1701–1901) by the Faculty of the Yale Law School, under the title of "Evidence." And see the following authorities as to the power of a court of chancery as to evidence: Reynolds v. Burgess, 71 N. H. 322, 51 Atl. 1075, 57 L. R. A. 949, 93 Am. St. Rep. 535, for the inspection of machinery; Hensey v. Langdon (C. C.) 80 Fed. 178, for the inspection of a mine; 1 Pomeroy, Equity, §§ 191, 225; 2 Story, Equity, §§ 689, 690. Can any one doubt but that all sentiment would dissipate, and all objection would vanish, if it were necessary for the estate to make the showing in order to recover the large sum of money involved? And why should it be optional with one party to say what part of the truth shall be made known, and what part kept from the court?

The order will be that the marshal of this district will exhume the body. The court will appoint a pathologist to examine the body, to the end that the evidence may be had as to whether the fall killed the insured. A chemist will be appointed to determine whether he died by morphine poison. The results of their efforts ought to materially aid the court in arriving at the truth. And such an order is made because this court is of the opinion that it cannot be made in the action at law, but holding that it is within the general powers of a court of equity, and that such an order is in the furtherance of justice.

THE SCANDINAVIA.

(District Court, D. Maine. October 16, 1907.)

No. 28.

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

The doctrine of assumption of risk is applied in admiralty as fully as in other branches of jurisprudence, notwithstanding the rule that damages will in some cases of concurrent negligence be divided.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Admiralty, § 302.]

2 SHIPPING—INJURY OF SERVANT—DEFECTIVE APPLIANCE ON VESSEL.

Libelant had been employed as fireman on a tug, and was the only person who remained on board at the time of her sale, when she was out of commission and lying at a wharf for repairs. He was told by the new engineer that he might stay in the employment, and remained on the vessel while the repairs were being made. Among the equipment was a ladder used in passing from the tug to the wharf, one rail of which was broken off at the end, so that, when that end was put down, the ladder was likely to fall; but it could be safely used by placing the other end down. Libelant's attention had been called to the condition of the ladder by the former owner, and he was advised as to the proper manner of using it; but the new owner had no knowledge of the defect. Libelant went on shore one evening, using the ladder, which he left on the wharf. On his return he placed the ladder with the broken end down, and it fell with him, causing his injury. *Held*, that he assumed the risk of using the ladder in its known condition, and that his injury was due to his own want of care, and the vessel was not liable therefor.

In Admiralty. Suit for personal injury.

Dennis A. Meaher, for libelant.
Benjamin Thompson, for claimant.

HALE, District Judge. The libel in this case claims damages in the sum of $4,000 for personal injuries received by the libelant on Sunday evening, April 23, 1905, while going on board the steam tug Scandinavia, then lying for repairs on the westerly side of the Portland Shipbuilding Company's wharf, on the South Portland side of Portland Harbor.

The libel alleges that the libelant was fireman on the tugboat, and, at the time of the injury, was going on board for the night; that he placed a ladder belonging to the tug on top of the house, the other end resting on the wharf; that the ladder was one of the furnishings of the boat, and was used for the purpose of going on board; that, by reason of its broken condition, the libelant fell from it, as he was passing over it, and was thrown to the rail, and was injured. The case shows that the ladder, 16 feet long, had one of its side rails broken off, at one end, at the point where the first round entered the rail. The Scandinavia is a vessel of about 37 net tons. It was conveyed to the claimant, the Central Wharf Steam Towboat Company, April 20th, three days before the injury. Up to that date it had been owned by James F. Perkins, and used by him in the towage business. For a few weeks before the injury Mr. Perkins had employed libelant as fireman on board the boat. For about five days before the purchase of the tugboat by the claimant she was at the South Portland wharf for the purpose of being examined. During the negotiations she was taken upon the ways, and then back to the wharf, where she lay at the time of the injury. The libelant testifies that, at one time, about two weeks before the injury, while he was in the employment of Capt. Perkins, he had put this ladder up "bad end down," and that Capt. Perkins said to him: "Look out for that, Jack; one end is broken;" and that he then turned the ladder around and put the broken end up; that afterwards he continued to work for Capt. Perkins, and used the same ladder, which was the only ladder aboard the tug, either while Capt. Perkins owned her or after the sale to

the claimant. The case shows that the condition of the ladder was never pointed out to the claimant; that its agents examined the boat with reference to her general appearance only, but not in detail; and that they had given orders for her to be fully repaired, and had placed no captain in charge. At the time of the purchase the libelant was the only person left aboard by Capt. Perkins. The second day after the purchase, and the day before the injury, the claimant placed Albert E. Matthews, an engineer in the employ of the company, on board the tug to take charge of her, for the purpose of getting her into commission. To Matthews the libelant applied for a job as fireman. Matthews told him he would "just as soon have him as anybody, as long as he kept straight." The libelant was hired for no particular time, but understood that he was to keep his job as fireman after the tugboat should go into commission. Matthews and the libelant were the only persons on board the boat while she was being repaired, except certain day laborers who assisted in cleaning and painting. When the engineer went away on Sunday afternoon, he left Flaherty aboard to look after the fires. It does not appear that any agent of the claimant was informed by the libelant, or by any one else, of the condition of the ladder. On the day of the injury, late in the afternoon, or early in the evening, libelant came upon the wharf from the boat, with the use of this ladder, which he hauled up on the wharf. He then went over to Portland, and some time between 10 and 11 in the evening he returned to the wharf. He found the ladder near the capsill of the wharf, where he had left it, in a position where, as he says, he could see the whole of it. He picked it up, put it down on the upper house, on the waterway, which is about eight inches wide, and started to go down. He had only gone one rung when it let him down. He has no distinct memory of placing the broken end of the ladder on the boat, but infers that he did so, because, as he testifies, "when I got down one rung, she flopped over onto me." There is no substantial contradiction as to the facts which I have stated.

Upon the testimony in the case there can be no doubt but that the libelant was at fault. His fault is substantially admitted by his learned proctor, who contends that he was guilty merely of contributory negligence; that the initial fault was that of the claimant, in that it did not furnish to its servant a suitable instrument for his use; that the libelant did not intelligently and distinctly assume the risk of using the defective ladder; that he is not shown to have fully appreciated the dangers of using it; that such dangers were not fully explained to him, or brought clearly before him, although he was warned of the defect; and that at the time of the injury he did not have in mind the condition of the ladder, and so used it and was injured. The libelant invokes the authorities that, before a servant can be held to have assumed a risk, he must be shown to have understood and appreciated the nature of it. He further urges with great earnestness that he was a seaman; that the ladder was one of the furnishings of the ship; that his duty as a seaman made it incumbent upon him to follow the orders of the master, and to use such appliances as were given him; that a seaman cannot leave the ship, but

must obey orders, and use such things as are placed in his hands by the master. The learned proctor for the libelant presents these considerations with force and learning.

On a careful consideration of the case, I cannot sustain the libelant's contention. After the purchase of the tug by the claimant, the libelant was the only person left aboard. The testimony to which I have referred shows that he knew the condition of the ladder; that he acted upon such knowledge; that previous to the injury he used the ladder by putting the good end down. He says that he did not use the ladder a great deal; but his testimony shows that he was familiar with its customary use in going to and from the wharf, for he testifies that, when the ladder was put up for the purpose of going ashore, "it will stay that way all day." He came ashore with the ladder. He saw it just before he used it at the time of the injury. His learned proctor invokes the familiar cases which hold that complicated machinery must be fully explained to a servant, and that such servant cannot be held to have assumed the risk of its use, unless it is shown that he fully appreciates the dangers. But these cases have no application here. There can be nothing more easily understood than a short ladder. It is not a complicated machine. If its condition is once brought to the attention of the servant, there can be no need for further explanation about it. The consequences of the use of it, with one rail broken off at the end, must be apparent to any one after such defect is pointed out. The case shows, not only that the libelant knew of the defect of the ladder, but that, after the sale, he was the only man who did know of the ladder being aboard and of its defective condition. He did not show the ladder to the claimant's agents when they came aboard for examination. He did not point out its defect to Matthews, the engineer who had charge of the boat while she was lying at the wharf. The tug was not in commission. She was not fitted for sea duty, but was lying at the wharf for the purpose of repair, for the purpose of putting all its apparel and furniture, including this ladder, into condition for service at sea.

It is unnecessary to decide whether or not, for certain purposes, the libelant may be held to have been a "seaman," within the meaning of the statutes and of the general maritime law; but he was not a seaman at sea. He was assisting in the repair of the boat. An engineer had charge during the time of repairing, but with no such authority as a master would have. The language of his employment by the new owner was extremely vague. There was nothing to prevent him from leaving the employment. If the ship, or any of its tackle and apparel, did not suit him, he was at liberty to leave at any moment. The familiar law with respect to the duty of a seaman to obey the orders of the master has no application here; for the libelant was not at sea. He was under no captain. The case shows that his employment was not such as to make it incumbent upon him to remain upon the ship for a moment longer than he desired.

It will be remembered that the admiralty rule of dividing damages where both parties are at fault was first applied to collision cases only, and afterwards extended to all cases of maritime torts occasioned

by concurrent negligence. When this subject presented a new question, in The Max Morris (D. C.) 24 Fed. 861, 864, Judge Addison Brown said:

"The more equal distribution of justice, the dictates of humanity, the safety of life and limb, and the public good will, I think, be clearly best promoted by holding vessels liable to bear some part of the actual pecuniary loss, where their fault is clear, provided that the libelant's fault, though evident, is neither willful, nor gross, nor inexcusable, and where the other circumstances present a strong case for his relief. Such a rule will certainly not diminish the care of laborers for their own safety, while it will surely tend to quicken the attention of the owners and masters of vessels towards providing all needful means for the safety of life and limb."

In speaking for the Circuit Court (28 Fed. 881), affirming Judge Brown's decision, Judge Wallace pointed out that although, in cases of marine torts, admiralty courts are in the habit of proceeding upon enlarged principles of justice and equity, still this does not imply "that such courts do not proceed upon settled rules equally with courts of equity or of common law." The language of the decision shows that the court did not intend to ignore the recognized features of the law of negligence, nor to disregard the accepted doctrine of the assumption of risk. Such intention is not shown in the decisions of the higher federal courts. In the Dredge Case, 134 Fed. 161, 67 C. C. A. 67, 69 L. R. A. 293, the Circuit Court of Appeals in this Circuit refused to apply the doctrine of Davies v. Mann in a maritime case, but did not intimate that the principles pertaining to assumption of risk and other well-recognized principles of the law of negligence are to be overridden in a court of admiralty.

In The Saratoga, 87 Fed. 349, the District Court divided the damages on the ground that the servant's injury was due to the combined and concurrent negligence of himself and the ship. This decision was reversed by the Circuit Court of Appeals in 94 Fed. 221, 36 C. C. A. 208, where, in speaking for that court, Judge Lacombe held that the libelant had a complete knowledge of the hatches which were alleged to have been defective, and that he must be held to have taken the risk. The court says:

"With the knowledge of this condition of things the libelant must be held charged. Passengers, visitors, or workmen from shore, unaccustomed to the regulation of the ship's internal economy, who are invited by the owner, either expressly or by implication, to wander about in the vicinity of such hatches, may hold the owner responsible for results; but so far as the crew, and the regular gangs of workmen from shore, who are familiar with the location and regulation of the hatches, are concerned, their knowledge of the situation and their continuance at work are held to be conclusive evidence that, as to the particular danger of which they were thus advised, they took their risk. * * * The libelant must be held to a knowledge of the conditions under which the work was done, since it had been done in the same way repeatedly and usually during his employment."

In The Serapis, 49 Fed. 393, the District Court held it to be a case of concurrent faults, and divided the damages; but in 51 Fed. 92, 2 C. C. A. 102, the Circuit Court of Appeals reversed the District Court, and held that the owners of the steamship could not be held negligent for having on board the ship a winch which had been there for over six years in continual use, in perfect order, but requiring more care on

the part of the person who worked it than some modern machines. The case showed that the machine was well known to the employé, and that it was well known to him that it required more attention on his part than other machines fitted for similar use. The court held that the libelant assumed the risks of all accidents. In applying the principles of maritime law to the facts in the case the court said:

"This libelant's misfortune has our deepest sympathy, but to do injustice through sympathy for the injured is to do away with law, and make recovery for loss dependent on the tenderness, or want of it, in the feelings of the court."

In The Maharajah (D. C.) 40 Fed. 784, 785, Judge Brown held that:

"A workman employed to work a particular machine, which he fully understands, takes the risk of accidents that may happen to him while using it, so long as the machine is maintained in the same condition as by his contract he has the right to expect and to rely upon."

Judge Brown said:

"The libelant was a longshoreman, employed by the day or hour. He was hired to work this winch. No skill was necessary, only care. Whatever liability there was to accident from the hand's slipping was visible and plain. It was not a concealed or unsuspected danger, but one as well known to the workmen as to the employer."

In The Henry B. Fiske (D. C.) 141 Fed. 188, 191, a case where a defective patent rider broke, such rider forming part of the tackle, apparel, and furniture of a schooner, Judge Dodge held that, if no sufficient reason appears why the breaking of the rider should have been anticipated, such danger as lay in the possibility of its breaking was a risk assumed by the libelant, a seaman on the vessel, as incident to his employment.

In The Carl (D. C.) 18 Fed. 655, the libelant was employed to assist in unloading goods between decks. His work was forward of the fore hatch. While washing the main deck, thinking all the hatches were about to be closed, he turned suddenly, and, forgetting the open hatch near him, stepped into it and was injured. Judge Brown held that the proximate cause of the accident was the libelant's inattention and negligence, and said:

"This negligence was, therefore, not merely contributory, but it was the immediate and proximate cause of the accident. The covering of the hatch above was but the preliminary and indirect cause, not necessarily or naturally producing the subsequent fall of the libelant."

In the case at bar, after a careful study of the uncontradicted facts, and an application of the well-known principles of maritime law, I come to the conclusion that the fault was entirely upon the part of the libelant. He was not placed by his employer in a position of undisclosed danger. He was not dealing with complicated machinery. He knew whatever defect existed in the ladder, but did not disclose such defect to the purchasers of the tug. While he was the only one knowing the condition of the ladder, he made no effort to repair it; nor did he direct the attention of the engineer, with whom he was afterwards employed, to its condition. As in The Serapis, supra, if he had taken care, he could have used the appliance safely. He knew the ladder

better than any one else, and assumed the risks of its use. His negligence was the immediate and proximate cause of the injury.

The libel may be dismissed. Inasmuch as the learned proctor for the libelant believed that he had a remedy for at least half damages, I decree that the claimant recover no costs from the libelant.

CLARK v. SMALLWOOD et al.

(Circuit Court, W. D. New York. September 9, 1907.)

No. 128.

1. MORTGAGES—TRANSFER OF PROPERTY—MORTGAGOR AS SURETY—RIGHT TO COMPEL FORECLOSURE.

An assignee of notes and a mortgage security, who has knowledge of an arrangement between the mortgagor and mortgagee by which a new agreement is substituted for the old, and the mortgagee becomes the owner of the mortgaged property, and, by assuming payment of the mortgage debt, becomes the principal debtor and the mortgagor his surety, is bound to take notice of such changed conditions and to foreclose the mortgage when notice is given by the mortgagor requiring it, under penalty of releasing the latter from liability.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, § 756.]

2. PRINCIPAL AND SURETY—DISCHARGE OF SURETY—FAILURE TO PROCEED AGAINST PRINCIPAL—WAIVER.

A surety for a debt secured by mortgage who has demanded of the creditor that he foreclose the mortgage loses his right to insist that the failure to comply with such demand until the mortgaged property has become worthless releases him from liability, where, with full knowledge of such failure, he continues for years to join in the renewal of the notes.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Surety, §§ 366–372.]

3. MORTGAGES—CONVEYANCE OF PREMISES—ASSUMPTION OF DEBT BY GRANTEE—DISCHARGE OF MORTGAGOR—SUIT TO CANCEL DEBT—DEFENSES.

Complainant bought an interest in certain oil leases in Pennsylvania, and gave his notes for the purchase money secured by a mortgage on the property. These notes and mortgage were transferred by the mortgagee to defendant bank. Subsequently complainant reconveyed the property, and the mortgagee assumed payment of the notes. Complainant afterward demanded that defendant foreclose the mortgage, but it was not done, and the notes were renewed from time to time until both defendant and the mortgagee became insolvent, and the mortgaged property which had been transferred to others had become worthless. Under the statute of Pennsylvania, a mortgage on a leasehold interest is not valid unless the lease, as well as the mortgage, shall be recorded, and the leases in question were not so recorded. *Held*, that the invalidity of the mortgage constituted a defense to a suit by complainant for the cancellation of the notes because of defendant's failure to foreclose.

4. ESTOPPEL—EQUITABLE ESTOPPEL—SILENCE RESPECTING MATTER OF RECORD.

The fact that defendant, with knowledge of the invalidity of the mortgage, induced complainant to enter into another contract and assume a further liability in the belief that the mortgage security was good and would be enforced, did not estop defendant from pleading the invalidity of the mortgage, where no actual fraud was practiced nor misrepresentation made; the means of ascertaining the validity of the mortgage being open to complainant, as well as to defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Estoppel, §§ 285–287.]

5. BANKS AND BANKING—ADVANCES BY BANK—IMPLIED AGREEMENT FOR INTEREST.

The right of a bank to interest on advances made is to be implied, unless the parties to the transaction have otherwise stipulated, or under the circumstances it would be inequitable to exact it, and such right is not lost merely by a failure or refusal to furnish statements of account to the debtor when requested.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Banks and Banking, §§ 686–700.]

In Equity. On final hearing.

Stearns & Thrasher (George E. Towne and Arthur C. Wade, of counsel), for complainant.

Rogers, Locke & Babcock (Louis L. Babcock, of counsel), for defendants.

HAZEL, District Judge. In this action the orator asks for an accounting between himself and the defendants, and specially that certain promissory notes made by him and discounted by the Fredonia National Bank, but now owned by the defendant Smallwood, be decreed and adjudged to be fully paid. The material facts are as follows: On December 30, 1889, the orator bought from Mr. Waterhouse an undivided one-third interest in certain oil lands situated in the state of Pennsylvania, known as the "Neiltown property," for the sum of $14,000, and to secure the payment thereof he gave notes and a mortgage upon the property. The mortgagee assigned the mortgage to the Fredonia National Bank as collateral security for the payment of the notes, which the bank discounted. Subsequently on May 10, 1890, the plaintiff, having become dissatisfied with his purchase and with the knowledge of the bank, reconveyed the property to his grantor, who, in consideration thereof, assumed the payment of all the notes which had theretofore been indorsed by him and discounted, as already stated. As the notes from time to time became payable, they were either renewed by the plaintiff and Waterhouse or paid by the latter under the agreement of reconveyance, and the original debt was reduced by Waterhouse from $14,000 to the sum of $7,200. In the spring of 1892 Waterhouse became insolvent, and discontinued paying the maturing notes, which, however, were thereafter repeatedly renewed, and payment thereof extended by the orator until the Fredonia National Bank suspended payment in June, 1905. Prior thereto, in the month of April, 1895, one Tarbox, to secure a debt of $1,200 to said bank, transferred to it as collateral security certain oil lands known as the "Tiona Property," and later, with the consent of the bank, he transferred the title of such property to the orator, who thereupon entered into an agreement with the bank by which the latter was to control and operate such oil properties, and to advance the amount necessary to put the oil wells on the Tiona property from flowing to pumping, and, after the expenses were paid, the proceeds of sales of oil were to be applied upon the mortgage liens and the promissory notes in question. Upon the trial the court allowed an amendment to the bill, which substantially charges that the orator was induced by the bank to take title to the Tiona

oil lands and assume the Tarbox indebtedness of $1,200 to the bank, and also to allow the deed of such property to run to the bank as collateral for the Waterhouse notes upon the contemporaneous oral agreement of the bank "at the first opportunity when the same could be done" to foreclose the mortgage in question, which, as already stated, had theretofore been reconveyed to Waterhouse. Evidence was introduced by the orator tending to prove that prior to the above-mentioned reconveyance and thereafter, in 1895, the oil wells upon the property flowed, the property was valuable, and the mortgage interest was regarded by the parties herein concerned as ample security for the original debt. At present the property in question concededly has no substantial value.

Accordingly the contention is that, if the bank had seasonably foreclosed the property as agreed, and when requested so to do, the proceeds of the sale would have been more than sufficient to wipe out the debt arising from the Waterhouse transaction. The defendants have given evidence denying the agreement to foreclose the mortgage, and have introduced testimony indicating that the mortgage in fact at the time of its execution was defective, the recording act of Pennsylvania not having been complied with, and no valid lien was acquired in respect to certain leaseholds described in the mortgage.

For the purpose of discussing the equities, it will be assumed that the proofs disclose an agreement to foreclose the mortgage and a sufficient notice by the orator to the bank to institute foreclosure proceedings, and apply the proceeds of the sale to the payment of the notes. We come to inquire, then: What were the equities of this case, and upon what principle must they rest? By the transfer of the property to Waterhouse, and his agreement to pay the notes made by Clark, the latter in my judgment became in equity the surety on the notes, and Waterhouse by the changed conditions and his said agreement to pay the notes at maturity became the principal debtor to the bank. The assignment of the mortgage to the bank was collateral, and without doubt foreclosure proceedings could have been instituted by the bank on the notes becoming due and unpaid. I think that the holder of a mortgage security, knowing of an arrangement between the mortgagor and mortgagee, by which a new agreement is substituted for the old, and by which there is a substitution of liabilities, is bound to take notice of such changed conditions, and is obliged to forclose the mortgage when notice is given requiring diligent pursuit of the principal debtor (Hunt v. Prudy, 82 N. Y. 488, 37 Am. Rep. 587; Colgrove v. Tallman, 67 N. Y. 95, 23 Am. Rep. 90), although it is questionable whether an indorser of a note, in the absence of special equities, can compel the holder to enforce his security (First National Bank v. Wood, 71 N. Y. 405, 27 Am. Rep. 66). In Newcomb v. Hale, 90 N. Y. 326, 43 Am. Rep. 173, the doctrine was recognized that, upon refusing or neglecting to comply with the notice of a surety to proceed against the primary debtor when the debt was collectible, it afterwards becoming uncollectible, the surety must be exonerated from liability. Foreclosure could have been instituted by the bank after the reconveyance of the property to Waterhouse without making Clark a party, who, under the arrangement,

stood in the place of the original mortgagee, and equitably, became secondarily liable on the notes made by him. Had the bank foreclosed the mortgage debt, it would have been trustee for Clark for the payment to him of any remainder after satisfying the debt on the notes. The evidence on behalf of the orator points out that verbal requests to foreclose the mortgage were frequently made from 1895 to 1905, when the bank closed its doors, the orator waited and delayed in the complete consciousness that his requests were persistently ignored, and that the bank neglected to proceed. Indeed, during this time the notes were repeatedly renewed by him and payment extended, reliance evidently being placed upon their final payment or adjustment from the proceeds of the Tiona oil properties. It was only from the date of the suspension of the bank that the orator asserted any equitable rights resulting from the altered situation. If he believed that the bank would not promptly act upon his request to foreclose the collateral security, his remedy was to pay the debt and obtain subrogation to the mortgage, or sue in equity to be relieved from his liability on the notes on account of the laches of the bank.

The principle enunciated in Norton v. Warner, 3 Edw. Ch. (N. Y.) 112, is not entirely inapplicable to the facts in controversy. There a mortgagee who had pledged the mortgage for a loan of a less amount than the mortgage was permitted to institute foreclosure proceedings where the pledgee refused to do so, and in McLean v. Towle, 3 Sandf. Ch. (N. Y.) 117, it was held that a surety who pays a mortgage given to secure a debt becomes subrogated in equity to the rights of the creditor, and may foreclose the mortgage in his own name. It may be suggested that it would have been an anomaly for Clark to foreclose a mortgage executed by himself, but the bill could have set forth the facts and circumstances so as to enable a court of equity to decree such relief as the nature of the case warranted. It must therefore be held in this case that the creditor acquiesced in the delay to foreclose the mortgage and he cannot now be held to assert an equitable remedy resulting from the claimed delay of the bank. It is, however, contended that the bank in the year 1892, without the orator's knowledge or consent, transferred or assigned the mortgage to the Tidal Oil Company, or discharged the same in consideration of the assumption or payment by such company of the Cogley debt to the bank amounting to a large sum of money. That there was a discussion in relation to the mortgage on the Neiltown property as an obstacle to the proposed sale is not disputed, but that it culminated in an assignment or discharge of the mortgage is not thought proven. The presumption may be indulged in, I think, that the sale of oil lands to the Tidal Oil Company was consummated irrespective of an assignment or discharge of the mortgage, and probably with the knowledge and assurance of its invalidity as a lien upon the leasehold. It is true that the witness Lown, referring to the sale of the Neiltown property, testified that it was agreed by the bank that the mortgage in question should be canceled and discharged, and that, in fact, it was either assigned or a written satisfaction of the mortgage delivered to the Tidal Oil Company. This testimony, however, lacks probative force, and, in part at least, is shown to be in error, as the mortgage, which had been mislaid,

was produced upon the trial; it having been found among the papers and documents of counsel consulted by the bank regarding its validity. I am satisfied by the evidence in its entirety that the claim that the bank actually profited by a discharge or cancellation of the Clark mortgage, or that by an agreement to procure a discharge thereof it was enabled to wipe out the Cogley debt (assuming that a mortgage given as collateral security can legally be segregated from the debt which it is designed to secure), is not supported by the proofs.

The evidence in relation to the validity of the mortgage as a lien upon the leaseholds described in the same is thought to have an important bearing upon this point. An inspection of the mortgage indicates that all the land therein described, about 700 acres, with the exception of 28 acres owned in fee, consisted of leasehold interests. The acts of 1885, 1868, and 1876, laws of the state of Pennsylvania, provide that leasehold property may be mortgaged as in the case of mortgaging of a freehold interest, provided the mortgage, together with the lease, be acknowledged and placed of record in the proper county. The decisions of the Supreme Court of the state of Pennsylvania construing such statutes have uniformly held that, where the mortgage covers leaseholds which were not recorded with the mortgage as required by the abovementioned acts, and, where there was no substantial compliance with such requirements, the mortgagee acquired no valid and subsisting lien. Hilton's Appeal, 116 Pa. 351, 9 Atl. 342; Sturtevant's Appeal, 34 Pa. 149; Ladley v. Creighton, 70 Pa. 490; Gill v. Weston, 110 Pa. 305–312, 1 Atl. 917. What the equities would have been had other rights and interests not intervened need not be discussed or passed upon as the title to the property in question is shown to have passed to other parties. It is insisted that the defendants are precluded from asserting the invalidity of the mortgage on the leasehold, on the ground that the orator believed it to be a valid lien, and was induced by the bank, which had knowledge of the claimed invalidity of the mortgage, to enter into the Tarbox agreement upon the promise to begin foreclosure proceedings. The doctrine of equitable estoppel, however, is not thought to apply to the facts in controversy. Clark was the original mortgagor of the title which he took from Waterhouse, and manifestly had the same means of ascertaining the same facts regarding the validity of the mortgage as had the bank. The principle enunciated in Brant v. Virginia Coal & Iron Company, 93 U. S. 326, 23 L. Ed. 927, where it was held that, if the conditions of the title are known to both parties or both have the same means of ascertaining the truth, there can be no estoppel, is thought to apply; and, as the requirements of the recording acts and circumstances of the claimed invalidity were equally open to Clark, the mere silence of Green, acting for the bank, is insufficient upon which to predicate an estoppel. Such is the rule in the absence of fraud (Driscoll v. Brooklyn Union Elevated Co., 42 Misc. Rep. 120, 85 N. Y. Supp. 1000), and I conceive that the evidence in this case falls short of establishing wrongful intent to mislead the plaintiff.

The next question presented is in regard to the interest chargeable by the bank upon the amount advanced to put the Tiona oil property from flowing to pumping. It was agreed that such advances should be repaid from the oil runs; no definite time of repayment being speci-

fied. Nothing was said by the parties regarding the payment of interest, and accordingly it is contended, first, that no agreement to pay interest can be implied; and, second, that, as frequent demands were made between the years 1895 and 1905 for a statement from the bank of the oil runs and credits, no interest is recoverable. That the bank is entitled to interest on such loans and advances, even though the agreement does not expressly so provide, is beyond serious question. I deem it to be the law that the right to interest is to be implied where there is no express promise, unless the parties to the transaction have otherwise stipulated, or where it would be inequitable to exact it. Gillet v. Van Rensselaer, 15 N. Y. 397; Rodgers v. Clement, 162 N. Y. 422, 56 N. E. 901, 76 Am. St. Rep. 342; C. C. Woerz v. Schumacher, 161 N. Y. 537, 56 N. E. 72; Spalding v. Mason, 161 U. S. 575, 16 Sup. Ct. 592, 40 L. Ed. 738. The point has force that as to the allowance of interest the parties must be governed by the uniform practice of charging interest by the bank. Such usage and custom, of course, was known to the complainant, and accordingly the charge of interest, though not in terms mentioned in the agreement, may nevertheless be deemed a part of it. Esterly v. Cole, 3 N. Y. 502. That the complainant personally and by counsel frequently demanded from the bank a statement of the account between them which for one specious reason or another was refused by its cashier standing alone is not sufficient to justify a decree that the bank is not entitled to the usual increment from loans and advances made by it. The amount advanced was largely, if not altogether, for the benefit of the complainant, as appears from the Tarbox agreement, and the sums realized from pumping and sale of oil were to be applied to the reduction of his debt after payment of expenses and a claim to the Warren Savings Bank.

All the questions submitted bearing upon the equities of the parties having been passed upon, nothing remains for consideration, except the amount for which judgment in accordance with this decision should be entered. In the briefs submitted by defendants, it is claimed that in the summary of the entire indebtedness as set forth in the complainant's brief a number of proper charges in relation to which evidence has been given have been ignored, and that other charges and items have been inserted in the summary that should have been eliminated. When the case was submitted for decision, it was understood that, unless the statement of account showing the balance due from Clark to the bank was practically agreed upon by the parties, I should feel obliged on account of press of other cases to refer the subject-matter of stating the account of other items of notes and advances made by the bank to Clark to a master.

In view, therefore, of such failure to practically agree upon the amount due the bank upon other notes and transactions, I deem it proper that an order be entered appointing the clerk of this court to state the account, make computations between the parties, including the amount of the notes and interest in controversy, and report his conclusions to this court with all convenient speed, or, if the parties are able to stipulate such amounts and interest, their findings may at once be submitted in accordance with this decision. So ordered.

DONNELL MFG. CO. v. WYMAN, Postmaster at St. Louis.

(Circuit Court, E. D. Missouri, E. D. September 2, 1907.)

No. 5,480.

POST OFFICE—FRAUD ORDERS—WITHHOLDING MAIL PENDING HEARING.

The Postmaster General is without authority, on the fixing of a date six weeks in advance for a hearing on the question of the issuance of a fraud order against a person or company, to direct all mail addressed to such person or company to be withheld in the meantime.

[Ed. Note.—Nonmailable matter, see note to Timmons v. United States, 30 C. C. A. 79.]

In Equity.

Geo. D. Reynolds and George V. Reynolds, for complainant.

Truman P. Young and Charles H. Dawes, Asst. U. S. Attys., for respondent.

SMITH McPHERSON, District Judge (specially assigned). The allegations of the bill of complaint are that complainant has a manufacturing plant and warehouse in St. Louis, from which it sells and distributes in several of the states groceries, medicines, and other merchandise through agents. August 13, 1907, the acting Assistant Attorney General for the Post Office Department directed the St. Louis Postmaster to hand to complainant charges inclosed, which charges were to the effect that complainant was engaged in a scheme to defraud, using the mails in furthering said scheme, and notifying complainant that at Washington City, September 27th, said charges would be heard, at which time complainant could appear at said hearing. And on the same day (August 13, 1907) the Acting Assistant Attorney General for the Post Office Department directed the St. Louis Postmaster to withhold from delivery all mail addressed to complainant pending such hearing. August 22, 1907, the Acting Postmaster General by telegram ratified the action of the Acting Assistant Attorney General for that department. From August 13, 1907, until the present time, complainant's mail has been held in the St. Louis Post Office and delivery thereof refused. So that the question is: Can the Post Office Department, pending an investigation, which may or may not result in a "fraud order," withhold mail for six weeks of time?

The statutes provide that "the Postmaster General may on evidence satisfactory to him issue a fraud order." A fraud order is one directing the post office of the addressee to return all mail of such addressee to the senders, sending the same back to the senders directly if the name of such sender is on the envelope, and, when such name is not on the envelope, to send the same to the dead letter office so that that branch of the department can return the letters to the senders; both classes of mail first being stamped "Fraudulent." The statute authorizing these "fraud orders" needs no defense from the many assaults so often made. There should be, and must be, some method of preventing the use of the mails in furthering fraudulent schemes, and to say that the use of the mails must go on until judicial proceed-

ings have been concluded is to say that the mails may thus be used until sharpers and rascals have become wealthy by crime. And therefore it was that Congress wisely provided that such mails could be arrested at the destination office and returned to the senders with advices that such mail was insnaring innocent senders. The present occupant of the bench believes most firmly in the efficacy, wisdom, and validity of the statute, and that seldom, if ever, will the statute be used to oppress or harm innocent addressees, and will be speedily corrected when "fraud orders" are mistakenly promulgated. Fraudulent concerns always masquerade as legitimate concerns, and an investigation must be had to determine which it is. Complainant's advertisements exhibited to the court illustrate this. From one view point complainant advertised for parties to conduct branch houses with a salary of $1,800 per year plus a commission on sales, but requiring a deposit of $1,000 by the agent as an evidence of good faith. From another view point parties answering such advertisements will enter into contract hurriedly read, if read at all, and agreeing to sell a certain amount of merchandise per month. But the concern furnishing the goods furnishes goods of such inferior quality or at such inflated prices, or both, that it is impossible for the agent to observe the contract, and the result is that the deposit of $1,000 is forfeited by the agent to the concern. This is a very stale and long time method of swindling. That it is swindling need only be stated. And this is what the government contends is being practiced by this concern. Such a scheme as this has been before the courts for years, and, when the latter view point appears from the evidence, the courts as of course brand it as rascality. But whether it is an honest method of business, or a scheme to swindle, depends entirely upon the purposes, and the practices and the results. And when it is a scheme for swindling, how any honest man can object to a fraud order, this court does not discern.

But as to whether it is a scheme to swindle, or an honest enterprise, can only be reached by investigation, and this is what the Post Office Department has set on foot. To determine this the Postmaster General will receive evidence for the complainant, as well as against it. And on all questions of fact the findings of the Postmaster General within the scope of the statute will be conclusive and binding upon the courts, as has heretofore been held by this court as well as by the Supreme Court and the Court of Appeals for this Circuit in the Kansas City Post Office case quite recently. Harris v. Rosenberger, 145 Fed. 449, 76 C. C. A. 225. But such findings, to be binding upon the court, must be after investigation and a hearing. It is very doubtful if such findings are conclusive in the absence of a hearing, because, to conclude the fact, either all the facts must have been submitted to the Postmaster General, or an opportunity to present the same.

The authority of the Postmaster General, as well as of any other department, is fixed by statute, or, as is sometimes the case, fixed by the Constitution. But in this case a "fraud order" has not been issued, and it cannot be known that one will be issued pending the hearing. A dismissal of the proceedings, or a "fraud order," will be the result of the hearing September 27th, or at such other time as the case may be taken up and concluded. It is enough to know that as yet a

"fraud order" has not been issued. If the Postmaster General, or, as was done in this case, by subordinates, had the authority to withhold complainant's mail for six weeks of time, it was by reason of some statute. And at the hearing in this court counsel for the government was wholly unable to present such a statute for consideration, and the most diligent search by the court has been with the same result. Apparently it can be stated that there is no such statute, and therefore no such authority exists. Since the submission of this case, the court has been advised that the date for hearing has been changed to an earlier date. But that does not change the situation, because, if the order was unauthorized, it has not been made valid by changing the date of the hearing. This court does not now hold that the Postmaster General cannot make all needful orders pending the hearing and in furtherance of the hearing. It may or may not be that the Postmaster General or those acting in his name for a limited time can withhold the mail of the addressee. But this court can reach no other conclusion than that for six weeks of time the mail cannot be withheld. A reasonable time only need be given the party for such hearing, and, if the party prolongs the hearing, it may be so that the Postmaster General can make proper orders to protect the public from schemes of swindlers.

It is therefore the opinion of the court that this order of the Acting Assistant Attorney General of the Post Office Department, even though ratified by an Acting Postmaster General later on, was unauthorized, because there is no statute susceptible of a construction giving such authority; and a proper order will be made directing the defendant herein to act as if no such order had been given.

THE HENRY O. BARRETT.

THE JAMES McCAULEY.

(District Court, E. D. Pennsylvania. October 17, 1907.)

Nos. 21, 24.

1. COLLISION—TOW AND ANCHORED VESSEL—FAULT AS BETWEEN TUG AND TOW.

Where a tug passed an anchored vessel at a safe distance, while her tow came into collision with it, the burden rests on the tow to establish alleged negligence on the part of the tug; it being her duty to follow the tug and conform to her movements, so long as they do not lead into danger.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, § 83.]

2. SAME—FAILURE OF TOW TO FOLLOW TUG.

A dredge, engaged in dredging a new channel in the Delaware river, was anchored at night on the easterly side of such channel, carrying proper lights indicating that vessels should pass to the eastward of her through the old channel, which was still in use and marked by lights. A tug, with a large schooner in tow on a hawser 480 feet long, was passing down the river, and, seeing the lights of the dredge, turned to the eastward when half a mile above, and the tow failing to follow endeavored to attract her attention by her whistle. The tug passed the dredge at a safe distance, and the tow failing to follow turned almost directly to the eastward, but the tow kept nearly straight ahead and struck the dredge, in-

juring her and one of the men on board, and drowning another. ***Held,*** **that the schooner was solely in fault in failing to pay proper attention to her course and to follow the tug, there being a sufficient depth of water in the old channel.**

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, § 78.]

In Admiralty. Suit for collision. On final hearing.

Henry R. Edmunds and Theodore M. Etting, for American Dredging Co.

Curtis Tilton and Edward F. Pugh, for the Henry O. Barrett.

John F. Lewis and Francis C. Adler, for the James McCauley.

HOLLAND, District Judge. This is a collision between the schooner Henry O. Barrett, while in tow of the tug James McCauley, and the dredge Columbia, which was anchored in the neighborhood of Dan Baker Shoals in the Delaware river, where she was at work in the daytime under contract with the government of the United States for dredging a new channel. It occurred in the early morning of April 2, 1903, at half past 4 o'clock. The schooner, a large coasting vessel, drawing upward of 24 feet of water, started from Philadelphia for Boston with a cargo of coal, and at the time of the accident the tug and the tow were bound down the river to the Capes. The tug was towing the schooner astern upon a hawser about 80 fathoms long. The night was dark, but lights were plainly visible. Both the tug and the tow had the required lights burning, and were proceeding at the usual rate of speed. At a point above Reedy Island Flats, commonly known as "Dan Baker Shoals," those on the schooner and tug saw a bunch of red lights and white lights about two miles away, toward which the tug directed her course. These lights subsequently proved to be on the Columbia. The red lights were so placed with reference to the white lights as to indicate that vessels should pass her on her port side, which was to the eastward. As the tug and the tow approached the dredge, the tug, at a distance probably of half a mile (at any rate at sufficient distance to enable the schooner to follow), steered to the eastward; but those in charge of the schooner failed to follow. The tug thereupon blew several blasts upon her whistle to attract the tow's attention. The tow failed, however, to follow, and the tug at once put her helm to starboard in an effort to pull the tow to the eastward, and the whistle was again blown. The tug by this time had gradually swung well over to the eastward and in a position plainly visible to those on the schooner; but the latter still failed to follow, and the helm of the tug was swung full to starboard and danger whistles were blown. The schooner had been pointing directly for the middle of the stern of the dredge, and the tug, almost at right angles, at the end of a hawser 480 feet long, was pulling her eastward. The result was that the efforts of the tug, together with whatever aid was given by the wheel of the schooner, were only sufficient to change the course of the schooner so as to make the blow a glancing one; the starboard bow of the schooner striking the upper port corner of the dredge, scraping along her side, doing some damage to both schooner and dredge, injuring Luka Bachich, and drowning one Albert E. Johansen, both deck hands on the dredge. The towing hawser was parted by the

collision, and the tug passed the dredge to the eastward by an ample margin of safety and in a position at the time of the collision nearly at right angles to the schooner and a full length of the hawser away from the dredge. The tug was pointing across the river toward the Jersey side. The dredge was anchored on the eastern side of the new channel, at or near a point where that edge of the new channel was intersected by the Reedy Island lights. To the eastward of her anchor was the old channel, which was well defined and properly lighted, with a width of from 400 to 600 feet, and having a minimum depth of 26 feet or thereabouts. The new channel lay to the westward of the dredge, which was 600 feet wide and about 30 feet deep at mean low water, had been substantially completed, and new range lights established; the old lights still being left in place. After the practical completion of the channel the government determined to cut away a corner at a place where there was a slight bend, and it was here that the dredge was engaged at the time of the collision. The old channel to the eastward was being used at the time of the collision by vessels of deep draft coming up and going down the river.

The dredge filed this libel against the schooner alone, and the latter made the tug a party co-respondent to this libel under the fifty-ninth rule in admiralty (No. 21 of 1903), and, in addition, has libeled both dredge and tug (No. 24 of 1903). A libel has been filed in behalf of the injured deck hand, Luka Bachich, Jr. (No. 19 of 1903), against the schooner, dredge, and tug. A libel has also been filed in behalf of Albert E. Johansen, the seaman who was drowned, against the owners of the tug in personam, and another libel in the same interest against the owners of the dredge in rem.

As it was the schooner that struck the dredge, while the tug passed at a safe distance, the burden of proof is upon the schooner and the other parties alleging it to establish the tug's alleged negligence in approaching the dredge. Invertrossachs v. The McCauley, 39 Fed. 194, 8 C. C. A. 87. Presumption of fault is against the tow. The Albert N. Hughes, 92 Fed. 525, 34 C. C. A. 516. So long as the tug is not going into danger, the tow is in duty bound to follow the course of the tug and conform to her movements. The Thomas Wilson (D. C.) 124 Fed. 649. The United States regulations required dredges in the Delaware river to have in view one white light and four red lights; the latter to be displayed on the side on which it is desired that vessels should pass. The evidence shows that the dredge upon the night of the collision had observed these requirements, with the possible exception that, instead of having one white light, two were used. The four red lights, however, were properly located to indicate to the tug and the tow that it was their duty to pass the dredge to the eastward, and there is nothing to show that either the tug or the tow was in any manner whatever deceived by the additional white light; but, on the other hand, it is shown that the officers on both the tug and the schooner understood the meaning of the lights as they appeared.

We further find that there was sufficient depth of water in the old channel for the schooner to pass down that side, and from the evidence there can be no other conclusion than that the officers in charge at the time were not paying the proper attention to the management of

the tow. The schooner was pointed for the middle of the stern in at least 30 feet of water, and if the man at the wheel had given any assistance in steering to the eastward of the dredge, with the tug pulling her in that direction until the latter was almost at right angles to the schooner, it is not at all probable that the collision would have occurred. The allegation that the tug was at fault because an inexperienced man, without a license, was at the wheel, is not established. The master was on deck, and there was nothing in the action of the tug which contributed to the accident; but, on the contrary, she made an effort to prevent it, and would no doubt have been successful, if the tow had observed the same care. Nor do we think that the claim of the schooner was the tug's failure to lay up above Reedy Island for high tide was negligence, because at the time of the accident there was sufficient depth of water for the schooner to pass down by the dredge, if the proper care had been observed. We think, for these reasons, that the schooner is entirely at fault and liable for the injury resulting from the collision.

A decree is therefore entered in favor of the libelant and against the schooner Henry O. Barrett alone.

In re GULIANO.

(District Court, S. D. New York. October 15, 1907.)

1. ALIENS—NATURALIZATION—REQUISITES ON SECOND APPLICATION.

Under Naturalization Act June 29, 1906, c. 3592, § 4, subd. 2, 34 Stat. 597 [U. S. Comp. St. Supp. 1907, p. 421] an alien who has made application for naturalization to a court of competent jurisdiction, and whose petition has been denied, cannot be admitted to citizenship by another court without alleging and proving that the cause for the denial of his first application has since been cured or removed; and where such cause was a finding by the court that the applicant had not during the preceding five years' residence "behaved as a man of good moral character," because of his having within that time pleaded guilty to a serious criminal offense, he cannot be admitted until the lapse of five years after such plea.

2. SAME—PROCEDURE.

Where the right of an alien to naturalization is doubtful, he may properly have the matter determined by means of a motion for leave to file a petition setting out the facts, and on notice to the United States attorney, without payment of the fees required on the filing of a petition by Act June 29, 1906, c. 3592, § 13, 34 Stat. 600 [U. S. Comp. St. Supp. 1907, p. 426].

On Motion that Petitioner be Permitted to File a Petition for Certificate of Naturalization.

The following facts appear from the papers submitted: Guliano came to the United States in 1891, being then 19 years old. In 1897 he applied for and obtained a certificate of naturalization in the Supreme Court of this state (Kings county). At the time of this application he swore that he was but 16 years of age on arrival, and did this, as he deposes, upon the advice and under the influence of a fellow countryman. The certificate of naturalization thus unlawfully obtained Guliano kept, and presumably used, until 1904, when, the illegality being discovered, he surrendered it to a special employé of the Department of Justice. Immediately thereafter, and in February, 1904, he declared his intention to become a citizen in the New York Supreme Court

(New York county). In February, 1905, he was indicted in the Circuit Court for this district under Rev. St. §§ 5425, 5428 [U. S. Comp. St. 1901, pp. 3669, 3670], and pleaded guilty. Sentence, however, was suspended. On August 14, 1907, he applied for his final papers to the Supreme Court of this state (New York county), and his application was, as shown by the extract from the records, "absolutely denied." He now moves for leave to file another petition in this court.

Arthur M. King, for petitioner.
Henry L. Stimson, U. S. Atty., opposed.

HOUGH, District Judge. The present naturalization law (Act June 29, 1906, c. 3592, 34 Stat. 596 [U. S. Comp. St. Supp. 1907, p. 417]) requires the payment of fees (considerable in amount for many of the applicants) in advance, viz., on the "making, filing and docketing the petition" (section 13). Upon the final hearing of said petition, which must be "had in open court before a judge" (section 9), the court must be satisfied, among other things, that the applicant during at least five years' residence within the United States "has behaved as a man of good moral character" (section 4, subd. 4), and must generally be convinced of the truth of the allegations of the petition, including (in this man's case) that he "has been denied admission as a citizen of the United States * * * and that the cause for such denial has since been cured or removed" (section 4, subd. 2). While the record from the state Supreme Court does not reveal the exact ground inducing the absolute denial of Guliano's application, it is inferable from all the papers now submitted that the court did not consider a man, who had within two years and a half pleaded guilty to a serious offense, a person who during five years prior to the hearing of his application had been of good moral character.

The jurisdiction of the Supreme Court over naturalization is as ample as that of any other. Guliano chose to submit to that jurisdiction the question (inter alia) of his moral character, and a decision has been reached adverse to him. The letter of the present act seems to place no limit upon the number of applications that an alien may make for naturalization; but I cannot think it follows that a man who has fully submitted his case to a court of competent jurisdiction and had judgment against him can propound a new application the next day in another court, and repeat the operation as long as his courage dictates or his pocket permits. It is inconceivable that, should Guliano's application be entertained in this court, and his final petition come on for hearing (as it would) within a few months after the decision above noted, such decision would be wholly disregarded, and a certificate granted upon substantially the same facts as had induced its denial a few months earlier.

But there is nothing in the statute forbidding a preliminary inquiry in cases where it is doubtful whether the applicant can truthfully verify a petition giving him any hope of a successful issue. Section 4 declares that an alien "may be admitted" in the manner therein set forth, and "not otherwise." The manner therein set forth consists of declaring on oath numerous facts and then proving them afterwards. One of the necessary facts is that the grounds of denial mov-

ing any court previously refusing an application have "since been cured or removed." He may, and I think should, be permitted to make a preliminary showing in this regard without the payment of the fees attaching to the filing of an application; and I know of no more appropriate method of such preliminary investigation than the course adopted here, viz., motion on the general calendar, after notice to the United States attorney for the appropriate district.

The spirit of the law requires every applying alien to have his day in court; but it is not necessarily a day for which a prerequisite is the preparation of an elaborate petition, posting for 90 days, and a hearing upon a crowded calendar, when it can be ascertained without expense that the application is foredoomed to fail. Such, I think, is Guliano's position. It has been decided by a court of competent jurisdiction that, because he pleaded guilty to the indictment above noted within five years prior to his application, he was not of good moral character for the statutory period. Other courts and other judges, upon slightly varying facts, might perhaps come to a different conclusion; but I do not think that this man can show that the cause of denial has been "cured" until at the least he has behaved himself as a man of good moral character for five years after his plea of guilty.

Motion denied.

In re BAUMBLATT.

(District Court, E. D. Pennsylvania. October 16, 1907.)

No. 2,621.

BANKRUPTCY—DEBTS ENTITLED TO PRIORITY—"CLERK" DEFINED.

The word "clerk," as used in Bankr. Act July 1, 1898, c. 541, § 64b (4), 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447], giving priority to debts for wages due to "workmen, clerks, or servants," earned within three months prior to the bankruptcy, includes a bookkeeper; and the right of a clerk to priority is not affected by the fact that his employment by the bankrupt was not exclusive, but that he also did work for others.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 536.]

In Bankruptcy. On certificate from referee concerning claim of Francis J. Thorn to priority.

See 153 Fed. 485.

J. Louis Breitinger, for trustee.

John M. McConaghy, for claimant.

J. B. McPHERSON, District Judge. The ground upon which the claimant asks to be allowed priority is that he was a bookkeeper for the bankrupt at the agreed sum of $50 per month, and that his wages for more than three months preceding the bankruptcy are still unpaid. The facts appear from the following opinion of Referee Richard S. Hunter, Esq.:

"The testimony of the claimant as to the salary due was that he was employed by the Tradesmen's Trust Company, the assignee of Baumblatt's predecessor in business, from November 17, 1905, to May 1, 1906, upon a

salary of $50 a month; that, when Baumblatt took over the business under an arrangement with the creditors, he said to the claimant, 'When you discontinue with the Tradesmen's Trust Company, go right on under the same conditions.' There was apparently no further conversation between them at that time: but the claimant testifies that Baumblatt knew the amount that was being paid him by the Tradesmen's Trust Company. The claimant kept the books and made out monthly reports, stopping at the bankrupt's place of business whenever necessary, and nearly every day; sometimes for three or four hours, and sometimes an hour. He made entries in the daybook, cashbook, and ledger. He remained in service from May 1, 1906, to September 1, 1906.

"On cross-examination of the claimant nothing further was elicited, except that the claimant was employed in various other businesses during the time that he kept the books.

"The bankrupt testified that he was positive he made the arrangement with the claimant for $25 a month, and that he was paid every month, with the exception of the last two months, July and August; that the claimant made the general entries in the books, but that another bookkeeper was employed to do the minor work. He added: 'That was all that I was able to pay. He did it more out of friendship for me than for a business consideration.'

"There is here a conflict of testimony. Both witnesses appear to be credible and believe that they are telling the truth.

"There is no doubt, however, that, in the absence of any agreement for a definite salary, the claimant could have shown services to the value of $50 a month. This is practically admitted by the bankrupt in the sentence last quoted from his testimony. It seems upon the whole more likely that the claimant's recollection on this subject should be correct than that of the bankrupt, who was harassed at that time in many ways.

"Is the amount due as a priority? The act gives priority to workmen, clerks, or servants. The distinction is drawn by the trustee between a clerk who is regularly employed by the bankrupt and remains all the time in his place of business, and an accountant called in for a special purpose, and for this distinction the decisions upon the Pennsylvania act of 1872, especially Llewllyn's Appeal, 103 Pa. 458, are invoked to show that the employment must be regular and permanent.

"Without considering how far the Pennsylvania act of 1872 can be held to influence a decision under the bankruptcy act, enough appears from the evidence to show that the services were of a continuous nature, and such as might extend for years to come to the business as carried on by Baumblatt.

"The referee finds that the claimant is entitled to a balance of salary of $215, of which $150 is allowed as a priority."

Upon exception by the trustee to the award of priority, the referee added:

"Counsel for trustee urges upon the referee that the occupation of the claimant was not exclusive, that he spent but a few hours each day with Baumblatt, and that his service was of a sort which must at some time terminate. This, however, does not appear to the referee to be the material circumstance. Exclusive employment by the bankrupt has never been considered necessary to constitute the claimant a clerk within the meaning of the act. Thorn was continuously employed at a regular salary per month, with no indication as to the length of his employment, and with a strong presumption on the face of the evidence that his services would continue necessary in Baumblatt's business for an indefinite time. This is, in the judgment of the referee, sufficient to entitle him to priority."

Only a few words more need be said. Whatever may be the precise scope of the word "clerk," as it is used in clause (b) 4 of section 64 (Act July 1, 1898, c. 541, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447]), I think it certainly includes a person who regularly keeps a bankrupt's books under the contract and in the manner set forth by the learned referee. Under the act of 1867, Judge Lowell decided that the word

included "a person employed for a temporary service in adjusting the books and accounts of a bankrupt" (Ex parte Rockett, Fed. Cas. No. 11,977); and this meaning is broader than is required to support the claim under consideration. If the well-known rule of statutory interpretation is followed, the act of 1898 must, I think, be held to have used the word in its ordinary signification; and, if this decision be correct, it scarcely admits of question that in common speech a "clerk" includes a bookkeeper, as well as other classes of servants.

The decision of the referee awarding priority to the claimant is affirmed.

MINNEAPOLIS, ST. P. & B. S. S. CO. v. MANISTEE TRANSIT CO.

(District Court, W. D. New York. October 18, 1907.)

SHIPPING—GENERAL AVERAGE—GENERAL AVERAGE LOSS.

The right to a general average contribution can only arise from a deliberate and intentional act of the master of the vessel or other representative of the joint enterprise in sacrificing a portion of the marine adventure, or incurring an extraordinary expenditure, for the joint benefit of all interests; and an owner of cargo injured by water poured into a burning vessel cannot recover contribution in general average from the vessel where the act was not done by nor under the direction of the master, but by the fire department of a city acting on its own authority.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, §§ 598, 599.

General average, see note to Pacific Mail Steamship Co. v. New York H. & R. Mining Co., 20 C. C. A. 357.]

In Admiralty.

Wilcox & Bull and Ansley Wilcox, for libelant.

Goulder, Holding & Masten, for respondent.

HAZEL, District Judge. The libel herein is filed by the charterer of the steam propeller Hennepin against the owner of the said steamship for general average contribution for damages to cargo of package freight sustained in the extinguishment of a fire on the said steamer. A general average statement was made which shows that the proportion for which the vessel is claimed to be liable is $6,525.39, subject to the sum of $1,650 for damages to the vessel.

It is a well-established rule of law that general average contribution is based upon a voluntary sacrifice of a portion of the marine risk which must have been made for the common benefit of the joint enterprise, and, quoting from the Supreme Court in the case of Ralli v. Troop, 157 U. S. 386, 15 Sup. Ct. 657, 39 L. Ed. 742, "for no other purpose." The sacrifice must have been made by the order of the owner, master, or authorized representative. The facts of this case are not thought essentially different from the facts proven in the Ralli Case. There the mate in charge of the vessel during the temporary absence of the master sounded an alarm of fire by ringing the vessel's bell, and a number of the crews of neighboring vessels, hearing the alarm, rendered assistance in flooding the firehold with water. During the progress of the fire the port authorities came with fire engines, poured water into the hold, and generally took charge of the vessel for the purpose of

putting out the fire. In the meantime the master returned to the vessel, but did not object to the operations of those in charge of the fire engines or the attempts to extinguish the fire. The kernel of the decision is found in the statement of the court that the master or mate in charge of the vessel was not in a position to determine the manner in which a portion of the maritime adventure should be sacrificed. Nothing was done to indicate a deliberate purpose to suffer a loss in order to save the rest of the endangered property. The failure to prove that the sole object of the port authorities was to save the ship and cargo was deemed fatal to libelant's right of recovery, and it was accordingly presumed by the court that the primal purpose of the port authorities was to save other vessels and property which might have been injured through the fire. In the case at bar there is no serious controversy as to the facts, but there is in regard to the rule of law.

On June 27, 1901, at about 2 o'clock in the afternoon while the steamer Hennepin was moored at the Lehigh Valley Railroad Company's wharf in Blackwell Canal at the port of Buffalo, fire broke out in the Lehigh Valley freighthouse, which was located adjacent to such wharf, and the fire was soon communicated to said vessel. The line was immediately cast off, and, although some difficulties were encountered owing to the narrowness of the channel and the proximity of a vessel moored forward, she crossed the channel, which at this point was about 200 feet wide, and lay alongside the opposite wharf. The steamboat was enveloped in smoke and flames, and the fire quickly spread to the engine room. The master of the Hennepin repeatedly blew alarm signals on his steam whistle, with the intention, he testifies, of calling for help from the city fire department. He directed the crew of the vessel to couple up the fire hose on the vessel preparatory to pumping water on the fire, but his directions were not carried out presumably because of the density of the smoke and flames. The smoke drove the engineer and his assistant from the engine room, and the master, whose hand had been burned, from the pilot house. Immediately after the vessel was moored to the opposite wharf the master and the ship's husband, who was on board at the time of the fire, hastily left the vessel, and went toward the burning freighthouse about 1,500 feet distant to solicit aid from the city fire department, but they procured no assistance. Meanwhile certain other city fire engines and firemen, responding to a second alarm of fire from the headquarters of the fire department, came to the relief of the burning vessel, and together with the fire tug Hutchinson, which after colliding with the burning steamer on account of the density of the smoke, rendered assistance. After having his burns dressed by the fire department surgeon, who was present at the fire, the master returned to the vessel and found her in charge of the city fire department, which was energetically decreasing the fire. The ship's husband who had returned to the steamer a short time before the master found firemen playing water upon radiators which he stated were not burning, and, supposing that the cargo would be unnecessarily wetted, he objected, but his protest was not heeded by the firemen. The master suggested to the firemen a convenient way to reach the blaze in the hold by cutting through the decks and covering boards, and later, the ship having listed

to port, he and the crew cut out a gangway shutter to allow the water to flow off and endeavor to right the vessel. Late in the afternoon the vessel sank in about 17 feet of water, her upper deck and part of the main deck remaining above the surface. When the fire seemed to be extinguished and the firemen had gone, the master left the vessel, the wheelsman remaining in charge. During that night the fire again broke out in the coal bunkers, but was readily extinguished by the fire department. Nothing was done to segregate the property to make a sacrifice for the joint benefit of the ship and cargo. No directions were given by the master towards sacrificing or saving any property under his dominion. The situation evidently did not afford the master an opportunity for exercising a reasonable judgment as to the destruction of property for the benefit of others engaged in the joint venture. He seemingly was content to allow the fire department to perform their duties, and did not supervise or interfere with their operations, except in one instance to indicate where holes should be made in the deck to insert the nozzle of the hose. It does not appear, however, that the fireman obeyed any directions or followed any suggestions of the master. The thought of sacrificing any part of the package freight for the joint benefit of the owners evidently did not occur to him. Some of the crew were present during the afternoon of the fire, but it is not shown that anything was done by them under directions of the master which would bring the case within the rule of general average. As stated by the Supreme Court in the Ralli Case, supra:

"The question what measures are the best and most prudent, the most feasible and available, to extinguish the fire, or, in other words, what part of the maritime adventure should be sacrificed, and in what manner, for the safety of the rest of the adventure, was to be determined by the master at the time of the emergency; and his determination, faithfully and reasonably made, was, so far as affects the right of mutual contribution between the parties to the adventure, not to be overruled by the municipal authorities at the time, or by the court long afterwards."

Libelant points out the inequity of refusing general average under the circumstances of this case, and insists that the master undertook to exercise authority and control notwithstanding the peremptory acts of the fire department. In the Ralli Case, supra, the Supreme Court considered such a situation, but it firmly adhered to the ancient Roman and Rhodian codes, which manifestly did not contemplate any modern situation by which strangers to a vessel without being under the restraints of the paramount authority of the master should in case of danger assist in the preservation of a ship and cargo. The court says:

"In the execution of this office, and in the performance of this duty, they act under their official responsibility to the public, and are not subject to be controlled by the owners of the adventure, or by the master of the vessel as their representative."

I have examined the decision in The Roanoke (D. C.) 46 Fed. 297, 53 Fed. 270; affirmed in 59 Fed. 161, 8 C. C. A. 67, but, in that case the fire originated on board the vessel, and the District Court found that the master directed the operations of the firemen who were expressly called to help the crew make a sacrifice and save a portion of the endangered cargo. After the fire was thought to have been put out,

the vessel departed on her voyage, but the fire broke out at intervals in different portions of the cargo, consisting of jute stowed in the hold, and was only kept checked by the crew through the steamer's hose at each outbreak. The important features of that case and the case under consideration would seem to be clearly distinguishable.

The libel is dismissed, with costs.

THE SITKA (two cases). THE ELIZA H. STRONG. THE COMMODORE.

(District Court, W. D. New York. July 13, 1907.)

Nos. 139, 140, 142.

1. COLLISION—DAMAGES RECOVERABLE—INTEREST.

Where the injury received by a vessel in collision was repaired, interest is allowable on the damages recovered from the vessel in fault only from the time the cost of the repairs became payable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, § 284.]

2. SAME.

Interest is not recoverable on demurrage awarded to a vessel for the time she was laid up for repairs after an injury in collision.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, §§ 284, 290.]

In Admiralty. On exceptions to report of commissioner on the question of the amount of damages.

For former opinion, see 132 Fed. 861.

Knud Pederson, for libelants.

Brown, Ely & Richards, for Strong Transportation Co.

Potter & Potter, for Gilchrist Transportation Co.

HAZEL, District Judge. Heretofore this court condemned the steamer Sitka for her negligence in colliding in St. Mary's river with the steamer Eliza H. Strong. There were two collisions, the second being between the Sitka and the barge Commodore in tow of the Eliza H. Strong; and as to such collision this court held both the steamer and barge in fault and decreed a division of the damages. The decision of the court will be found in 132 Fed. 861. The commissioner appointed herein, upon the authority of The Iroquois, 84 Fed. 697, allowed interest on the damages sustained by the Strong as against the Sitka upon the theory that from the time of the collision such allowance was proper as compensation for permanent injuries and repairs. In The Iroquois, supra, a permanent injury to the vessel was proven, and from the time of its infliction the libelant was deprived of her earning capacity. In this case the proofs show that the injured vessel was undergoing temporary repairs for about seven days, for which period of time demurrage has been allowed.

Interest should be allowed the libelant from the time the disbursements for repairs of the Strong became payable, instead of from the time of the collision. The decisions hold that the allowance of interest rests in the discretion of the court, and it is usually allowed from the time the damages or items of expense were incurred. The Mahanoy

(D. C.) 127 Fed. 773; Spencer on Marine Collisions, § 206. See, also, North Shore Staten Island Ferry Co. v. Huguenots, Fed. Cas. No. 10,330. The authorities cited by proctors for the Sitka, who contend that interest is allowable only from the time the final decree is entered, do not strictly apply. In The Manitoba, 122 U. S. 97, 7 Sup. Ct. 1158, 30 L. Ed. 1095, and The Jose E. More (C. C.) 37 Fed. 122, interest was allowed from the date of the decree; but the conclusions therein were based upon a limitation of liability, the surety bond filed standing as a substitute for the vessel, and because of such limitation of liability all of the damages sustained by the libelant were not recoverable. Interest, therefore, could only be recovered from the date of the decree.

It is contended by libelant that, on account of claimant's delay in making proof of damages after libelant had closed its evidence, interest should be allowed from the time of the collision. Upon this point it is sufficient to say that I think any delay there may have been was not wholly without the implied assent of libelant. Certainly the latter was not "strictly urgent to bring the case to decision," nor did the claimant strenuously seek such delay, as was the case in The Rabboni (D. C.) 53 Fed. 948.

It is also objected by claimant that the commissioner erred in allowing interest on demurrage. It is doubtful whether this item should be allowed. The weight of authority would seem to withhold its allowance. The Eloina (D. C.) 4 Fed. 573, and cases cited. Upon the hearing before the commissioner, as shown by the brief submitted to him, interest on demurrage was demanded by claimant against the barge Commodore. Such allowance of interest to libelant was made without his attention being called to the rule enunciated by Judge Benedict in the case above cited. Libelant contends that heretofore in this district interest on demurrage was allowed, and in support of such contention The Bulgaria (D. C.) 83 Fed. 312, is cited; but in that case the point was not pressed or expressly passed upon.

The other exceptions of the claimant and the exceptions filed by the libelants are not sustained. The commissioner has correctly passed upon the numerous and difficult propositions presented, and, with the exceptions hereinbefore mentioned, is amply supported in his rulings by the precedents cited by him in his written opinion.

Therefore, except as herein modified, the report of the commissioner is affirmed.

THE FEARLESS.

THE VIZCAINA.

(District Court, E. D. Pennsylvania. October 17, 1907.)

No. 13 of 1901.

COLLISION—STEAMSHIP AND FERRYBOAT LEAVING SLIP—MUTUAL FAULT.

A ferryboat, after giving the starting signal, left her slip on the Philadelphia side of the Delaware river. To the southward of her pier and 60 feet distant was a long covered pier, extending into the river 180 feet beyond the pilot house of the ferryboat, in which the master was stationed when he gave the signal to start. As she started a steamship came past the end of the long pier, about 100 feet distant therefrom; and be-

fore the ferryboat, which started with the full power of her engines, could be stopped, a collision occurred. *Held*, that both vessels were in fault; the ferryboat for not starting at sufficiently slow speed to enable the master to avoid collision with any vessel that might be passing up by the end of the long pier, which prevented the master from seeing down the river, and the steamship for passing up so close to the end of such pier without signal or other warning.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, §§ 200–202.]

In Admiralty. Suit for collision. On final hearing.

John F. Lewis and Francis C. Adler, for libelant.

Henry R. Edmunds and Convers & Kirlin, for respondent.

HOLLAND, District Judge. The collision between the ferryboat Fearless and the British steamship Vizcaina occurred March 4, 1901, at about 7:30 o'clock in the morning, opposite pier 28, in the Delaware river. Pier 28 extends out into the river 540 feet and is covered with a high shed. The berth to which the Vizcaina was going was on the North, or upper, side of this pier. Above pier 28 to the north, across 60 feet of open water, lies the pier of the ferryboat Fearless. That pier is 240 feet long. The ferryboat, when in her slip, lies at the end of it, and she is 160 to 170 feet long. Her forward pilot house is 40 to 50 feet aft of her stem. Hence her pilot, when in the pilot house, would be about 180 feet back from the end of pier 28. The Fearless is a screw-wheel ferryboat, engaged in carrying passengers from pier 28 down the river to Gloucester. The Vizcaina is a steel steamship, 300 feet long and 42 feet wide. She was without cargo of any kind on this morning, and had left her anchorage off Kaign's Point, a mile below, and steamed up the river for the purpose of docking at pier 28. The tide was running ebb, and there was some ice in the river. The steamer passed up by pier 28 at the distance of about 100 feet from the end thereof and at about the time the ferryboat was ready to leave the slip on its journey across the river. The time of departure of the Fearless having arrived, she gave the usual warning whistle and was cast loose from her berth. The master alone in the forward pilot house gave the signal to the engineer, and the boat moved at such a speed as she could acquire at once from the full power of the engine. He suddenly discovered the Vizcaina right ahead of him, rang four bells to go back, gave the danger whistle, and immediately afterwards crashed into the port bow of the Vizcaina a few feet aft of the latter's stem.

The evidence in this case shows that the cause of this accident was due to the negligence and carelessness of both vessels. Pier 28 extends about 180 feet beyond the forward pilot house of the Fearless when docked, and the master was unable to see down the river. It was his duty to pass out into the stream at a rate of speed sufficiently slow to enable him to avoid collision with any craft that might be passing up by the end of pier 28. Instead of that, he started from the slip at a speed as rapid as the full power of his engine enabled him to go, and as he passed out beyond the end of the pier he was moving so rapidly that he was unable to avoid the collision with the Vizcaina, which at that moment came in view. The fault of the latter was in that she

was steaming past this danger point entirely too close to the pier, without giving any warning or apparently heeding the signal given by the ferryboat before she started from the slip. Neither vessel was proceeding with care at the time of the collision, and they are both equally responsible for the result. The damage resulting should therefore be equally divided between the ferryboat Fearless and the steamship Vizcaina. In this case the ferryboat is the libelant and the Vizcaina the respondent. The suit is No. 13 of 1901. The Vizcaina also filed a libel against the ferryboat Fearless, which is No. 14 of the same year.

As the conclusion of the court is that they are both equally liable, the matter of damages can be adjusted in either case.

THE VIZCAINA.

THE FEARLESS.

(District Court, E. D. Pennsylvania. October 17, 1907.)

No. 14 of 1901.

In Admiralty.

Henry R. Edmunds, for libelant.

John F. Lewis and Francis C. Adler, for respondent.

HOLLAND, District Judge. It is ordered that this case shall be disposed of in connection with No. 13 of 1901 (156 Fed. 428), and in accordance with the decision this day filed therein.

In re ELLIS BROS. PRINTING CO.

(District Court, W. D. New York. October 3, 1907.)

No. 2,513.

1. BANKRUPTCY—ADVERSE CLAIMS—JURISDICTION OF BANKRUPTCY COURT.

The mere assertion of a claim of title to property adverse to a trustee in bankruptcy, even with an intention to protect it by the usual process of law, will not preclude the bankruptcy court from exercising its power to proceed summarily; but it is only when the evidence indicates that the asserted claim is not false or fraudulent that such court is deprived of jurisdiction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, §§ 321–323.

Jurisdiction of federal courts in suits relating to bankruptcy, see note to Bailey v. Mosher, 11 C. C. A. 313.]

2. SAME.

The claim of an attorney, who as such collected money for a bankrupt before the bankruptcy, of the right to retain such money and apply it on an indebtedness from the bankrupt to him, is not such an adverse claim of title as to deprive the bankruptcy court of jurisdiction to adjudicate such claim in a summary proceeding therefor by the trustee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, §§ 321–323.]

In Bankruptcy. On report of special master.

Joseph H. Morey, for trustee.

Eugene Warner and Charles W. Strong, for respondent.

HAZEL, District Judge. Upon the authorities cited in the report of the master the bankruptcy court has power to inquire into the facts for the purpose of determining whether any basis exists for the adverse claim of title to the property asserted by the respondent. The mere assertion of an adverse claim of title, even with an intention to protect it by the usual process of law, will not preclude the bankruptcy court from exercising its power to proceed summarily. In re Andre, 135 Fed. 736, 68 C. C. A. 374. It is only when the evidence indicates that the asserted claim is not false or fraudulent that the bankruptcy court is deprived of jurisdiction. If it should appear from the proofs that the respondent, Strong, refuses to surrender the money collected by him to the trustee simply on the ground that the title to the same is conclusively evidenced by his possession of it, or if the claim is unreal or colorable, then it is the duty of this court to direct its payment to the trustee. This principle of law is so clearly and definitely stated by the Supreme Court in Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405, that no other citations are thought necessary.

In the prior cases decided by this court, in passing upon the right to exercise summary jurisdiction, it was not intended to be understood as holding that, irrespective of whether the elicited facts were sufficient in law, the mere assertion of an adverse claim of title or ownership deprived the court of summary power. If the proofs show that in fact there is no legal basis for the asserted adverse claim, the summary power of the court is not defeated. In Re Andre, supra, the principal question in controversy, as I read the case, was whether before adjudication the sheriff should be required by the bankruptcy court to release his levy; he being an adverse claimant under an attachment and claiming that he had a lien upon the property levied upon for poundage. The court held that the sheriff had a right to retain the property, not only until the attachment was dissolved, but until he was required to surrender it by a court of competent jurisdiction.

The position of the respondent, as appears by his answer, is that he collected the money of the bankrupt as its attorney before the petition was filed, that such bankrupt was indebted to him for legal services, and that he had applied the amount collected upon such indebtedness and hence has actual title thereto. From the admitted facts I think the bankruptcy court has jurisdiction of the subject-matter, and the special master may make such rule or order touching the respondent's lien to the money in his hands as may be proper.

This being the ruling upon the first question discussed by counsel, it is unnecessary to decide the second point, namely, that the court has inherent power to control the action of its attorneys.

In re MAYER.

(District Court, E. D. Pennsylvania. October 16, 1907.)

No. 2,556.

BANKRUPTCY—ADVERSE CLAIM TO PROPERTY—SUFFICIENCY OF EVIDENCE.

A claim to property which was in the possession of a bankrupt at the time of the filing of the petition *held* not established by the unsupported testimony of the claimant, where, if true, he could have produced other evidence in corroboration.

In Bankruptcy. On review of referee's decision rejecting claim of Max Mayer.

Wessel & Aarons, for trustee.
Milton M. Cohen, for claimant.

J. B. McPHERSON, District Judge. It would have been more satisfactory, I think, if the learned referee had found the fact distinctly, whether or not the transaction to which the claimant testified had actually taken place between himself and his brother, the bankrupt. The decision is apparently put upon the ground that, even if the claimant's testimony should be accepted as true—several good reasons being given for disbelieving his story—nevertheless the Pennsylvania authorities forbid his recovery. For my own part, it seems that the question of fact is quite as important, and that it would be dangerous to accept such testimony as is now before the court without corroboration, save in exceptional cases. The bankrupt, who must have known as much about the matter as his brother, was not called as a witness. There is not a scrap of written evidence to support the claim, directly or indirectly. It is not even proved that the property in dispute ever belonged to the partnership, although the merchants who are said to have sold it to the firm were easily accessible; and, in a word, the whole statement rests absolutely upon the claimant's uncorroborated account, to which it would be almost impossible for the trustee to reply. I do not decide that in no case can a claim be made out by the unsupported testimony of the creditor, but simply that, under the circumstances of the present case, I do not find such testimony to be sufficient. I therefore hold that the evidence offered by Max Mayer does not establish his claim to be the owner of the goods in dispute, and that he has not overcome the prima facies of the bankrupt's ownership, due to possession of the property at the time the petition was filed.

The amended order of the referee, dismissing the claimant's petition, and directing him to deliver forthwith to the trustee the safe and the show cases in dispute, or to pay their value, $210, to the trustee, is accordingly affirmed.

CHARLTON et al. v. KELLY.

(Circuit Court of Appeals, Ninth Circuit. October 22, 1907.)

No. 1,445.

1. MINES AND MINERALS—MINING CLAIMS—MARKING OF BOUNDARIES.
Under Rev. St. § 2324 [U. S. Comp. St. 1901, p. 1426], which requires that a mining location "must be distinctly marked on the ground so that its boundaries can be readily traced," no particular method of marking is required, and what is sufficient may depend on the topography of the ground; it being a question of fact in each case whether the lines are so marked that they can be readily traced by a person making a reasonable effort to do so.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mines and Minerals, §§ 40–44.]

2. SAME—DISCOVERY OF MINERAL.
An instruction that, to constitute a discovery of gold sufficient to support a location of a gold placer mining claim as against an adverse mineral locator, the gold found must be of such character and quantity and found under such circumstances as to justify a man of ordinary prudence in the expenditure of time and money in the development of the property, is not erroneous; the word "development," as so used, being the equivalent of "exploration."

[Ed. Note.—Sufficiency of discovery of mineral characteristics to support mining location, see note to Lange v. Robinson, 79 C. C. A. 6.]

3. SAME—ACTION TO RECOVER CLAIM—INSTRUCTIONS.
Instructions given in an action to recover possession of a mining claim, relating to the questions of discovery of mineral and possession, considered, and *held* not erroneous as applied to the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mines and Minerals, § 109.]

4. TRIAL—INSTRUCTING JURY—DISCRETION OF COURT.
A court has a wide discretion in the matter of charging the jury, and may bring the jury in at any time and give them additional instructions, whether requested or not; and where they ask for additional instructions on a particular question it is not error for the court also to further instruct them on other issues.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 744, 74[illegible].]

5. WITNESSES—IMPEACHMENT—USE OF DEPOSITION TAKEN IN ANOTHER CAUSE.
Statements made by a witness in a deposition taken in another action, contradictory of his testimony given in the cause on trial, may be read in such cause for the purpose of impeachment, regardless of their relevancy to the issues on trial; and in such case the party introducing them is not required to read the entire deposition.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 1255.

6. NEW TRIAL—GROUNDS—MISCONDUCT OF OFFICER AFFECTING JURY.
If an officer of the court, whether he has charge of the jury or not, makes to the jury during their deliberations statements calculated to influence their verdict, it is ground for a new trial; but if, under all the circumstances, it does not appear that the conduct of the officer had the effect of influencing the verdict, a new trial will not be granted on that ground.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, § 100.]

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

The plaintiffs in error brought ejectment to recover possession of a certain mining claim in the Fairbanks recording district, Alaska, known as "Upper No. 6 Below Discovery," in the second tier of bench claims on the right limit of Dome creek, alleging a location made on August 11, 1904, on a discovery of gold made on the day previous; the location having been completed by the recording of two location notices, one on September 29, 1904, and an amended location certificate on May 31, 1906. The defendant in error claimed under a location made on June 26, 1905, of a claim known as "No. 6 Below Discovery," third tier of benches, the lower half of which claim overlaps the location of the plaintiffs in error. It was claimed by the plaintiffs in error that up to the time of the location of the Kelly claim they had been in the actual possession of their claim through one Kelsey, their agent, who was obliged to leave the claim on June 26, 1905, the day of the Kelly location, in order to obtain provisions, and was detained in Fairbanks as a member of a jury until the following September, when he returned to the claim. The evidence was that the ground on which these claims were located was covered with a heavy growth of moss, from one to three or four feet thick, and with timber and brush. It was contended by the defendant in error that the plaintiffs in error never did make a valid location of their claim, for the reasons, first, that no discovery of mineral was made thereon, sufficient to comply with the statute; and, second, that the boundaries of the claim were not marked so that they could be readily traced on the ground, and that no proper certificate of location was recorded before the rights of the defendant in error vested. After the case had been submitted to the jury, and they had been in deliberation about 20 hours, they notified the bailiff in charge that they could not come to an agreement and requested him to notify the judge. The bailiff communicated this request to the marshal. The marshal went to the jury room and spoke to the jury of their inability to agree, and suggested that they get further instructions from the judge. There is evidence from affidavits of the jurors that the marshal remarked to the jury that the case was an important one, that it was on trial for a second time, and that they ought to be able to agree. The jury at that time stood evenly divided. They were thereafter brought into court and further instructed, and again retired and agreed upon a verdict for the defendant in error. The remarks of the marshal to the jury were set forth in affidavits and were presented to the court on a motion for a new trial. The motion was overruled, and judgment entered for the defendant in error.

West & De Journel, Jeremiah Cousby, Heilig & Tozier, and T. C. West, for plaintiffs in error.

McGinn & Sullivan, J. C. Campbell, W. H. Metson, Frank C. Drew, C. F. Oatman, and J. R. Mackenzie, for defendant in error.

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

GILBERT, Circuit Judge (after stating the facts as above). Error is assigned to the instruction of the court to the jury on the subject of the marking of the plaintiff in error's claim. It is said that the substance of the instruction was that it is necessary that a mining claim be marked upon the ground by stakes or other permanent monuments; whereas, the law is that the statute is sufficiently complied with if there is such marking on the ground by stakes, monuments, mounds, and written notices, or otherwise, that the boundaries of the location can be readily traced. The instruction of the court upon this branch of the case was that it depended somewhat upon the conformation of the ground and the surrounding conditions whether the boundaries were so marked as to comply with the law, and said:

"You are instructed that a claim may be marked upon the ground by stakes or other permanent monuments, but you are instructed that the law requires

a claim to be so distinctly marked upon the ground that its boundaries can be readily traced. The requirements of the statute in this respect are not necessarily fulfilled by merely setting stakes at each of the corners of the claim and at the center of the end lines, unless the topography of the ground and the surrounding conditions are such that a person accustomed to tracing lines of mining claims can, after reading a description of the claim in the posted or recorded notice of location or upon the stakes, by a reasonable and bona fide effort to do so, find all of the stakes and thereby readily trace the boundaries. Where the country is broken, or the view from one stake or monument to another is obstructed by intervening timber or brush, it may be necessary to blaze trees along the line, or cut away the brush, or set more stakes at such distances that they may be seen from one to the other, in a way to indicate the lines so that the boundaries can be readily traced. But it is not for the court to say what is a sufficient marking of the boundaries. It is your duty to determine, from all the evidence in the case and from the topography of the ground in question, whether or not a sufficient marking of the boundaries of the claim by the plaintiffs was made so that the same could be readily traced by a person making a reasonable effort to do so. If you find from the evidence in this case that this location was so definitely marked on the ground by the plaintiffs or their agents that its boundaries could be readily traced, then I instruct you that the plaintiffs have complied with this requirement of the law. If not, then I instruct you that they have failed in one of the essentials of a valid placer mining location, and that your verdict must be for the defendant."

We find no error in this instruction. The statute requires that the location must be marked on the ground so that its boundaries can be readily traced. It does not prescribe or define the nature of the marks or the position of the same on the ground. It is universally held that any marking on the ground whereby the boundaries of the claim may be readily traced is sufficient. The instruction so given by the court below recognized this rule. It did not confine the jury to the consideration of stakes or other permanent monuments on the ground, and it left to the jury the decision of the question whether, from the evidence in the case and the topography of the ground, a sufficient marking of the boundaries of the claim had been made by the plaintiffs in error so that the same could be readily traced by a person making a reasonable effort to do so. North Noonday Mining Co. v. Orient Mining Co. (C. C.) 1 Fed. 522; 6 Sawy. 299; Book v. Justice Min. Co. (C. C.) 58 Fed. 106, 113, and cases there cited.

It is contended that the court gave erroneous instruction on the subject of the discovery necessary to the location of a placer claim. The general objection is made that the charge was argumentative, comprising the recital of opinions of text-writers and misleading extracts from decided cases. The charge upon this branch of the case was comprehensive and exhaustive. It contained the recital of the language of decisions of the Supreme Court of the United States and of the state of California, none of which, so far as we can discover, was inappropriate to the case. But it is said that the portion of the charge relating to the insufficiency of mere indications of mineral to constitute a discovery was erroneous and misleading. Upon that subject the court said that slight surface indications did not constitute a discovery, and quoted the language of the Supreme Court of California in Miller v. Chrisman, 140 Cal. 449, 73 Pac. 1084, in which it was said:

"To constitute a discovery, the law requires something more than conjecture, hope, or even indications."

The court further said:

"If you shall find and believe from the evidence in this case that Klonos, Kelsey, and Schmidt found the colors and the particles of gold so testified to by them in the draw or small water course on the surface of the ground in dispute, then you should determine whether or not such finding was of sufficient character and found in such places, and under such conditions as to constitute such a discovery of mineral as will satisfy the law. You are instructed that mere indications, however strong, are not sufficient to answer the requirements of the statute."

The court proceeded to say that the statute should, as between conflicting claimants to mineral lands, receive a broad and liberal construction, so as to protect bona fide locators who had really made a discovery of mineral. We find nothing in these instructions as to the law relating to discovery that is not in harmony with the decisions of the Supreme Court of the United States or with the decision of this court in Lange v. Robinson, 148 Fed. 799, 79 C. C. A. 1, which is relied upon by the plaintiffs in error. In that case we said:

"The question must be decided, not only with reference to the gold actually found within the limits of the claim located, but also in view of its situation with reference to other lands known to contain valuable deposits of placer gold, and whether its rock and soil formations are such as are usually found where these deposits exist in paying quantities."

And we held that, to constitute a discovery sufficient to support the location of a gold placer claim as against another mineral claimant, it is not necessary that gold must have been found thereon in paying quantities, but that there must have been such a discovery of gold as to give reasonable evidence that the ground is valuable for placer mining, taking into consideration its character, location and surroundings.

The principal objection made to the charge on this branch of the case is that the court instructed the jury that the mineral discovered must, in order to constitute a discovery, be of such quantity and character and found under such circumstances as to justify a man of ordinary prudence in the expenditure of his time and money in the development of the property. It is argued that a discovery sufficient to justify the expenditure of time and money in the development of a mining claim must necessarily be greater than that which is necessary to justify the expenditure of money for the purpose of exploration, with the reasonable expectation that, when developed, the claim will be found valuable as a placer mining claim. Counsel for the plaintiffs in error have assumed for the word "development" a broader meaning than was intended in the charge. The court did not mean that, in order to comply with the law, there must be such a discovery as to justify the expenditure of time and money upon a claim to the extent of opening up the whole thereof and acquiring an exhaustive knowledge concerning its resources. The word as it was used by the court, and as in connection with the whole charge it must have been understood by the jury, was equivalent to the word "exploration," and was used in the sense in which it was employed in Chrisman v. Miller, 197 U. S. 313, 323, 25 Sup. Ct. 468, 470, 49 L. Ed. 770, in which the court thus quoted with approval the language of Mr. Justice Field in a prior case:

"The mere indication or presence of gold or silver is not sufficient to establish the existence of a lode. The mineral must exist in such quantities as to

justify the expenditure of money for the development of the mine and the extraction of the mineral."

Error is assigned to the instruction on the subject of possession. The court instructed the jury that they should view the matter of the absence of a prior occupant and the character of his actual occupancy and possession with care and caution. This it is said is erroneous, because it is an invasion of the province of the jury, prohibited by section 673 of the Alaskan Code. In answer to this it is sufficient to say that the instruction but expressed a rule of law, not a comment on the testimony in the particular case, nor an expression of opinion as to the credibility of witnesses or the weight of the evidence. It is contended that the charge was erroneous, also, in that the court instructed the jury that if they should find from the evidence that the plaintiffs in error were not in the actual possession of the premises in good faith, and had not temporarily left the same in good faith, but were merely holding the same for speculative purposes and without any discovery of mineral thereon, their verdict should be against the plaintiffs in error on that question. There was evidence in the case from which the jury might have drawn the inference that the claim had been staked by the plaintiffs in error without appropriate discovery and for merely speculative purposes. In view of that evidence, there was no error in the charge as given.

The further point is made that the instruction was erroneous, in that it charged the jury that the affirmative matter in the defendant's answer was not denied by the reply. This objection is too trivial to require extended comment. The complaint had alleged that the defendants wrongfully entered upon the property in dispute on or about July 1, 1905, and from that date had wrongfully withheld the same from the plaintiffs in error. The answer alleged that the defendants in the action had the actual possession of the property from and after July 1, 1905. After alleging that the defendant in error was in the actual possession, the plaintiffs in error could not, in their reply, deny the affirmative answer alleging the same fact, nor can the language of their reply be so construed.

Upon the request of the jury for further instructions in answer to their question whether the placing of tools and cooking utensils on a mining claim constitute possession, when the owner is away after supplies and provisions, the court said:

"Merely placing a tent and a few tools and a small supply of provisions upon a placer mining claim do not alone and of themselves constitute actual possession."

It is contended that this was error, for the reason that the court did not thereby fully answer the jury's question. But, upon the question of the relation which the absence of the owner from the claim while seeking supplies or provisions bears to the question of his possession, the court in the original charge had instructed the jury that where a prospector has in good faith temporarily gone away from his claim for the purpose of purchasing provisions or supplies, or for any other temporary purpose, intending to return and resume his actual occupation, possession, and labors, such temporary absence is not to be construed

to be an abandonment of his rights to the ground, and that one entering the ground during such temporary absence could not initiate any right thereto. But it is said that the court proceeded to give instructions not requested by the jury, and that this was error. There can be no question that the court may exercise a wide discretion in the matter of charging the jury, and may bring the jury in at any time and give them additional instructions whether requested or not. Allis v. United States, 155 U. S. 117, 15 Sup. Ct. 36, 39 L. Ed. 91; Nichols v. Munsel et ux., 115 Mass. 567.

It is contended that the court erred in admitting in evidence a portion of a deposition of one of the plaintiffs in error, taken in another cause, in regard to discovery of gold upon the surface of claim No. 4 Below Discovery. It is said that the admission of this deposition was erroneous, for the reason that it was a deposition taken in another cause, and therefore not admissible in the case on trial. This objection leaves out of view the purpose for which the deposition was offered and admitted in evidence. It was not offered to prove any of the substantive issues of the case, but to impeach the testimony of the witness by showing that at another time and place he had made statements under oath inconsistent with those made upon the witness stand in the case on trial. For the purpose of impeachment a deposition is to be regarded as any other statement or declaration of the witness, and it is not necessary that the whole of the deposition be read, or any greater portion thereof than that which directly relates to the proposed impeachment.

It is urged that the communication made by the marshal to the jury while they were deliberating upon their verdict was such fatal irregularity as to require the reversal of the judgment. The facts on which this contention is based were presented to the court below by affidavits upon the motion for a new trial. Ordinarily the granting or withholding a new trial rests in the sound discretion of the trial court, and the ruling on such a motion is not assignable as error. In the present case there was clearly no abuse of discretion. If an officer of the court, whether he has charge of the jury or not, makes to the jury during their deliberations statements calculated to influence their verdict, it is ground for a new trial. Clyde Mattox v. United States, 146 U. S. 140, 13 Sup. Ct. 50, 36 L. Ed. 917; State v. La Grange, 99 Iowa, 10, 68 N. W. 557; State v. Dallas, 35 La. Ann. 899; Barnett v. Eaton, 62 Miss. 768. But if, under all the circumstances, it does not appear that the conduct of the officer had the effect of influencing the verdict, a new trial will not be ordered upon that ground. United States v. Reid et al., 12 How. 361, 13 L. Ed. 1023; Leach v. Wilbur, 9 Allen (Mass.) 212; State v. Wart, 51 Iowa, 587, 2 N. W. 405; Nelling v. Industrial Mfg. Co., 78 Ga. 260. The affidavits concerning the nature of the remarks of the marshal to the jury are to some extent contradictory. Conceding the facts to have been as presented most strongly for the plaintiffs in error, they are that the marshal said:

"What is the matter with you that you can't agree in this case? This is a very important case, and this is the second time it has been tried. You ought to be able to come to some agreement some way. You had better call up the judge and get some more instructions."

There is nothing in the affidavits to show that any of the jurors was influenced by these remarks, and there is nothing in the language shown calculated to influence the jury for one or the other of the parties. While such remarks by an officer of the court to a jury are prohibited by law, and should be discountenanced, they are not necessarily ground for a new trial, and they are certainly not ground for the reversal of a judgment in an appellate court after the trial court has passed upon their force and effect on a motion for a new trial.

There are other assignments of error in the record, but in none of them do we find error for which the judgment should be reversed.

The judgment is affirmed.

HOLMGREN v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. October 14, 1907.)

No. 1,382.

1. CRIMINAL LAW—REVIEW ON WRIT OF ERROR—ASSIGNMENTS OF ERROR.
An assignment of error in a criminal case, based upon the fact that the jury were permitted to take with them to their room the indictment, on which was indorsed the verdict of the jury on a former trial finding the defendant guilty, cannot be considered by the appellate court, where the matter was not brought to the attention of the trial court until after the verdict was returned.

2. SAME—MATTERS REVIEWABLE—RULING ON MOTION FOR NEW TRIAL.
A judgment of conviction in a criminal case will not be reversed by an appellate court because of the overruling of a motion for a new trial based upon the ground that the jury took to their room the indictment, on which was recorded a former conviction of defendant, where such motion and the supporting affidavits were considered and passed upon by the trial court.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3071.]

3. SAME—EVIDENCE—ACCOMPLICES WITHIN RULES OF EVIDENCE.
On the trial of a defendant charged with perjury in giving false testimony in a proceeding for naturalization of an alien, the applicant for citizenship is not an accomplice in such sense as to require the jury to be cautioned in respect to his testimony, where it does not appear that defendant gave the false testimony at the instigation of such applicant.

4. PERJURY—ELEMENTS OF OFFENSE—FEDERAL STATUTE.
On the trial of a defendant charged with a violation of Rev. St. § 5395 [U. S. Comp. St. 1901, p. 3654], which denounces a penalty against one who "knowingly swears falsely" in making any oath under any law relating to naturalization, it is sufficient to warrant conviction if defendant knowingly and willfully testified falsely, and it is not necessary that his act should also have been corrupt or malicious.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Perjury, § 1.]

5. SAME—INSTRUCTIONS.
Instructions on the trial of a defendant charged with perjury in naturalization proceedings, under Rev. St. § 5395 [U. S. Comp. St. 1901, p. 3654], considered and approved.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Perjury, §§ 134–138.]

6. CRIMINAL LAW—FALSE SWEARING IN NATURALIZATION PROCEEDING—JURISDICTION OF OFFENSE.

A District Court of the United States has jurisdiction of a prosecution under Rev. St. § 5395 [U. S. Comp. St. 1901, p. 3654], for false swearing in a naturalization proceeding, notwithstanding the fact that such proceeding was in a state court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 170.]

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

Marshall B. Woodworth, for plaintiff in error.

Robert T. Devlin, U. S. Atty., Benjamin L. McKinley, Asst. U. S. Atty., and Frank A. Duryea, Special Asst. U. S. Atty.

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

GILBERT, Circuit Judge. The plaintiff in error was indicted for violation of section 5395 of the Revised Statutes [U. S. Comp. St. 1901, p. 3654]. The indictment contained three counts; each count charging the plaintiff in error with the commission of perjury when testifying as a witness in three separate naturalization proceedings. He had two trials in the court below. On the first trial he was acquitted on counts 1 and 2, and convicted on count 3. The perjury of which he was convicted on the third count consisted in swearing that he had known in the United States the applicant for citizenship for five years prior to the application; whereas, as alleged in the indictment, he had not known him for more than four years prior to said application. He was granted a new trial, and on the second trial he was convicted under the third count and recommended to the mercy of the court. A motion for a new trial was made and denied. A motion in arrest of judgment was also denied.

One of the errors principally relied upon is that the District Court permitted the jury to take with them, and keep during all of their deliberations in the jury room, the indictment, upon which was indorsed the verdict of the jury on the previous trial, finding the plaintiff in error guilty on the third count of the indictment. This assignment of error cannot avail the plaintiff in error, for the reason that the matter was not brought to the attention of the court at any time until after a verdict was returned; the submission of the indictment with the indorsement thereon to the jury having been an accident for which counsel for plaintiff in error was as much accountable as was any one. Said the Court of Appeals for the Eighth Circuit, in St. Louis S. W. Ry. v. Henson, 58 Fed. 531, 7 C. C. A. 349:

"It is the province of an appellate court to review the rulings of the trial court on questions actually brought to the attention of the court and decided by it."

And in Manufacturing Co. v. Joyce, 54 Fed. 332, 4 C. C. A. 368, it was said:

"The rule is well established that the appellate court will only permit those matters to be assigned for error that were brought to the attention of the court below during the progress of the trial and then passed upon."

In Railway Co. v. Heck, 102 U. S. 120, 26 L. Ed. 58, Chief Justice Waite said:

"Our power is confined to exceptions actually taken at the trial. The theory of a bill of exceptions is that it states what occurred when the trial was going on."

But it is said that the alleged misconduct of the court and its officers, in submitting to the jury the indictment with the indorsement of the former verdict thereon, is ground for reversal in this court under another assignment of error, which is that the trial court denied the motion of plaintiff in error for a new trial. It is shown in the record by affidavits in support of the motion for a new trial that the indictment was delivered by a bailiff to the jury when they retired to consider their verdict, and that there was indorsed thereon:

"Tried April 5–6–7, 1906. Verdict, not guilty on the first and second counts of indictment, and guilty on the third count of the indictment. April 13, 1906. New trial granted."

The attorney for the plaintiff in error stated in his affidavit that he had no knowledge that the indictment had been handed to the jury, and that, when he saw the deputy clerk hand certain papers to the jury before retiring, he thought they were simply forms of verdict for the jury. There was an affidavit of one of the jurors that during the course of the deliberations of the jury the indictment, with the indorsements thereon, was read by the jury, and the affidavit of another juror to the same effect, with the further statement that in his mind the indorsement on the indictment created an unfavorable opinion against the plaintiff in error. This latter portion of the affidavit was not admissible, for the evidence of jurors as to the influences which affected their deliberations is inadmissible either to impeach or support the verdict. Clyde Mattox v. United States, 146 U. S. 140, 13 Sup. Ct. 50, 36 L. Ed. 917.

Whether the submission to the jury of an indictment upon which a former conviction is recorded is error for which a judgment should be reversed is a question upon which the decisions are not harmonious. In Green v. State, 38 Ark. 304, the court refused to reverse the judgment on that ground.

In 2 Thomp. on Trials, § 2591, it is said:

"It is not enough for counsel to show, in support of a motion for a new trial, that a particular paper was sent to the jury by the adverse party without his knowledge. It is his duty to ascertain what papers are sent to the jury before they leave the court."

In Forbes v. Commonwealth, 90 Va. 550, 19 S. E. 164, the Supreme Court of Appeals of Virginia held that it was not error to send to the jury the indictment, whereon is recorded the verdict of "guilty" of a former jury, where no objection is made until after the verdict.

In State v. Shores, 31 W. Va. 491, 7 S. E. 413, 13 Am. St. Rep. 875, the court, in refusing to reverse a judgment on that ground, said:

"The jury had seen the indictment with the indorsement, before any motion was made with reference thereto. Every member of the jury may have been in court and heard the verdict read against Hall, and still that would not have disqualified them as jurors."

In Cargill v. Commonwealth, 93 Ky. 578, 20 S. W. 782, the court said:

"But the appellant made no objection, and it was his business, as well as that of the other side, to see that the proper papers were taken by the jury, and, it not being done, to call the court's attention to it. By proper vigilance upon his part, his rightful objection would have been available to him."

In State v. Tucker, 52 Atl. 741, 75 Conn. 201, it was held that the failure to remove the record of the judgment of conviction given to the jury, or to direct them not to regard it, was not prejudicial to the defendant, where no objection was made until after the verdict. The court said:

"It is the duty of counsel, as well as of the court, to ascertain what papers are delivered to the jury."

In Smalls v. State, 105 Ga. 669, 31 S. E. 571, the court said:

"If a party desires a verdict rendered at a former trial of the same case concealed from the inspection of the jury, he should present a request to this effect."

In Sanders v. State, 131 Ala. 1, 31 South. 564, the court found no error in giving to the jury the indictment, on which was recorded the verdict of a former jury, and so held on the ground that the statute requires that the indictment should be taken by the jury on their retirement to consider their verdict.

In Hjeronymus v. State (Tex. Cr. App.) 83 S. W. 708, the statute forbade reference to a former trial and conviction or any allusion to it, but the court held that there was no error in the case under consideration, as it was not made to appear that the jury was aware of the existence of the former verdict until after they had agreed to convict, nor was it shown that the former verdict was used by them in arriving at their verdict.

In Harvey v. State, 35 Tex. Cr. R. 535, 34 S. W. 623, the court said:

"In our opinion the weight of the testimony in this regard is to the effect that the jury who tried the case did not notice or read, or attempt to read, the obliterated verdict, and if they had done so, in the absence of some showing of injury to appellant, we could not consider this as fundamental error, or such error as ought to have authorized the court below to grant a new trial."

In Anschicks v. State, 6 Tex. App. 524, the court said:

"It was the business of counsel to see to it that the jury were permitted to carry with them such papers as were proper to be used in their retirement."

In Ogden v. United States, 112 Fed. 523, 50 C. C. A. 380, however, the Circuit Court of Appeals for the Third Circuit held that the fact that, on the retirement of the jury in a criminal case, an officer of the court handed to them the indictments on which the defendant was tried, which were taken into the jury room with other papers for their consideration, and that indorsed on the back of each indictment was the verdict of a former jury finding the defendant guilty as charged therein, was such a violation of the rights of the defendant as to entitle him to a new trial, and that it was not incumbent upon him to show that such indorsements were actually read by the jurors or any of them. In that case the right of the defendant, against

whom a verdict of guilty had been rendered on the second trial, to move for a new trial and to have that motion considered on the reasons presented for it, had been denied by the trial court. That right was held to be an absolute one, the granting or refusal of which did not rest in the discretion of the court. Therein lies the important and essential difference between that case and the case at bar. In the Ogden Case, the trial court refused to permit the filing of a motion for a new trial, offered in due time, or to consider it or the affidavits offered in its support. The Circuit Court of Appeals said:

"It is not disputed that in the courts of the United States the allowance or refusal of a new trial rests in the sound discretion of the court to which the application is addressed, and that the result cannot be made the subject of review by writ of error. The gravamen of the case, however, made by the plaintiff in error, is that the court below declined to exercise its discretion at all in refusing the motion for a new trial and excluding from its consideration the reasons filed in support thereof."

In the case at bar, the court below entertained the motion for a new trial and considered the affidavits which were filed in its support. The determination of a motion for a new trial involves the exercise of a wide discretion and a knowledge and appreciation of a case which ordinarily can be possessed only by the trial judge. It is for this reason that his ruling on the motion will not be reviewed in an appellate court, and this rule applies as well to a motion for a new trial presented on affidavits showing matters which occurred after the retirement of the jury to consider their verdict, as to other grounds for a new trial. Kerr v. Clampitt, 95 U. S. 188, 24 L. Ed. 493; Board of Commissioners v. Keene Savings Bank, 47 C. C. A. 464–476, 108 Fed. 505; Illinois Cent. R. Co. v. Coughlin, 75 C. C. A. 262, 145 Fed. 37; Clyde Mattox v. United States, 146 U. S. 140, 13 Sup. Ct. 50, 36 L. Ed. 917.

In the case last cited, the motion for a new trial was based on affidavits showing that communications had been made to the jury by the bailiff, and that certain newspapers had been read by the jury while considering their verdict. The court, while recognizing and affirming the rule that the allowance or refusal of a new trial rests in the sound discretion of the court to which the application is addressed, and cannot be made the subject of review by writ of error, held that the case then under consideration was taken out of the rule, for the reason that the trial court had excluded the affidavits and had refused to exercise any discretion in respect to the matters stated therein.

In Kerr v. Clampitt, the court said:

"If the new trial be asked for irregularity in the proceedings of the court, jury, or adverse party, or for abuse of discretion by which either party was prevented from having a fair trial, or for misconduct of the jury, or accident or surprise which ordinary prudence could not have guarded against, or for newly discovered evidence, the application must be made upon affidavits. * * * But whether the application be made upon affidavits, or a statement thus prepared, the rulings thereon, whether of the district court originally, or of the Supreme Court of the territory on appeal, are not subject to review by this tribunal. We have no jurisdiction to revise the action of an inferior court upon the question of granting or refusing a new trial, however meritorious the grounds presented for its consideration or erroneous its decision."

In Louisville & N. R. Co. v. Sumner, 125 Fed. 719, 60 C. C. A. 487, the Circuit Court of Appeals for the Sixth Circuit said:

"It has often been said by this court that it will not review the action of the lower court in its disposition of a motion for a new trial or other matters addressed to its discretion, but we have held that for a refusal to exercise its discretion on a motion of which it should take cognizance a writ of error will lie."

In view of these authorities and the nature of the facts which were so presented in the affidavits on the motion for a new trial in the present case, we cannot see that the ruling of the court below in denying the new trial, in the exercise of the discretion which was vested in that court, is subject to review in this.

It is assigned as error that the court failed to warn the jury of the danger in convicting a defendant on the testimony of an accomplice. This assignment is based upon the theory that Frank Werta, the applicant for citizenship, was an accomplice with the plaintiff in error, who made the false oath. An accomplice is "one who knowingly, voluntarily, and with common intent with the principal offender, unites in the commission of a crime." People v. Bolanger, 71 Cal. 19, 11 Pac. 799; State v. Roberts, 15 Or. 197, 13 Pac. 896. To render one an accomplice, "he must in some manner aid or assist or participate in the criminal act, and by that connection he becomes equally involved in guilt with the other party by reason of the criminal transaction." People v. Smith, 28 Hun (N. Y.) 626. Mere knowledge on the part of a witness that the defendant purposes to commit a crime, or does commit a crime, does not render the witness an accomplice. There is nothing in the evidence in the bill of exceptions to show that Frank Werta was an accomplice within these generally accepted definitions. There is no evidence that he solicited the plaintiff in error to make the oath concerning his residence in the United States, or suggested the facts which were sworn to or assisted him in or incited him to the commission of the offense. On the other hand, the evidence conveys the impression that the affidavits as to the time of Werta's residence in the United States were furnished not at his own, but at the instigation of others. Under the circumstances, we think it would have been error to caution the jury on the theory that Werta's testimony was that of an accomplice.

It is said that the court erred in failing to charge the jury that the perjury must be corrupt and malicious, as well as knowing and willful. Section 5395 of the Revised Statutes [U. S. Comp. St. 1901, p. 3654], under which the plaintiff in error was indicted, denounces a penalty against one "who knowingly swears falsely in making any oath under any law relating to naturalization." The court in charging the jury instructed them that they must be satisfied beyond all reasonable doubt, not only that the testimony alleged to be given was false, but that it was willfully and knowingly false, "that he willfully and knowingly testified falsely." This was clearly sufficient. It was not necessary, in order to commit the offense defined in the statute, that there should have been any purpose of gain or any instigation of malice. In United States v. Edwards (C. C.) 43 Fed. 67, it was held that an indictment under the statute must allege that the false oath was taken willfully,

and that an allegation that it was corruptly taken does not embrace the element of willfulness.

Error is assigned to the refusal of the court to instruct the jury that they could not convict the defendant upon mere suspicion, however strong, but only upon evidence establishing his guilt to a moral certainty and beyond a reasonable doubt. The instruction so requested would have been proper, but the court was not bound to adopt it in the precise form in which it was presented, and there was no error in refusing it, in view of the fact that the court properly instructed the jury that the defendant was presumed to be innocent, that they would not be justified in returning a verdict of guilty unless they were satisfied to a moral certainty and after a consideration of all the evidence that he was guilty, and said:

"You are further charged that you cannot convict the defendant upon his statements, admissions, or actions alone. Independently of his statements or actions, there must be other evidence tending to show that the crime has been committed."

And further said that it was incumbent upon the government to prove the guilt of the defendant beyond a reasonable doubt and by the testimony of two witnesses, or by the testimony of one witness and corroborating circumstances with reference to each assignment of perjury.

It is contended that the court erred in refusing to instruct the jury as follows:

"Where a person who is a mariner comes to the United States, and afterwards follows his business as a mariner, if he has the intention of becoming a citizen of the United States, his abode on American vessels would constitute a residence in the United States."

The difficulty in the way of giving this instruction was that there was no testimony which warranted it. There is nothing in the evidence to show that Werta was serving upon American vessels prior to March, 1901. It is true that he had come to the United States in 1899 as a member of the crew of a Finnish ship, upon which ship he had signed articles for a round trip voyage to return to London; that while on said ship he remained at Mobile, Ala., about three months; and that thereafter he sailed away to Buenos Ayres on the same ship. His remaining for that period of time in the United States on a foreign vessel without having formed the intention to remain in the United States constituted no residence in the United States. The instruction was properly refused.

It is assigned as error that the court sustained the objection of the district attorney to the introduction in evidence of a document purporting to be the application and affidavit of Frank Werta to the local board of inspectors, which was offered for the purpose of impeaching Werta's testimony. The court ruled that the affidavit did not contradict the testimony of the witness. We cannot say that there was error in the ruling, for the affidavit is not embodied in the bill of exceptions.

It is contended that the court erred in overruling the demurrer of the plaintiff in error and his motion in arrest of judgment, on the ground that the court was without jurisdiction, since the alleged of-

fense was committed in naturalization proceedings in a state court. We held otherwise in Schmidt v. United States, 133 Fed. 257, 66 C. C. A. 389.

The judgment is affirmed.

BUNKER HILL & SULLIVAN MINING & CONCENTRATING CO. v. SAFFORD.

(Circuit Court of Appeals, Ninth Circuit. October 14, 1907.)

No. 1,307.

MINES AND MINERALS—LEASES—ACTION FOR BREACH—SUFFICIENCY OF EVIDENCE.

A judgment in favor of the lessees of certain mine dumps, which they were to work over for mineral on a royalty basis, against the lessor, for an alleged violation of the lease in excluding plaintiffs from the property, *held* not supported by the evidence, a preponderance of which showed that the work had been abandoned by the lessees because they found it unprofitable.

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

Miron A. Folsom, for plaintiff in error.

John P. Gray, Albert Allen, and J. H. Forney, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. The defendant in error was plaintiff in the court below. The complaint upon which the action was there tried, after setting out the ownership and operation by the defendant company of certain described mining claims near the town of Wardner, in the county of Shoshone, Idaho, together with large banks or dumps of mine waste rock from its said mines, that had accumulated at and near the mouths of the various tunnels entering the mines, and near its works and mills, alleged that in the year 1903 the defendant entered into an agreement by which it leased to the plaintiff and one J. B. Mackenzie all of its dumps of mine waste rock situated near its said mines in Shoshone county by an instrument in writing which is set out at large in the complaint, from which instrument it appears that the lessor company, for and in consideration of the royalties, covenants, and agreements in the lease reserved, and to be kept and performed by the lessees, leased the dumps to them for a term expiring at noon on the 1st day of October, 1907, unless sooner forfeited through the violation of any of the covenants of the lease. In consideration of the demise, the lessees covenanted and agreed with the lessor as follows:

"(1) To enter upon said dumps or banks to work the same so as to take out the greatest possible amount of lead and silver. (2) To work said dumps steadily and continuously as the weather and supply of water for washing will permit, from the date of this lease, with at least five men and with as much of said water as can be obtained and used. Cessation to work for the total number of twenty days of any calendar month shall be considered a violation of these covenants, but no work shall be required while the dumps are frozen. (3) To take care of the dumps after they have been worked, so as to

prevent their accumulating upon any ground of the lessor not intended for such waste, and to prevent the same from accumulating in such a way that they will be washed into Mile (Milo) creek, or the South Fork of the Couer d' Alene river, or upon the property of any person or corporation whatever. (4) To allow said lessor and its officers and agents from time to time to enter upon and into all parts of said banks or dumps for the purpose of inspection. (5) To not assign this lease, or any interest thereunder, and to not sublet the said premises or any part thereof, without the written assent of said lessor, and to not allow any person not in privity with the parties hereto to take or hold possession of said premises, or any part thereof, under any pretense whatever. (6) To pay as royalty to the lessor 10 per cent. of the gross value of the product, less freight and treatment and other smelting charges; the lessor to ship and sell all of the product and pay the lessees the return from the same, less the royalty due lessor, and any other charges there may be against the lessees growing out of the lease. (7) To put up a bond signed by bondsmen satisfactory to the lessor (or in lieu thereof a cash bond), in the sum of five thousand dollars ($5,000.00), within ten days from date, sufficient in form to protect the lessor from any damage which the lessees may do to the property of the lessor, or to the property of any other person, and to protect the lessor against any loss or damage whatever by reason of any act of the lessees, and to protect the lessor against liens for labor or supplies. (8) To conduct the workings of all the said dumps as desired by the lessor, in so far as the said work or operations may interfere with the operations of the lessor of its property, such interference to be decided by the manager only. (9) To deliver to said lessor the said premises, with the appurtenances, in good order and condition, without demand or notice on said 1st day of October, or at any time previous upon demand for forfeiture, or upon demand if the continuance of operations by the lessees would interfere with the work of the lessor, or would require the use of water needed by the lessor, or where the continued working by the lessees would require the territory needed by the lessor."

The complaint further alleged that within 10 days after entering into the agreement the plaintiff and Mackenzie executed to the mining company the bond mentioned, and entered upon the performance of their part of the contract, and selected, with the consent and approval of the defendant company, the place where the working of the dumps should begin, and, in order that such working should not in any manner interfere with the work of the defendant company, constructed, at considerable expense, a tramway, the defendant company furnishing the material therefor, such tramway being constructed for the purpose and use of the defendant company, so that it could deposit the ores being mined by the defendant in such a place that the working by the plaintiff and Mackenzie would not interfere with the defendant's work, after which the plaintiff and Mackenzie forthwith constructed at one of the dumps a plant, consisting of flumes, jigs, and other appliances for the concentration and separation of the ores contained therein from the waste rock, and also constructed a platform across Milo Gulch, to prevent the waste from their works from filling up or interfering with that stream, and thereupon commenced the contemplated operations, carrying the work on with more than five men, and continued in such work, in accordance with the terms and conditions of the lease, until on or about June 8, 1903, at which time the lessees were compelled to suspend their work on account of a temporary lack of water in Milo Gulch; that, during the time the lessees so operated, they extracted and delivered to the defendant company, to be shipped and smelted, and in accordance with the terms of the contract, 50,660 pounds of concen-

trates containing silver and lead, of the value, less freight and treatment and other charges, of $642.44, which sum of money was received therefor by the defendant, and was divided between the respective parties in accordance with the terms of the contract; that on or about July 25, 1903, and while the plant of the lessees was shut down by reason of the temporary lack of water to operate it, and during the absence of the lessees, the defendant company, contriving to injure the lessees, and without their knowledge or consent, and in violation of the provisions of the lease, wrongfully deposited large quantities of rock in such position that it would roll down and destroy the works of the lessees, and that they were so destroyed, and at the same time, without notice or demand, wrongfully took possession of the dumps, and has ever since excluded the lessees therefrom, resulting in damage to the lessees in the sum of $100,000; that subsequently, and prior to the commencement of the action, Mackenzie, for a valuable consideration, sold and assigned to plaintiff all of his right, title, interest, and claim under the lease, together with all of his interest in and to said dumps, jigs, flumes, tools, and other property belonging to the plaintiff and the said Mackenzie.

The defendant in its answer admitted the making of the lease, but put in issue the other material allegations of the complaint, and further answered, and alleged, among other things, that the plaintiff and Mackenzie took possession under the terms of the contract of all the dumps described in the complaint, and constructed certain flumes, jigs, etc., for the purpose of working the dumps; that among others was a dump known as the "Stemwinder dump," the works erected on which did not cost more than $100; that about June 8, 1903, and after working the dump, the plaintiff and Mackenzie found that they contained such a small amount of lead and silver that they could not be worked with a profit, and because they were unable to pay the laborers employed in the work the said lessees on or about the date mentioned abandoned the work; that such abandonment was not caused by any lack of water, or because the dump was frozen, or from any inclemency of the weather; that the plaintiff and Mackenzie ceased work continuously for a total number of more than 20 days in the month of June, 1903, by reason of which cessation of work they abandoned and forfeited all rights under the lease, and that neither of them ever afterwards attempted to resume work thereunder; that the lessees did not conduct their work as desired by the lessor, but, on the contrary, so as to interfere with the operation by the lessor of its property, and that the manager of the defendant company on or about July 1, 1903, decided that the method of working which had been adopted by the plaintiff and Mackenzie interfered with the operation by the lessor of its said property, and caused the plaintiff and Mackenzie to be notified of such decision; that on or about July 1, 1903, the defendant needed for dumping purposes the use of a certain portion of the Stemwinder dump which had been occupied by the plaintiff and Mackenzie, and that on or about that date, and after the plaintiff and Mackenzie had closed down their said work and abandoned or forfeited the same, the defendant notified them of that fact, and to remove a certain flume and other works from a portion of that dump if they considered the same

of any value, but that, notwithstanding that there was such notice, the plaintiff and Mackenzie failed to remove such property, and that thereafter, and on or about July 25, 1903, the defendant in the course of its mining operations resumed the use of a portion of the Stemwinder dump, as a result of which a portion of one of the flumes was injured to an extent not exceeding $40, but that such injury was without the fault of the defendant, and after the plaintiff and Mackenzie had been given reasonable opportunity to remove the same; that the said acts of the defendant did not interfere with the working by the plaintiff and Mackenzie of any other of the dumps mentioned in the lease, or any portion of the Stemwinder dump, except such as was needed by the defendant company; "that, notwithstanding the acts of abandonment or forfeiture on the part of said Mackenzie and said plaintiff of said contract, defendant has not at any time excluded, and does not now exclude, the said plaintiff or the said Mackenzie, or either of them, from any portion of any of said dumps except the portion required for dumping purposes as hereinabove specified; but defendant alleges that neither plaintiff nor Mackenzie has ever attempted to resume work thereon. And defendant alleges that it has not removed any portion of said dumps mentioned or described in said contract, but defendant has added to said dumps in the course of its operations."

At the trial the plaintiff waived any and all damages growing out of injury to its flumes and other apparatus, claiming only damages for loss of prospective profits, and at the conclusion of the plaintiff's case the defendant moved the court for a direction to the jury to return a verdict in its favor on the grounds that the evidence was too uncertain and speculative for a basis for any verdict, that the lease was terminated by notice given by the manager of the defendant company of the interference by the work of the lessees with the mining operations of the lessor, and that the undisputed evidence showed breaches of the covenants of the lease, in that the lessees abandoned the said work and also violated those clauses of the lease prohibiting the assignment thereof, or any interest therein, and against the subletting of any part thereof.

In denying the motion so made by the defendant, as well as in its instructions to the jury, and in its subsequent order overruling the defendant's motion for a new trial, the court below expressed grave doubts as to the sufficiency of the evidence upon which to rest a verdict for damages for loss of anticipated profits, and in respect to the alleged assignment by one of the lessees to the other of his interest in the lease, and in respect to the alleged subletting, and also in respect to the alleged termination of the lease on the ground of the interference by the lessees' works with the operations of the defendant company. We do not deem it necessary to decide either of those questions, for the reason that a careful consideration of the record satisfies us that the lease and all work thereunder was abandoned by the lessees shortly after the commencement of the work, not because of any lack of water, or because any of the dumps were frozen, or because of any state of the weather, but because of their financial difficulties, and because they found the work unprofitable. We think this plainly appears from the plaintiff's own testimony, taken as a whole, and in connection with

the undisputed fact, shown by the record, that after the lessees suspended all of their work they left that section of the country and leased the dumps to Relling & Williams, who, after working there awhile, also "got tired and quit."

The judgment is reversed, and the case remanded.

SAILORS' UNION OF THE PACIFIC et al. v. HAMMOND LUMBER CO.

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

No. 1,400.

1. INJUNCTION—TEMPORARY RESTRAINING ORDER—VALIDITY OF BOND.
   The validity of a bond given by a complainant in compliance with the requirements of a temporary restraining order is not affected by the fact that it was dated prior to the order, where the sureties justified, and the bond was filed after the order was made; the date being no essential part of the instrument.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 328.]

2. SAME—GROUNDS—INTERFERENCE WITH RIGHT TO EMPLOY MEN.
   Any attempt by force, violence, or coercion to compel an individual firm or corporation to refrain from employing men or to prevent any man or men from working for another, is an unlawful interference with a property right, and may under well-established equitable principles be restrained by injunction.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 175.]

3. SAME.
   A court properly granted a restraining order and temporary injunction to restrain defendants, which were certain labor unions whose members were sailors and marine firemen, from interfering with the business of complainant, where it was shown by the bill and affidavits that defendants conspired to prevent complainant from operating vessels owned by it during a strike, and that in pursuance of such conspiracy members of defendant unions picketed the wharves, and also by means of launches boarded complainant's vessels, committed assaults upon the crews, threatened the officers, and terrorized passengers, to whom they used profane, insulting and obscene language.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, §§ 305, 306.]

4. SAME—PROPERTY RIGHTS.
   An owner of a vessel has a property right not only in the vessel itself, but in its use and the business in which it is employed, which may be protected by injunction restraining unlawful interference with employés engaged in operating the vessel and conducting such business.

5. SAME—CONSTRUCTION.
   The terms of a restraining order or temporary injunction are to be construed in the light of the allegations and prayer of the bill on which it was granted.

6. SAME—GROUNDS—REMEDY AT LAW.
   Ground is presented for injunctive relief whenever there is an actual and threatened injury to property, coupled with allegations of facts bringing the case within one of the recognized grounds of equitable jurisdiction, and showing that there is no plain, adequate, or complete remedy at law, and such relief may be invoked as a remedy for injury to, or destruction

of, one's business, if no action at law would afford as complete, prompt, and efficient a remedy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, §§ 9, 10.]

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

See 149 Fed. 577.

"The appeal in this case is from an interlocutory order granting an injunction pendente lite. The appellee brought a bill in equity, in which it alleged that it is a New Jersey corporation engaged in the lumber business and in carrying passengers and freight to and from various ports in California, using for that purpose three sea-going vessels; that in June, 1906, the appellants conspired and threatened to prevent, and to continue to prevent, the appellee's vessels from leaving the port of San Francisco with crews of its watchmen and guards, and, in pursuance of such conspiracy, they endeavored forcibly to remove one of the appellee's employés, and pinioned and imprisoned another of its employés, and committed many other acts of violence and unlawful interference with the business of the appellee; that the acts and doings of the appellants have become widely known, and the appellants threaten to repeat and continue such acts and prevent the vessels of the appellee from leaving the port, and from carrying passengers, and to interfere with and prevent the appellee from continuing its business; that such acts do interfere with the business of the appellee and its vessels, and if they are permitted to continue, the appellee will suffer irreparable damage, in that crews cannot be secured to man its vessels, nor can freight be secured to load its vessels; that the appellants are insolvent and without money or property sufficient to pay the damage sustained; that the appellee has already suffered through the acts complained of, in a sum exceeding $10,000; that an attempt to recover damages at law would require a multiplicity of suits; that, unless the acts of the appellants are restrained, the business of the appellee and its vessels will be totally destroyed; and that the appellee has no adequate remedy at law. The bill was supported by numerous affidavits showing that on or about June 1, 1906, the Sailors' Union of the Pacific demanded of the San Francisco shipowners a wage increase of $5 per month in all steam schooners, which was refused; that thereupon the unions struck; that the appellants created an executive committee known as the "Strike Committee," composed of seven members of the Sailors' Union of the Pacific, two members of the Pacific Coast Marine Firemen's Union, and two members of the Marine Cooks' and Stewards' Association; that between 50 and 60 vessels were involved in the strike; that the said committee bought a launch and hired another, both launches being manned by members of the three unions and used as picket boats; and that the water front was also picketed by strikers. The affidavits showed specific acts of violence committed by the unions on the dates of June 5th, June 17th, June 27th, June 30th, July 3d, July 4th, and July 11th; that at these various dates men on the launches forcibly boarded vessels in the harbor, made threats of bodily injury to the officers in charge, terrorized passengers, to whom they used profane, insulting, and obscene language, committed brutal assaults upon crews, firemen, cooks, and stewards, and committed other acts, showing that they were in the active prosecution of an unlawful plan to interfere with, harrass, annoy, and prevent the operation of the vessels and destroy the business and property of every nonunion shipowner in the port of San Francisco, for the purpose of coercing them into yielding to their demands.

W. H. Hutton, for appellants.

Henry Ach, J. W. Dorsey, and Chas. Page, for appellee.

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

GILBERT, Circuit Judge (after stating the facts as above). It is contended that the restraining order issued on July 13, 1906, was wrongfully issued, for the reason that no bond therefor was filed. The application for the restraining order was made on July 9, 1906, and a bond bearing that date had been prepared for that purpose. The court, instead of granting the order on that date, made an order to show cause on July 13th, and on that day granted a temporary restraining order, directed that the application for an injunction pendente lite be heard at a future date, and ordered that the temporary restraining order issue on the execution and filing by the appellee of a bond in the sum of $1,000 to be approved by the clerk. Immediately thereafter, and on July 13th, the sureties on the bond which bore the date of July 9th justified thereto before the clerk, and the clerk approved the bond and filed the same. Subsequently, on August 8, 1906, the court granted an injunction pendente lite upon the execution of a bond, and on the same day the requisite bond was filed by the appellee in compliance with the order of the court. The appeal is taken from the order of the court so made on August 8, 1906. The bond was valid, notwithstanding that its date was four days prior to the date when it was filed. The date of a bond is not an essential part of it. The instrument takes effect from the time of its filing. Williams v. McConico, 27 Ala. 572; Jenkins v. Hay, 28 Md. 547. Counsel for the appellants cites the decision of this court in Tyler Min. Co. v. Last Chance Min. Co., 90 Fed. 15, 32 C. C. A. 498, in which it was held that the liability of a surety cannot be extended by implication beyond the expressed terms of his contract. But in that case the bond had been given to procure a restraining order enjoining the defendants in the suit from working a certain portion of a mine and from removing or appropriating ore previously taken therefrom. A subsequent order was made, which continued such restraining order in force, but modified and changed it by permitting the working of the mine and the disposition of the ore taken therefrom under regulations prescribed by the court. It was held that the sureties could not be held liable for damages accruing to the defendants under the modified order. There is no such question in the present case. The sureties on the bond in this case justified thereon on the very day on which the order was made, and the bond was filed upon that date and approved by the clerk. It thereby became the bond upon which the order was granted, and it was from that date the valid obligation of the sureties.

It is contended that the issuance of the restraining order and the injunction were in excess of the court's jurisdiction, and that, although there are decisions of the Circuit and District Courts of the United States which sustain such jurisdiction, the use of the writ of injunction for the purposes sought in the bill in the present case has not been countenanced by any decision of the Supreme Court of the United States. The affidavits sufficiently show a combination of persons by concerted action to accomplish an unlawful purpose. It needs no citation of authorities to sustain the proposition that the appellee had the right to contract to employ labor and to carry on its business as it saw fit without interference from others, and that any attempt to com-

pel an individual, firm, or corporation to refrain from employing men or to prevent any man or men from working for another is an unlawful interference with a property right. That such interference may, under well-established equitable principles, be restrained by injunction, is abundantly sustained by the courts of this country and of England. In re Debs, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092; Arthur v. Oakes, 63 Fed. 310, 11 C. C. A. 209, 25 L. R. A. 414; Hagan v. Blindell, 56 Fed. 696, 6 C. C. A. 86; Jonas Glass Co. v. U. S., etc., Glassblowers' Ass'n, 64 N. J. Eq. 640, 54 Atl. 565; Vegelahn v. Guntner, 44 N. E. 1077, 167 Mass. 92, 35 L. R. A. 722, 57 Am. St. Rep. 443; Taff Vale Railway Co. v. Amalgamated Society of Railway Servants, App. Cas. Law Reports 1901, p. 426.

It is urged that the injunction was violative of the rights of the appellants; that the defendant unions and their members had the right to endeavor to improve their condition and to organize for that purpose, and had the right to communicate their desires to others, whether they were in the employment of the appellee or not, and to explain the differences that existed between their former employers and themselves; and that, if it became necessary to employ launches to carry out these purposes, they had the legal right to do so, as the waters of the bay of San Francisco are free to all. Conceding that the appellants had all of these rights, the argument ignores the salient facts brought to the attention of the court by the bill and the affidavits. It was not to prevent the exercise of any of such rights that the injunction was sought or obtained. Its purpose was to prevent acts of lawlessness, of violence, of insult, and of intimidation. No one can read the affidavits without arriving at the conclusion that members of the unions went far beyond the peaceful communication of their rights, their attitude toward their former employers, their purpose of self-protection, and the objects of their combination. It may be true, in the present case, as in many others of a similar character, that the disorders of the strike were deprecated by the officers and leaders of the unions, but that fact does not relieve the appellants of responsibility, nor render the court powerless to deal with them in their collective capacity for the violent acts which in the present case are shown to have been committed, and which, according to the affidavits, were threatened to be continued.

It is contended that the court erred in issuing the injunction for the reason that the appellee had no property right in that in which the court protected it, and it is argued that, while the appellee had a property right in its vessels, it had none in the labor of its employés, as the latter could leave its employment as they saw fit. To sustain that contention, Northern Pacific R. R. Co. v. Whalen, 149 U. S. 157, 13 Sup. Ct. 822, 37 L. Ed. 686, is cited. In that case the court held that the only ground on which, independently of an express statute, a court of equity could grant an injunction in a private action for nuisance, is special injury to property. The court said:

"No employer has such a property in his workmen, or in their services, that he can, under the ordinary jurisdiction of a court of chancery, maintain a suit as for a nuisance, against the keeper of a house at which they voluntarily buy intoxicating liquors, and thereby get so drunk as to be unfit for work."

This language of the opinion is especially relied upon, but the distinction between that case and the case at bar is elsewhere clearly stated in the opinion, where the court pointed to the fact that the defendants had not conspired or intended to injure the plaintiff's property or business, or to prevent the plaintiff's workmen from performing their contracts of service. The bill in the case at bar alleges, and the affidavits prove, that the appellants had conspired to injure and destroy the appellee's business and to prevent its workmen from performing their contracts of service. The appellee's property is not only its vessels, but the business of carrying freight and passengers, without which the vessels would lose their value. The right to operate vessels, and to conduct business is as much property as are the vessels themselves. All the rights which are incident to the use, enjoyment, and disposition of tangible things are property. "Property is everything that has an exchangeable value." Mr. Justice Swain, in The Slaughterhouse Cases, 16 Wall. 127, 21 L. Ed. 394. "Property may be destroyed, or its value may be annihilated. It is owned and kept for some useful purpose, and it has no value unless it can be used." In re Jacobs, 98 N. Y. 105, 50 Am. Rep. 636.

But it is said that the injunction goes further than the law permits, in that by its language it prohibits the appellants from doing that which they have the lawful right to do. By the order of the court the appellants are enjoined "from in any wise interfering with the crews, foremen, cooks, stewards, seamen, or either of them or any of the servants or employés of the said steam schooners or steamship or either or any of them, without due process of law; * * * from in any wise interfering with the business of the said steam schooners and said steamship except by due process of law, with the business of complainant or orator of and concerning the said steam schooners and the said steamship; * * * and from in any wise conspiring, colluding or confederating together for the purpose of preventing the said steam schooners and steamship from receiving and discharging freight and passengers." It is said that under this injunction the appellants would be in contempt if they asked one of their relatives not to go as a passenger on one of the appellee's steamers, or if they made complaint of the violation of navigation laws of the appellee's vessels, or if they exercised their right to discriminate against the appellee by shipping cargo on other vessels than those of the appellee. The language of the injunction, however, is to be interpreted in the light of the allegations and prayer of the bill, and these may make an otherwise indefinite order sufficiently specific. Hamilton v. State, 32 Md. 348. It is the acts set forth in the bill that the appellants are enjoined from doing.

It is urged that there is no showing that the alleged damage is irreparable, but that, on the contrary, the showing is that, if the appellee was suffering any damage for which the appellants were liable, it was easy of estimation, and could have been recovered in a single action against any of the appellants, who are abundantly able to respond in damages. It is true that the answer to the bill alleges that the appellants are not insolvent, and that they possess $150,000 in cash in bank. But it may be said, in general, that ground is presented for

injunctive relief whenever there is actual and threatened injury to property, coupled with facts bringing the case within one of the recognized grounds of equitable jurisdiction, and showing that there is no plain, adequate, or complete remedy at law.

Said the court, in Walla Walla City v. Walla Walla Water Co., 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341:

"The remedy at law, in order to exclude a concurrent remedy at equity, must be as complete, as practical, and as efficient to the ends of justice and its prompt administration as the remedy in equity."

One ground of equitable jurisdiction in cases of continuing trespass is the fact that the measure of damages is exceedingly difficult of ascertainment. In such a case the solvency or insolvency of the wrongdoer is an immaterial fact. Kellogg v. King, 114 Cal. 378, 46 Pac. 166, 55 Am. St. Rep. 74. And relief by injunction may be invoked as a remedy for the destruction of one's business, if in such a case no action at law would afford as complete, prompt, and efficient a remedy. North v. Peters, 138 U. S. 271, 11 Sup. Ct. 346, 34 L. Ed. 936; Watson v. Sutherland, 5 Wall. 74, 18 L. Ed. 580. It is made sufficiently clear by the allegations of the bill and the facts proven that, notwithstanding that the appellants may possess $150,000, the remedy at law is not as complete, prompt, and adequate as the remedy in equity. The remedy at law would involve a multitude of suits and delay, pending which the injury to the appellee's business might proceed to ultimate destruction. The question of withholding or granting the injunction was one which rested in the sound discretion of the Circuit Court. We find no ground for saying that there was abuse of that discretion.

The order is affirmed.

SAN JOSE-LOS GATOS INTERURBAN RY. CO. v. SAN JOSE RY. CO.

(Circuit Court of Appeals, Ninth Circuit. October 14, 1907.)

No. 1,446.

1. COURTS—FEDERAL COURTS—CONSTRUCTION OF STATE STATUTES.

The construction of a statute of a state by its highest court will be followed by the federal courts; but, where such highest court is composed of a number of judges, a construction placed upon a statute by the opinion of one judge which is not concurred in by a majority is not so binding, but leaves the question to be determined independently by a federal court.

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

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.]

2. MUNICIPAL CORPORATIONS—GRANT OF STREET RAILROAD FRANCHISE—CALIFORNIA STATUTE.

Civ. Code Cal. § 499, provides that "two lines of street railway, operated under different managements, may be permitted to use the same street, each paying an equal portion for the construction of the tracks and appurtenances used by said railways jointly; but in no case must two lines of street railway, operated under different managements, occupy and use the same street or tracks for a distance of more than five blocks consecutively." *Held*, that such provision does not deprive the municipal

authorities of a city of power to grant to two railways, having tracks of different width, the right to operate their cars on the same street for a distance not exceeding five blocks, each occupying the middle of the street, and each paying an equal portion of the cost of paving between and beside the tracks as required by section 498.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1465.]

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

Louis Oneal and Owen D. Richardson, for appellant.

Goodfellow & Eells and S. F. Leib, for appellee.

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

DE HAVEN, District Judge. This is a suit in equity to obtain a decree enjoining the defendant from constructing a street railroad upon a portion of San Fernando street, in the city of San Jose. The Circuit Court granted an injunction pendente lite; and from this order the defendant appeals. The plaintiff was at the date of the commencement of the action operating a single track narrow-gage electric street railroad within the city of San Jose, under a franchise granted in the year 1891, and expiring in the year 1936. The track of plaintiff's road is in the center of the street, and the distance between the rails is three feet. Defendant on March 6, 1905, obtained from the municipal authorities of the city of San Jose a franchise to construct and operate a single track broad-gage electric railroad along certain streets of that city, including two blocks of San Fernando street, occupied by plaintiff's road. The bill of complaint alleges that, by the terms of the franchise under which defendant proposes to construct and operate its railroad, the tracks of such railroad are "required to be as nearly as possible in the middle of the street, and the defendant is now proceeding to lay and construct the same in accordance therewith; the distance between defendant's rails being four (4) feet, eight and one-half (8½) inches; the same being parallel with your orator's rails; each of the defendant's rails being outside of or further from the center of the street than each of your orator's rails." The bill then alleges that the operation by defendant of its cars will interfere with and prevent in a great measure, the operation by plaintiff of its railroad and cars, and will deprive it of the rights and privileges to which it is entitled by its franchise.

There is only one question presented by this appeal, and that relates to the validity of defendant's franchise; plaintiff contending, in support of the order appealed from, that under section 499 of the Civil Code of California the city of San Jose was without authority to grant the right to construct and maintain a broad-gage railroad along that portion of San Fernando street already occupied by the plaintiff's narrow-gage railroad under its prior franchise, and that by reason of this want of power in the city the franchise under which defendant seeks to construct its road is void. The section of the Civil Code referred to is as follows:

"Sec. 499. Two lines of street railway, operated under different managements, may be permitted to use the same street, each paying an equal portion for the construction of the tracks and appurtenances used by said railways jointly; but in no case must two lines of street railway, operated under different managements, occupy and use the same street or tracks for a distance of more than five blocks consecutively."

The allegations of the bill of complaint show that defendant by its franchise is given the right to lay the rails of its road parallel with those of plaintiff's road, and, by reason of the greater width of defendant's road, it will when constructed occupy the same portion of the street now occupied by plaintiff's road and an additional space of 10.25 inches on each side of it.

The contention of the plaintiff is that under the section of the Civil Code of California, just quoted, the municipal authorities of a city or town cannot grant to two lines of street railway, operated under different managements, the right to use any portion of the same street, except upon condition that both of them use the same track and rails, and where, as in the case here, the road operating under the prior franchise is of narrow-gage construction, the city is without authority to permit a broad-gage railroad to be constructed along any portion of the same street, because the cars of the two roads could not be operated upon the same rails, and Omnibus R. R. Co. v. Baldwin, 57 Cal. 160, is cited as a controlling authority in support of plaintiff's position. The principal opinion in that case was delivered by Mr. Justice Sharpstein, and, speaking of section 499 of the Civil Code of California, which, so far as relates to the present question, was substantially the same then as above quoted, he said:

"The first clause of this section clearly means that a right to use the same street cannot be granted to more than two corporations in any case, and, if granted to two, it must be upon the condition that both use the same track, and that each pay an equal portion of the cost of constructing it."

This language certainly supports the contention of plaintiff, but it was not concurred in by a majority of the court. The court was then composed of seven members, and all of them participated in the decision of that case, and it appears from the case as reported that only two judges concurred in the view thus expressed by Mr. Justice Sharpstein, and another, while concurring specially in the judgment upon a particular ground stated by him, added:

"I do not, however, concur in full in the construction, placed by my associates upon section 499 of the Civil Code."

The remaining three judges dissented from the judgment, without expressing any opinion whatever as to the proper construction of the section referred to.

It is well settled that the construction of a statute of the state by its highest court will be followed by the federal courts. Olcott v. Supervisors Fond du Lac County, 16 Wall. 678, 689, 21 L. Ed. 382; Fairfield v. County of Gallatin, 100 U. S. 47, 25 L. Ed. 544; Louisville etc., Railway Co. v. Mississippi, 133 U. S. 587, 591, 10 Sup. Ct. 348, 33 L. Ed. 784; McElvaine v. Brush, 142 U. S. 155, 160, 12 Sup. Ct. 156, 35 L. Ed. 971. But we do not think, in view of the fact that the opinion of Mr. Justice Sharpstein, above quoted, was not concur-

red in by a majority of the court, that Omnibus R. R. Co. v. Baldwin, 57 Cal. 160, can be considered as having settled the construction of section 499 of the Civil Code of California, in accordance with the contention of plaintiff; and, as the question does not seem to have been passed upon by the Supreme Court of the state in any other case, we must be governed by our own interpretation of the statute, and in our opinion the most reasonable construction of the section under consideration is that it, in effect, declares that two lines of street railway, operated under different managements, may be permitted by the municipal authorities to use the same street (for a distance of not more than five consecutive blocks), each paying an equal portion for the construction of such tracks and appurtenances as are used by them jointly. The main purpose of the section is to protect the public from the inconvenience which would result if more than two railways under different managements were permitted to use the same street, or if two railways under different managements were permitted to use the same street for a distance of more than five consecutive blocks, and, as the city or town is authorized to grant to two independent railways the right to use the same street to the extent named, provision is made for an equitable distribution of the cost of constructing such tracks and appurtenances, as are used by them jointly. Section 498 of the Civil Code of California provides that, in granting the right of way to street railway corporations, the city or town authorities must require from them a strict compliance with the following conditions:

"(1) To construct their tracks on those portions of streets designated in the ordinance granting the right, which must be, as nearly as possible, in the middle thereof.

"(2) To plank, pave, or macadamize the entire length of the street, used by their track, between the rails, and for two feet on each side thereof, and between the tracks, if there be more than one, and to keep the same constantly in repair, flush with the street, and with good crossings.

"(3) That the tracks must not be more than five feet wide within the rails, and must have a space between them sufficient to allow the cars to pass each other freely."

It will thus be seen that when the right to lay rails in a street is given to two roads, both narrow or both standard broad gage, they must from necessity occupy precisely the same part of the street, and consequently use the same track and rails, and in that case each must pay an equal portion of the cost of constructing the tracks and appurtenances used by them jointly, as provided in section 499. So, also, when one is a narrow and the other broad gage, both must from necessity make a joint use of the portion of the street occupied by the road having the narrower width, and, by the terms of the same section, the cost of constructing that portion of the roadbed occupied by both must be borne by each jointly, but the clause requiring each of the roads to pay "an equal portion for the construction of the tracks and appurtenances used by said railways jointly" was not intended to deprive the municipal authorities of the power to grant to two railways having tracks of different width the right to operate their cars upon the same street. This provision of the statute does not concern the public, but defines the rights and obligations of the railroad companies, in the matter of which it speaks.

It is not claimed that the operation of defendant's broad-gage road in the manner proposed by it would inconvenience the plaintiff's road to any greater extent than would a narrow-gage road operating its cars on plaintiff's track, but it is said that narrow and broad gage railways running over the same street would, by reason of the additional rails required for their use, obstruct the use of the street for other purposes than those of railway traffic, but the inconvenience to the public from this cause would not be great where the rails are laid flush with the surface of the street, as the law requires; and, were it otherwise, the fact would not justify the court in reading into the statute a provision not found therein, denying to municipal authorities the power to grant to such differently constructed roads the right to use the same street for a distance of not more than five consecutive blocks.

The order is reversed.

COLUMBIA BOX & LUMBER CO. v. DROWN.

(Circuit Court of Appeals, Ninth Circuit. October 14, 1907.)

No. 1,428.

1. NEGLIGENCE—DANGEROUS MACHINERY—ACTION FOR INJURY.
Plaintiff was working for a contractor who was installing a sprinkler system in defendant's mill, and while he was making a pipe connection, standing with one foot on a ladder and the other against a post, astride a revolving shaft, his clothing was caught by a set screw which projected from a safety collar on the shaft, and he was thrown to the floor and injured. It was shown that, by erecting a platform on which to stand, plaintiff could have done the work in safety, and also that the shaft would have been stopped if required. There was also testimony that the purpose of the safety collar was to protect a person working near from coming in contact with the set screw, and that, if the latter was properly adjusted to the collar, there was no danger from it; also that, while plaintiff saw the collar and knew that it contained a set screw, he did not know that the latter projected. *Held*, that upon such evidence the questions of defendant's negligence, plaintiff's contributory negligence, and his assumption of the risk were all properly submitted to the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 279.]

2. SAME—WHEN QUESTION FOR JURY.
Where reasonable men might draw different conclusions from the undisputed evidence, the question of negligence or contributory negligence is one of fact for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 290, 291, 295.]

3. APPEAL AND ERROR—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.
Error in permitting a witness to state a conclusion is without prejudice where he had previously stated the facts on which it was based.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4162.]

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

John T. Welch, Martin C. Welch, and Frank H. Kelley, for plaintiff in error.

Boyle & Warburton, Richard W. Ruffin, and E. B. Brockway, for defendant in error.

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

DE HAVEN, District Judge. This action was brought by the plaintiff to recover damages alleged to have been sustained by him while working in a mill operated by the defendant. The complaint alleges that plaintiff was in the mill by invitation of the defendant, in the performance of certain work which defendant was having done, and that the place where plaintiff was working was unsafe and dangerous by reason of a set screw which projected from a safety collar upon a revolving shaft. The answer denies that the place where plaintiff worked was rendered unsafe or dangerous by reason of the set screw referred to in the complaint, and alleges, first, that plaintiff was injured by reason of his own carelessness, and, as a further defense, that he knew of the location and character of the set screw, and could have chosen a place to do his work where he would not have been in any danger of coming in contact with it, and that, with full knowledge and appreciation of the danger incident thereto, the plaintiff assumed the risk of working in the place where he was injured. When the evidence was closed, the defendant moved the court to direct the jury to find a verdict in its favor. The motion was denied, and the case submitted to the jury, which returned a verdict for the plaintiff for $3,500, and judgment was thereupon rendered in his favor for that sum. The case is brought here by the defendant upon writ of error.

It appears from the evidence that, at the time the injury was received by plaintiff, he was working for one Wellington, who was installing a sprinkler system in the defendant's mill, as an independent contractor. The plaintiff had had experience in installing similar plants in mills, and knew the ordinary dangers attendant upon working near machinery while in motion; and had been engaged in this work in defendant's mill for two months prior to the accident. The mill was in operation, and the plaintiff was in the act of changing a riser pipe which ran through the second floor of the mill. This pipe was to connect at right angles with the main line of pipe, and 7½ feet above the lower floor there was a shaft which served to operate a waste conveyor, which could have been stopped without interfering materially with the operation of the mill. While engaged in changing the riser pipe, the plaintiff came in contact with a set screw which projected from one-fourth to five-eighths of and inch from the safety collar on the shaft just referred to. The plaintiff had observed the safety collar, and knew that it contained a set screw, but did not know that it projected from the safety collar, and the plaintiff testified that the purpose of a safety collar is to protect a person while working near a set screw from coming in contact with it, and that, when the set screw is properly adjusted to a safety collar, there is no danger in working close to it. In attempting to put the riser pipe in position,

plaintiff placed a ladder against the main line of pipe, with brads in the foot to hold it from slipping. He then mounted the ladder and stood thereon with one foot, the other braced against a post nearby, the revolving shaft between his legs, and the safety collar with its set screw behind him. He then applied a pair of tongs and a wrench to the riser pipe, to get it in place, and, while in the position described, in making turns with the wrench, one leg of his trousers caught on the set screw, and he was thrown to the floor and received the injuries of which he complains. The accident happened in the morning, and the place where plaintiff was working was sufficiently lighted. Wellington and his employés, of whom the plaintiff was one, furnished their own tools, chose for themselves the time and manner in which the installation work should be done, and plaintiff knew the machinery would be stopped at any time in order to facilitate the work of installation, if such action were requested. There was also evidence tending to show that the way in which plaintiff attempted to do the work in which he was engaged was not safe; that by erecting a suitable platform on which to stand instead of using a ladder plaintiff could have performed his work with safety, and also that he could have put the riser pipe in position by working on the farther side of the main line of pipe, without danger of being caught by the set screw. There was also evidence tending to show that the set screw could be easily seen when the shaft was revolving; and there was some evidence to the effect that there is but little danger in working about a set screw, if its head is sunk into a safety collar, and that it was not necessary for the plaintiff to put up staging for the purpose of installing the riser pipe.

1. The refusal of the court to direct the jury to return a verdict for the defendant is assigned as error, and, in support of this assignment, it is argued here that the evidence does not show that plaintiff in error was guilty of negligence in permitting the projecting set screw on the shaft, where plaintiff was injured; second, that it appears from the evidence that plaintiff was guilty of contributory negligence in attempting to place the riser pipe in place while the shaft was in motion, and without erecting a platform upon which to stand when working; third, that the danger of coming in contact with the revolving shaft, in adjusting the riser pipe in the manner attempted by plaintiff, was open and apparent to any person, and, in choosing to work close to the shaft while it was in motion, the plaintiff must be held to have assumed the risk of the danger attending such work. These contentions have been very strongly urged by counsel for the plaintiff in error, but in our opinion all of them, in view of the evidence above stated, were properly submitted to the jury for decision. The rule is:

"When the evidence is conflicting, or when reasonable men might differ as to the inferences which ought to be drawn from the undisputed evidence, the question of negligence or contributory negligence is not one of law, but of fact." Davies v. Oceanic Steamship Co., 89 Cal. 286, 26 Pac. 827.

And in section 53, Shearman & Redfield on the Law of Negligence, it is said:

"There are no abstract rules defining so clearly the duties of men, under all circumstances, that the court can state them without passing upon any question of fact. The extent of the defendant's duty is to be determined by a consideration of all of the surrounding circumstances. The law imposes duties upon men according to the circumstances in which they are called to act. And, although the law defines that duty, the question whether the circumstances exist which impose that duty upon a particular person is one of fact. In very many cases the law gives no better definition of negligence than the want of such care as men of ordinary prudence or good men of business would use under similar circumstances."

Negligence is defined in Cooley on Torts, p. 630, as:

"The failure to observe, for the protection of the interests of another person, that degree of care, precaution, and vigilance which the circumstances justly demand, whereby such other suffers injury."

In considering whether the evidence was sufficient to warrant the court in submitting to the jury the question of defendant's alleged negligence, it must be remembered that plaintiff was in defendant's mill by its invitation and for its benefit, and, this being so, the defendant owed to the plaintiff the duty of providing a reasonably safe place for him to work; the duty of not negligently exposing him to a danger which was not apparent, and which therefore ordinary care would not require him to guard against. There are cases, it is true, in which it has been held as matter of law that it is not negligence for a master to have in his mill or factory an unguarded set screw. Hale v. Cheney, 159 Mass. 268, 34 N. E. 255; Rooney v. Sewall & Day Cordage Co., 161 Mass. 153, 36 N. E. 789; Keats v. National Heeling Mach. Co., 65 Fed. 940, 13 C. C. A. 221; Goodnow v. Walpole Emery Mills, 146 Mass. 261, 15 N. E. 576; Dillon v. National Coal Tar Co., 181 N. Y. 215, 73 N. E. 978; Ford v. Mt. Tom Sulphate Pulp Co., 172 Mass. 544, 52 N. E. 1065, 48 L. R. A. 96. But we think the better rule is that the question whether there is or is not negligence in the maintenance of such a screw, or in allowing dangerous machinery to remain unguarded, is one of fact to be determined by the jury; except when, upon the case presented, it is seen that by reason of the particular location of the projecting screw, or unguarded machinery, with reference to the place where the duties of the plaintiff required him to be, but one conclusion could be reached by reasonable men as to the fact, then the court may take the question from the jury and determine it as matter of law. Powalske v. Cream City Brick Co., 110 Wis. 461, 86 N. W. 153; Homestake Min. Co. v. Fullerton, 69 Fed. 923, 16 C. C. A. 545; Pruke v. South Park Foundry Mach. Co., 68 Minn. 305, 71 N. W. 276; Glens Falls Portland Cement Co. v. Travellers' Insurance Co., 162 N. Y. 399, 56 N. E. 897; Guinard v. Knapp-Stout & Co. Company, 95 Wis. 482, 70 N. W. 671.

Now, the fact appearing in the case before us that the screw was so far above the floor as not to endanger employés of defendant when attending to their ordinary duties in the mill is not conclusive upon the question of defendant's alleged negligence, because plaintiff's duty required him to work near the projecting set screw, and, if it be true, as testified to by some of the witnesses, that he would have been in no danger if it had been protected, then it certainly was a question of fact whether in the exercise of ordinary care the defendant ought not to

have so protected the screw that one whose duties required him to work near it would not, if himself exercising proper care, have come in contact with it. Was the danger of such contact one so remote that a reasonably prudent man would not have thought it necessary to guard against it? This was a pure question of fact for the jury.

And so upon the question of plaintiff's alleged contributory negligence. Assuming the plaintiff's evidence to be true that he did not know of the presence of the projecting screw, that he did not think it projected, because of the safety collar on the shaft, that the manner in which he was working was not dangerous, if the screw had been properly set in the safety collar, then certainly it cannot be held as matter of law that he was negligent in working in the way he did, without taking other precautions against accident. Some men might conclude that he ought to have erected a platform or caused the mill to have been stopped while he was engaged in putting the riser pipe in position, and it may be conceded that a very careful man would have done so; but it was peculiarly a question for the jury to say whether a man of ordinary prudence would under the circumstances testified to by plaintiff, or in view of the conditions as they appeared to him, have deemed it necessary for his safety that the mill should be stopped, or that a platform should be constructed upon which he could stand while endeavoring to put the pipe in place. Nor can it be said that the plaintiff voluntarily assumed the risk of the injury he sustained, unless he knew, or by the exercise of reasonable care might have known, of the existence of the projecting screw, and whether he did know, or ought to have had this knowledge, was a question of fact upon the evidence, and properly submitted to the jury.

2. The plaintiff, when under examination as a witness, was asked the following question:

"If one observed a safety collar on a revolving shaft, state whether or not he would have a right to assume that the safety collar properly protected the set screw?"

This was objected to "as leading and asking for a conclusion of the witness, and invading the province of the jury." The objection was overruled, and the question was answered in the affirmative. The action of the court in overruling the objection to the above question is assigned as error. The objection ought to have been sustained, but it is clear from the record that the error was without prejudice to the defendant. The witness had theretofore testified:

"The purpose of a safety collar is to protect a set screw from catching in any one's clothing, or catching any part of the person working around a place of that kind. That is where it gets its name, safety collar. The purpose of the safety collar is to protect a party from coming in contact with a set screw."

The witness having thus testified concerning the office of a safety collar, the defendant was not prejudiced by the further statement of the conclusion or opinion of the witness that one acquainted with machinery and knowing the purpose of safety collars, seeing one on a revolving shaft, would have the right to assume that it protected a set screw. "If the statement of inference, conclusion, or judgment

is accompanied by an enumeration of the facts on which it is based, the error, if any, is usually harmless, as the jury can estimate the true probative value of the statement." 17 Cyc. 60. In Langworthy v. Township of Green, 88 Mich. 207, 50 N. W. 130, in holding that it was not prejudicial error to permit a witness to testify that he was driving as carefully as a man could at the time when he was thrown from a wagon, the court said:

"The rule is that, where the court or jury can make their own deductions, they shall not be made by those testifying; but where the witness gives fully and succinctly, as in this instance, the facts upon which he bases that conclusion, there is no presumption of prejudice."

3. There is no conflict between the general verdict and the special findings of the jury. The finding that the plaintiff would not have been injured, if the shaft had not been revolving, is the statement of a self-evident fact, but it does not follow therefrom that the plaintiff failed to exercise ordinary care in attempting to adjust the riser pipe without having the machinery stopped; nor is the other finding, that the plaintiff in error would have stopped the machinery if he had been requested, equivalent to a finding that it was not guilty of negligence in permitting the screw to project from the safety collar.

4. Numerous errors are assigned in relation to instructions given, and the refusal to give certain instructions requested. These assignments do not require discussion, and it is sufficient to say, that the case was fully and fairly submitted to the jury by the instructions given, and no error was committed by the court in refusing to give other instructions requested by the defendant.

Judgment affirmed.

GILMORE v. McBRIDE.

(Circuit Court of Appeals, Ninth Circuit. October 14, 1907.)

No. 1,348.

1. WRIT OF ERROR—REVIEW—VERDICT OF JURY.

On a writ of error to a federal court in an action at law, where the evidence was conflicting, the verdict is conclusive in the appellate court on every question of fact embraced within the issues submitted to the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3935–3937.]

2. ATTORNEY AND CLIENT—SUIT BY ATTORNEY FOR SERVICES—NOTICE OF LIEN AS ADMISSION OF VALUE.

In an action by an attorney to recover a reasonable fee for services rendered in conducting an action, the fact that plaintiff filed a notice claiming a lien in such action is not a conclusive admission on his part that the value of his services did not exceed the sum claimed in such notice, but the question of the weight to be given to such notice as an admission is one for the exclusive determination of the jury under all the evidence in the case.

3. SAME—EVIDENCE OF VALUE OF SERVICES—VALUE OF PROPERTY INVOLVED IN SUIT.

In determining the reasonable value of services rendered by an attorney, it is proper to consider the value of the property in litigation, and

where such property consisted of an interest in a mining claim which was recovered by the attorney for his client, in a subsequent action by him to recover for his services, evidence is admissible to show the market value of such interest, not only when recovered, but also up to the time of trial, if still owned by defendant, as well as the amount he has actually received as his share of the proceeds of the working of the claim.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attorney and Client, § 370.]

4. APPEAL AND ERROR—REVIEW—HARMLESS ERROR.

Errors in permitting a witness to testify to values without his competency having been shown, and in stating facts from hearsay, were harmless and not ground for reversal of the judgment, where the competency of the witness was shown on his cross-examination, and the facts to which he testified upon hearsay were corroborated by the testimony of the adverse party.

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

A. G. McBride (C. S. Johnson and A. J. Daly, of counsel), for plaintiff in error.

Charles Page, Edward J. McCutchen, and Samuel Knight, for defendant in error.

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

DE HAVEN, District Judge. This was an action at law to recover the value of services alleged to have been rendered to the defendant by the plaintiff as an attorney, in an action brought by the defendant to recover an undivided interest in a mining claim known as the "Daisy Placer Claim," situate in Nome mining district, Alaska. The complaint alleges that the reasonable value of the services so rendered was, and is, $2,500; that $644.75 has been paid on account thereof, leaving a balance of $1,855.25 due to plaintiff.

The answer put in issue the allegations of the complaint, and, in addition thereto, alleged that defendant did not employ plaintiff alone to conduct the litigation referred to in the complaint, but employed the firm of Davis & Gilmore for that purpose; that plaintiff was a member of that firm; that the agreement between defendant and said firm, in relation to such employment, was that the firm was to be paid a reasonable fee to be fixed by the defendant; that the amount of such fee was fixed by the defendant in the sum of $500; that plaintiff was paid $144.75 in excess of that amount; and defendant by way of counterclaim demanded a judgment against plaintiff for said sum of $144.75.

The case was tried by a jury, and a verdict rendered in favor of the plaintiff for the sum of $1,605.25, and for this amount and costs judgment was thereupon given in favor of the plaintiff. The cause is brought here by the defendant on writ of error.

1. It is most earnestly insisted by the plaintiff in error that the verdict is against the evidence. But the rule is:

"Unless there is an entire want of evidence upon which to base the verdict returned by the jury, such verdict is conclusive here as to every fact embraced within the issues submitted to the jury for decision. This results from the well-settled rule that on a writ of error the appellate court can only con-

sider errors of law, and that the review under such a writ does not extend to matters of fact." Graham v. Earl, 92 Fed. 155, 34 C. C. A. 267.

See, also, Zeller's Lessee v. Eckert, 4 How. 289, 11 L. Ed. 979; King v. Smith, 110 Fed. 95, 49 C. C. A. 46, 54 L. R. A. 708; Parsons v. Bedford, 3 Pet. 433, 7 L. Ed. 732.

In this case there was a sharp conflict in the evidence as to the terms of the contract, under which the plaintiff rendered the services referred to in the complaint, and a like conflict upon the issue whether the plaintiff was alone retained by the defendant, or whether the firm of Davis & Gilmore was employed, and also as to the reasonable value of the services rendered by the plaintiff.

The case, then, upon the record before us, is not one in which there is no evidence at all to sustain the verdict, and, under the law as above stated, "the verdict is conclusive here as to every fact embraced within the issues submitted to the jury for decision." The case of Central Railroad v. Pettus, 113 U. S. 116, 5 Sup. Ct. 387, 28 L. Ed. 915, cited by the plaintiff in error, in which the Supreme Court reduced the amount allowed by the Circuit Court to an attorney as a fee, does not sustain his contention that this court may, upon its own view of the evidence, determine whether the fee allowed to the plaintiff by the verdict was a reasonable one or not, and also whether the jury ought not to have found in favor of the plaintiff in error upon the other issues. The case cited was an equitable action, and cases in equity are heard in the appellate court upon the evidence; but, in an action at law, the rule is otherwise; and when, as here, the evidence is conflicting, the verdict must be accepted as a correct determination of the issues of fact.

The fact that, after the trial of the action in which the services here sued for were rendered, the plaintiff and an attorney whom he had employed to assist him filed a notice claiming a lien in the sum of $1,000, "for fees and services together with expenditures on account of costs and disbursements," made by him in that action, was not a conclusive admission upon the part of the plaintiff that the value of his services, and the costs and disbursements made by him in that action, did not exceed the sum of $1,000. The question of the weight to be given this notice as an admission against the claim made by the plaintiff in this action was one for the exclusive determination of the jury, and to be decided by them in view of the reasons given by the plaintiff for filing said notice, and the other evidence in the case; and, in submitting that question, the court properly instructed the jury:

"That the plaintiff is not limited in the amount he may recover, if the evidence warrants a recovery for more, by the amount set forth in the so-called attorney's lien filed by him, but you must be guided to a conclusion by what in your opinion, from the examination of all the evidence in the case, including the evidence of the filing of the lien, is a reasonable and fair compensation for the services rendered by the plaintiff for the defendant."

2. Evidence of the market value of the Daisy placer claim at various times between the date of the commencement of the action of McBride v. McCoy et al., in the year 1901, down to the date of the trial of the case at bar, was admitted, and also evidence in relation to the value of the gold received by the plaintiff in error during the same time, as his

share of the gold taken from that mine. The admission of this evidence is assigned as error, but we think it was relevant as bearing upon the question of the reasonable value of the plaintiff's services.

In determining the reasonable value of services rendered by an attorney, it is certainly proper to consider the value of the property in litigation, and the consequent pecuniary benefit realized by the client as the result of the attorney's skill and labor. We do not agree with the plaintiff in error that such evidence should be confined to the date of the rendition of the judgment in which the property was recovered, but the inquiry may take a wider range, and include its value at the time of the trial, if still owned by the defendant. In other words, in such a case, the present value of the property recovered is not too remote for the consideration of the jury. It tends to show the benefit which the defendant has actually received as the result of the attorney's services, an inquiry which we think is always open, so long as the amount of the fee remains to be settled.

3. While giving his testimony, the plaintiff was asked the following question by his counsel: "What was the current value for the Daisy claim for the year 1901?" This was objected to, upon the ground that the witness had not shown himself qualified to state. The objection was overruled. Defendant excepted, and witness answered that its value in 1901 was $100,000; that he thought it could have been sold for that sum easily. And in answer to the question: "What has been taken out of the property since that time, if you know?" the witness proceeded to state what had been told him in relation to that matter, by a Mr. Orton, the acting manager of the claim. Objection was made to his giving evidence of what had been told him by Mr. Orton, in relation to such receipts. The objection was overruled, and the plaintiff answered that he had been told by Mr. Orton that $130,000 was taken from the claim in cleaning up in the spring. In overruling these objections, the court erred, but the errors were without prejudice to the defendant, for upon the cross-examination of the witness it was shown that he possessed sufficient knowledge to entitle him to give testimony in relation to the value of the claim; and the error in permitting the plaintiff to testify as to what Orton had told him about the amount of gold taken from the mine was cured by the deposition of defendant, in which he stated that his share of the output of the mine for the year referred to was about $4,000. This, of course, was net, and, as defendant's interest was $^1/_{24}$, his testimony was substantially the same as the hearsay evidence to which objection was made.

4. There are 46 assignments of error in the record, but the foregoing opinion covers all which in our opinion require any extended discussion by us.

The jury were fully and fairly instructed in relation to all of the issues, and no error was committed by the court in its refusal to give any instruction requested by the defendant not covered by the charge actually given.

We find no error in the record.

Judgment affirmed.

MUNROE v. FRED T. LEY & CO.

SAME v. EDISON ELECTRIC ILLUMINATING CO. OF BOSTON.

(Circuit Court of Appeals, First Circuit. October 22, 1907.)

Nos. 698, 699.

1. MASTER AND SERVANT—INJURY TO SERVANT—ASSUMED RISK.
A lineman, engaged with others in removing wires from poles, who was injured by the falling of a pole on which he was at work, caused by its being rotten beneath the sidewalk in which it was planted, cannot be held to have assumed the risk from such danger under the circumstances explained.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 610, 612.

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

2. SAME—ACTION FOR INJURY—QUESTIONS FOR JURY.
In an action by a lineman employed with others in removing electric light wires from the poles on which they were strung to recover for an injury caused by the falling of a pole on which he was at work, it was shown that the cause of the injury was the negligent method of doing the work; that the act of negligence which was the immediate cause of the falling of the pole was done by a workman by direction of one of two men who were standing on the ground, and not working with their hands, but giving directions to the workmen. *Held*, that such evidence was sufficient to entitle plaintiff to go to the jury on the question whether or not such men were, or either of them was, "entrusted with and exercising superintendence and whose sole or principal duty was that of superintendence," so as to render the defendant, as employer, liable for his negligence under the Massachusetts employer's liability act (Rev. Laws Mass. c. 106, § 71).

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1068–1088.]

3. SAME—ACTION FOR INJURY—WHEN OWNER OF PREMISES IS NOT LIABLE.
A subordinate corporation contracted with an electric illuminating company, which controlled a number of plants, for all its work of reparation and rebuilding, and in the contract agreed to assume all risks in reference thereto. *Held*, that the major corporation was under no liability, either at common law or under the employer's liability statutes of Massachusetts, for any injury arising to a lineman employed by the subordinate corporation in the work of reparation or rebuilding on its premises, or about its works, through the negligence of the subordinate corporation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 1251.]

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

George H. Tinkham (Simon E. Duffin, on the brief), for plaintiff in error.

Frederick P. Cabot (Henry F. Hurlburt and Charles M. Davenport, on the brief), for defendant in error.

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

PUTNAM, Circuit Judge. The plaintiff in error in each case was the plaintiff below, so that there will be no confusion in describing

the parties. In each there was a trial by jury, and the Circuit Court directed a verdict for the defendant, which was followed by a judgment accordingly; and the plaintiff took out these writs of error.

In the suit against Fred T. Ley & Co., the facts, as stated by the plaintiff, were as follows:

"This is an action of tort, brought by John D. Munroe, an alien, who while working at the top of an electric light pole was thrown to the ground by its breaking off a little below the surface of the ground. The declaration contained six counts, the first three at common law, and the last three under the employer's liability act of Massachusetts.

"The plaintiff was one of a gang of men, working under the directions of a foreman, which was engaged in removing the wires from a line of 13 electric light poles about 12 years old. This work was being done preparatory to removing these poles; the system having been changed from an overhead to an underground one. Upon these poles were four heavy wires, and from them 12 similar wires had been removed within a year prior to the accident. The poles were set in a brick sidewalk, such as is common in the city of Boston, were square, painted, and about 40 feet high. While at the top of one of these poles, the plaintiff was thrown to the ground by the pole snapping off a little below the surface. This pole was sound above ground, but was rotten below the surface. The defendant had never made a contract, written or verbal, with the linemen in its employ by which the latter were to undertake the duty of inspecting poles for interior defects, nor had it given its linemen any instructions to that effect, either written or verbal, nor was the plaintiff furnished with the necessary tools with which to inspect for interior defects. The plaintiff had never worked upon this line of poles. He was not informed of the age of the line, nor that 12 heavy wires had been removed from them within a comparatively short time before the accident. The poles and wires belonged to the Edison Electric Illuminating Company of Boston, and the defendant was doing the work of removal under a written contract with the latter company.

"On the morning of the accident, the linemen, acting under a general order, were untying the wires from the tops of the poles. One of the linemen, Pring, not having his pliers, the tool used by linemen to untie wires, was ordered by the foreman, MacDonald, to cut the wires on the fourth pole, which he did. At the time the wires were cut at the fourth pole, the wires on the fifth pole had been untied, and the plaintiff was on the top of the sixth pole and did not know of the cutting. Dorchester street, upon which the remaining seven poles were located, takes at this point where the sixth pole was located a sharp dip downhill. When the sixth pole snapped off, it fell in the direction of the seventh and remaining poles."

In addition to the above, it should be said that there was some evidence showing, not only that MacDonald was giving orders to the men, but also one Leyden. It is claimed by the plaintiff that the fact that the pole was decayed was within the rules with reference to the duty to furnish safe conditions to work in; that the defect of rottenness might have been discovered by reasonable inspection; that it was the company's duty to inspect; that there was no assumption of risk on the part of the plaintiff; that there was error in the court's refusing to permit the plaintiff to show that there was a custom for linemen working under the circumstances shown by the case not to inspect poles for interior defects; that there was also error in the court's refusing to permit the plaintiff to testify that he relied on MacDonald or Leyden to inform him whether or not the line was an old line; and that there were other errors which have not been particularly brought to our attention. The view we take of the case, however,

relieves us from the necessity of passing on any question except the broad one that the court erred in directing the jury to return a verdict for the defendant, and on this solely with reference to the statutory topic of superintendence. We will direct that the judgment be reversed and a new trial had on only the counts which are based upon the statute, which is found in Rev. Laws Mass. c. 106, § 71, as follows:

"If personal injury is caused to an employee, who, at the time of the injury, is in the exercise of due care, by reason of: * * *

"Second, The negligence of a person in the service of the employer who was entrusted with and was exercising superintendence and whose sole or principal duty was that of superintendence, or, in the absence of such superintendent, of a person acting as superintendent with the authority or consent of such employer."

Clearly Munroe was not at fault for not ascertaining that the pole was rotten. None of the cases cited are analogous for various reasons. The rottenness was concealed by a brick sidewalk. Under the general rule, as settled by the Supreme Court over and over again, a person employed is not bound to use reasonable care to ascertain the safety of what belongs to his employer, and is bound only by what he "knows or ought to have known"; and, in the present case, there is no sufficient evidence showing that a different rule applies to linemen. Even if there were any evidence of value that generally linemen are expected to examine poles before climbing them to ascertain whether decayed or not, it would not apply to the present case, because, first, the linemen here were not furnished with tools to enable them to dig out the sidewalk around the poles, and, second, the orders given them by Leyden and MacDonald prohibited them from doing anything of that nature. As soon as they were on the ground, the linemen were driven up the poles in haste, and under persistent orders, with oaths, to "hump themselves," so to speak. Therefore the circumstances precluded any examination by them, whatever might have been the custom usually, and whatever the circumstances of the decisions cited by the defendant.

However, it seems to us to be of no consequence whether Munroe should have examined the condition of the pole as to rottenness or not, because its rottenness was not the causa causans. If the work had been done in a proper manner, the accident would not have occurred. The plaintiff had a right to go to the jury on the proposition that the proper manner was, first of all, to have untied all the wires. If this had been done, the pole would have stood, so far as any evidence in the case shows otherwise. There were 13 poles in all. Munroe was on the sixth pole. The poles from the sixth to the thirteenth were on a downhill road, so that the tendency of seven poles was to pull the sixth pole towards them and downhill. The wire was cut on the fourth pole, and had been untied on the fifth pole, so there was nothing to hold the sixth pole, on which the plaintiff was, against the downhill pull of poles 7 to 13 each, inclusive. Therefore, as the record shows, when the sixth pole snapped off, it fell, and, as of course, in the direction of the seventh pole.

The plaintiff puts this proposition as follows:

"The plaintiff contends that the manner in which the work was conducted by the foreman, MacDonald, was negligent, and the negligence brought about the injury to the plaintiff."

He puts this at our bar in such a way as to preclude all other efficient causes, because, he says:

"This ordering of Pring to cut the wires on the fourth pole was the negligent act of the superintendent which the plaintiff avers brought about his injury."

The main question in the case is whether MacDonald or Leyden was a person in the service of the Ley Company "entrusted with and exercising superintendence, and whose sole or principal duty was that of superintendence"; or, second, one who, in the absence of such superintendent, was a person "acting as superintendent with the authority or consent of such employer." These words of the statute seem to represent plain English, and so plain that they neither need, nor are capable of, categorical definition. So far as we have examined the Massachusetts cases, none of them undertakes to give such a definition. Many of them have been engaged in determining, not whether under the circumstances of the case there was any person "exercising superintendence," but more particularly with reference to the questions arising from the use of the words "sole or principal." Some have stated certain inclusive rules; that is, rules which show that certain persons are within the statute. But none of them, as we have said, assumes to give a complete definition. For the reason we have stated, to do this is not practicable.

The facts of the present case are that no one undertakes to testify that either MacDonald or Leyden did any work with their hands. They were giving orders, and were engaged entirely in so doing, and nobody else was giving orders. An illustrative fact is that one witness states that MacDonald was standing on the ground doing nothing excepting giving orders. He did not see him climb any poles, and the witness took his orders from him, and the principal orders were directed to all the linemen. Another one testifies that MacDonald gave him orders, with an oath, to get up the pole and stop his "kidding," and that MacDonald "was in the gutter, looking out for the wires, and giving orders to the ground men in reference to them." Another one testifies that he took orders as a lineman from Leyden and MacDonald; and another one that both MacDonald and Leyden "gave orders," and that MacDonald said: "Get your tools and strip that pole." The record is full of this kind of testimony. There is no question that either MacDonald or Leyden gave the order to cut the wire which resulted in Munroe's injury.

It seems plain therefore that the plaintiff had a right to go to the jury on the issue that MacDonald and Leyden, or one of them, had, so far as doing this particular work was concerned, full charge. They were doing it wholly in accordance with their own notions as to the method of doing it, subject, of course, as every person is who is placed in authority, to the usages and methods of doing work generally, or of doing the particular work of the particular person or corporation whom they represent.

Looking at the various decisions of the Supreme Judicial Court of Massachusetts, it seems to us that the observation of the judge at nisi prius in Malcolm v. Fuller, 152 Mass. 160, 163, 25 N. E. 83, was correct, so far as it went:

"A superintendent is a man having the control, with the power of authority. That is to say, when he speaks, the workmen are to obey, not because he advises them, or requests them, or hopes they will, but because, by virtue of his position, they have agreed to obey him. That is the nature of his authority."

Thus, the question of "exercising superintendence" is one, not of the magnitude of the job, but of the nature and power of the person in charge thereof. One who is on the ground, dissevered from all other authority, and having full power at the time over the work to be done, even though only temporarily, may be "exercising superintendence." McPhee v. Scully, 163 Mass. 216, 217, 220, 39 N. E. 1007. We have carefully examined a number of the decisions of the Supreme Judicial Court of Massachusetts with regard to this topic, and have selected here only the two which seem the most typical of the case before us. Taking together all those which we have examined, we find nothing therein which prevents our making such an application here of the statute in question as its plain English seems to require.

The record raises a question whether MacDonald or Leyden was superintending the work; and, so long as there is a question of that character, it, of course, follows that it is doubtful whether either one of them was. So, also, the case might easily have been made more definite and clear by a very few questions put to the witnesses; but we have here the fact that the plaintiff may well contend that MacDonald and Leyden, one or both of them, were in full charge of the job, giving orders to the men, and apparently "exercising superintendence." Whether one or both united therein may or may not prove of consequence, because the fault in the method of doing the work might have been the joint fault of both.

The result is that the evidence shows that the occasion of the injury to Munroe was the negligent method of doing the work; also, there is enough in the record to entitle the plaintiff in the case against Fred T. Ley & Co. to go to the jury under the provision of the statute which we have cited. Therefore the judgment there must be set aside, and a new trial ordered.

Coming now to the suit against the Edison Electric Illuminating Company, the record shows an agreement between the Ley Company and the Edison Company by virtue of which the Ley Company entered into a contract with the Edison Company to become its general constructor and repairer, and to assume all risks. The nature of this contract was such that the Ley Company might be called on to take up the Edison Company's work, whatever the condition of repair or safety might be. It is difficult to see how, under this contract, the Edison Company could be responsible to the Ley Company for the condition of its poles or anything else; and, if the Edison Company was under no obligation to the Ley Company, it is difficult to see how it could be under obligation to its employés. The plaintiff relies on the

general rule as explained in Pollock's Torts (6th Ed. 1901) 492, 493, and cases cited; Elliot v. Hall (1885) 15 Q. B. D. 305, 315; and on Hayes v. Philadelphia Company, 150 Mass. 457, 23 N. E. 225. It seems to be the statutory rule of Massachusetts that under the employér's liability act any agreement between the owner of premises and the contractor that the contractor will assume all responsibility does not affect the employé of the contractor. Wagner v. Boston Elevated, 188 Mass. 437, 442, 74 N. E. 919, and Sullivan v. New Bedford Gas Company, 190 Mass. 288, 292, 76 N. E. 1048. Nevertheless, it would also seem that the rule on which the plaintiff relies, and even the Massachusetts statute, as interpreted by the Massachusetts courts, cannot apply to the case of a general jobber like the Ley Company here, who itself assumes all responsibility, thus relieving the party with whom it contracts of any duty in the premises.

However, it is not necessary to go into the above questions, because, as we have already stated, according to the plaintiff's case, the causa causans, the truly efficient cause of the injury, was not the condition of the poles, but the negligence of the employés of the Ley Company in the manner in which the work was done. The undoubted condition of the facts and the position taken by the plaintiff himself would prevent him holding a verdict if he received one on any ground except that of the negligence of the Ley Company. Therefore, on this part of the case, we are justified in speaking positively to the effect that the plaintiff has no cause against the Edison Company.

Judgments will be entered as follows:

In No. 698, John D. Munroe v. Fred T. Ley & Company, the judgment is reversed, and the case is remanded to the Circuit Court, with directions to set aside the verdict, and to grant a new trial on such count or counts of the declaration as are based on the second clause of section 71 of chapter 106 of the Revised Laws of Massachusetts; and the plaintiff in error recovers his costs of appeal.

In No. 699, John D. Munroe v. Edison Electric Illuminating Company of Boston, the judgment of the Circuit Court is affirmed; and the defendant in error recovers its costs of appeal.

LEAK v. LEAK.

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

No. 1,443.

DIVORCE—APPEAL—APPEALABLE JUDGMENT UNDER ALASKA CODE.

Carter's Alaska Code, pt. 4, § 504, which provides for appeals from the District Court for the district of Alaska to the Circuit Court of Appeals for the Ninth Circuit in civil causes where the amount involved or the value of the subject-matter exceeds $500, does not authorize an appeal from a decree granting or denying a divorce or awarding the custody of their minor children to one or the other of the divorced parties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, § 563.]

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

On Motion to Dismiss Appeal.

Jno. R. Winn and Newark L. Burton, for appellant.
Malony & Cobb, for appellee.

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

GILBERT, Circuit Judge. The motion to dismiss the appeal must be sustained. The appeal is taken from a decree of the District Court for the District of Alaska, and particularly from that part thereof which grants a divorce and separation to the appellee, and awards him the care and custody of one of the minor children of the parties. Section 504 of Carter's Alaska Code, pt. 4, provides for appeals to this court from the District Court of Alaska in civil causes only in cases where the amount involved, or the value of the subject-matter, exceeds $500. There is no statutory provision for appeal in cases where the value of the subject-matter of the controversy cannot be measured in money, and this court is given no power to review the judgment of the District Court of Alaska in decreeing or denying divorce, or in awarding the custody of their minor children to one or the other of the divorced parties. Simms v. Simms, 175 U. S. 162, 20 Sup. Ct. 58, 44 L. Ed. 115.

LEAK v. LEAK.

(Circuit Court of Appeals, Ninth Circuit. October 14, 1907.)

No. 1,435.

1. DIVORCE—APPEAL—APPEALABLE JUDGMENT UNDER ALASKA CODE.
   A decree of the District Court of Alaska granting or denying a divorce or awarding the custody of minor children in a divorce suit is not appealable under Carter's Alaska Codes, pt. 4, § 504, which provides for appeals only in cases involving money or property.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, § 563.]

2. SAME—ALLOWANCES TO WIFE—ALASKA STATUTE.
   Under Carter's Alaska Codes, pt. 4, § 471, which authorizes the court in a divorce suit in its discretion to provide by order that the husband pay such an amount of money as may be necessary to enable the wife to prosecute or defend the suit, and also for the care and custody and maintenance of the minor children of the marriage during the pendency of the action, the court may properly order the husband to deposit a sufficient amount to pay the costs and expense of an appeal by the wife, and may also allow to the wife the cost of medical attendance necessarily incurred pending the suit for a minor child in her custody, but it has no power to award her a sum to cover the cost of depositions previously taken by her; the allowance authorized by the statute being for future expenses only.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, § 642.]

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

Malony & Cobb, for appellant.
Jno. R. Winn and Newark L. Burton, for appellee.

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

DE HAVEN, District Judge. This is an appeal from the District Court of Alaska, Division No. 1. The action was brought by the husband, who is the appellant, to obtain a decree of divorce from his wife, the appellee, and for the care and custody of their minor children. The cause of action, as stated in the complaint, was for adultery and for cruel and inhuman treatment, but the appellant was permitted at the trial to amend his complaint by withdrawing the charge of adultery. The appellee answered, denying the allegations of the complaint, and also filed a cross-complaint praying for a divorce, and that the care and custody of the children be given to her. The court found the issue of cruel and inhuman treatment in favor of the appellant, and thereupon entered its decree dissolving the marriage relation between the parties, and awarded to the appellant the custody and control of one child, Melville Sloan Leak, and the care and custody of the other, Victor Leak, to the appellee. The decree further adjudged that the appellee should recover from the appellant the sum of $515.90 to satisfy certain orders made by the court during the pendency of the action. One of these orders directed the appellant to pay the appellee the sum of $75.90, expenses which had been incurred by her before the date of such order, in taking certain depositions, "and the further sum of $150 additional attorney's fee, allowed * * * attorney for defendant for defending said cause." A second order directed the appellant to pay to the appellee $190 for the use of certain physicians who had rendered professional services to the child Victor during the pendency of the action; and another order directed him to pay to appellee $100 per month temporary alimony. There was due on account of this last order the sum of $100 at the date of the decree. Subsequent to the final decree the court, upon the application of the wife, appellee herein, made a further order that, in case the wife should appeal from the decree within 10 days, the appellant herein should pay into the registry of the court the sum of $250, to be paid out as costs of her appeal, upon vouchers properly executed and delivered to the clerk of the court, or should secure the payment of such sum by a sufficient bond. The appellant has appealed from this order, and also from that portion of the decree awarding the custody of the minor child Victor Leak to the appellee, and directing him to pay appellee the said sum of $515.90 in accordance with the orders just referred to.

The appeal from that part of the decree awarding the custody of the minor child Victor to the appellee must be dismissed on the authority of Simms v. Simms, 175 U. S. 162, 20 Sup. Ct. 58, 44 L. Ed. 115; Leak v. Leak (No. 1,443) 156 Fed. 473, the opinion in which was filed October 7, 1907. The other questions do not require extended discussion. It is sufficient to say that the court did not err in its order allowing $150 as additional compensation to the attorney for the appellee, and directing that the appellant pay the same into the registry of the court for disbursement on that account; nor do we think the court erred in directing the appellant to pay the sum of $190 to satisfy the claim of the physicians who rendered their professional services to the

same child during the pendency of the action, and while in the custody of the appellee.

It appears from the facts recited in the order just referred to that on April 12, 1906, the child was in a critical condition, and in need of immediate medical and surgical relief. Neither of the parties would consent to the giving of the needed attention to it by the surgeon selected by the other, and there were at that time two motions pending before the court, one upon the part of the appellee for an order requiring the appellant to give her $100, for the purpose of paying the expenses of herself and child to New York, to be operated on by specialists, and a motion by the appellant that he be given the custody of the child. The court, after hearing the testimony of physicians as to the serious condition of the child, and being satisfied that, if left to the parties to agree upon a surgeon, "no agreement would be reached, and as a result the said child would probably die, the court advised counsel for both parties" that it would not order an operation to be performed, but if at 12 o'clock midnight of that day the child remained in the same condition, and had not been given proper medical attention, the appellant's motion for a change of custody would be granted; and, being asked by appellee's counsel "how the surgeons were to be paid if the operation were performed, the court stated in the presence of all counsel that the plaintiff (appellant) would be ordered to pay therefor, and at 12 o'clock midnight, April 12, 1906, all counsel being present, appellee's counsel, "announced that the child had been given medical attention," whereupon the court denied the motion for change of custody, "and directed that the bills for said medical and surgical attention be presented," and when presented they were allowed in the amount stated in the order.

Section 471, pt. 4, of the Code of Alaska, provides:

"After the commencement of an action, and before judgment therein, the court or judge thereof may, in its discretion, provide by order as follows: First. That the husband pay or cause to be paid, to the clerk of the court, such an amount of money as may be necessary to enable the wife to prosecute or defend the action, as the case may be. Second. For the care and custody and maintenance of the minor children of the marriage during the pendency of the action."

Upon the facts above stated, the order of the court directing the appellant to pay to appellee $190 for the purpose of enabling her to satisfy the claims of the physicians for their professional services in attending upon the child Victor was justified by the second subdivision of the section just quoted. The order of court made after the entry of the final decree, requiring the appellant, in the event of an appeal by the wife, to deposit in the registry of the court or to give security for the payment of $250, costs on such appeal, was proper. We think, however, the court erred in its order requiring the appellant to pay to the appellee the sum of $75.90, being the amount theretofore expended by her for taking certain depositions. The court had previously made an order directing the appellant to pay the appellee the sum of $100 for necessary expenses which she might incur in the preparation of her defense. It appears that this sum was not sufficient, and appellee, without making further application to the court, proceeded upon her own

account, and borrowed the additional sum of $75.90 to cover the additional cost. It has been uniformly held in states having statutes similar to section 471, pt. 4, of the Code of Alaska, before quoted, that the court in an action like this is only authorized to make an allowance to the wife for future expenses. Thus in Beadleston v. Beadleston, 103 N. Y. 404, 8 N. E. 736, it is said:

"The purpose of the statute is to furnish the wife means to carry on her action or to defend the same during the pendency thereof. The allowance looks to the future. There can be no necessity for an allowance to make a defense which has already been made or solely to pay expenses already incurred. * * * There is ample power in the court to make allowances from time to time to enable the wife to carry on her defense, and when she needs money for that purpose she must apply for it. But, if she has succeeded in making her defense from her own means, or upon her own credit, she cannot, before judgment, while the action is pending, have an order compelling her husband to pay such expenses; and there is no statutory authority in the court to make such an order, and thus to compel him to pay her debts."

This view was repeated by the same court in McCarthy v. McCarthy, 137 N. Y. 500, 33 N. E. 550. See, also, as supporting the same rule, Loveren v. Loveren, 100 Cal. 493, 35 Pac. 87; Lacey v. Lacey, 108 Cal. 45, 40 Pac. 1056. In Loveren v. Loveren, the court, speaking by Fitzgerald, J., said:

"If the expenses of the action have been incurred or paid by her with means derived from her separate estate or upon her credit, then there can be no necessity for an allowance by the court to enable her to do that which she has already done, and without such necessity the court has no authority under the statute to make such an order. And no better evidence can be adduced of her ability in this respect than the fact that she has been able, as the record shows, to incur these expenses and to pay them with money borrowed by her entirely upon the strength of her credit. Expenses so incurred and paid may be, where it is proper to do so, taxable as costs in the case, but they cannot be made the basis of an order within the meaning of this statute granting an allowance therefor and compelling the husband to pay them."

The appeal from that portion of the decree awarding the custody of the child Victor to the appellee is dismissed. The order made after final decree is affirmed, and the decree appealed from, in so far as it orders and adjudges that appellee recover from appellant $515.90, is modified, by deducting from said sum $75.90, which appellant was required to pay for taking depositions, and, as so modified, the decree is affirmed, the appellee to recover costs.

FITZSIMMONS v. UNITED STATES.

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

No. 1,340.

POST OFFICE—VIOLATION OF POSTAL LAWS—"LOTTERY."

A scheme by which certificates are issued by a corporation, on each of which the holder agrees to pay $1 per week, subject to forfeiture for nonpayment, and about 75 per cent. of which payments are paid into a "mutual benefit credit fund" until all certificates prior in date have matured and been canceled, when his own certificate shall mature, and he shall be

paid from such fund the sum of $2 for each week such certificate has been in force, provided there is so much in the fund, not exceeding however $160, is a lottery within the meaning of Rev. St. § 3894 [U. S. Comp. St. 1901, p. 2659], and any person engaged in conducting such scheme by means of letters or circulars sent through the mails is guilty of a criminal offense under said section.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Post Office, § 54.

For other definitions, see Words and Phrases, vol. 5, pp. 4245–4252; vol. 8, pp. 7710–7711.

Nonmailable matter, see note to Timmons v. United States, 30 C. C. A. 79.]

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

The plaintiff in error was convicted of violation of the clause of section 3894 of the Revised Statutes [U. S. Comp. St. 1901, p. 2659], which provides that no letter, postal card, or circular concerning any lottery shall be carried in the mail or delivered at or through any postoffice or branch thereof. He was the president and a stockholder of a corporation organized under the laws of California, known as the "Cumulative Credit Company." The company issued certificates, the provisions of which were held by the court below to constitute a lottery. The provisions of the certificate material to the question here involved are as follows:

"This is to certify, that ——— is entitled to and agrees hereby to pay and contribute the amount of one dollar per week to the Cumulative Credit Company, a corporation, hereinafter designated as 'the Company' at its home office at 125 South Broadway, in the city of Los Angeles, California, for the purpose of creating an expense credit fund and a mutual benefit credit fund, for the uses and purposes hereinafter provided. Said payments to be made in each consecutive calendar week following the date hereof, until this certificate shall have been canceled in its regular order in pursuance of its conditions as herein stated.

"At the option of the owner hereof, the said weekly payments may be made in advance to cover a period of not to exceed five consecutive weeks.

"If for any reason the payment of the said one dollar per week to the company be not made by the owner hereof at the time and in the manner above provided for, this certificate shall be deemed to be delinquent, and all the rights of the owner hereof, hereunder, suspended; except, in the event of this certificate so becoming delinquent, if the owner hereof shall pay to the company, in addition to the one dollar per week provided to be paid herein, for the first week of each delinquency twenty-five cents, and for each succeeding week (not to exceed nine successive weeks) of such delinquency, the sum of one dollar, then this certificate shall again become and be in full force and effect. But if said additional payments be not so made and the weekly payments as aforesaid shall become and remain delinquent for ten successive weeks, then this certificate shall immediately become null and void and of no effect, and all rights and privileges hereunder of the owner hereof shall immediately cease and determine.

"The company is hereby authorized and directed to set aside seventy-five per cent. of the sixth to the eightieth, inclusive, of the above-mentioned payments and one hundred per cent. of all payments thereafter, and place the same in the mutual benefit credit fund, from which shall be paid the amounts due on this and other like certificates as they severally shall mature as hereinafter provided, as follows:

"This certificate shall be deemed to be matured when all like certificates of prior date and number shall have been matured and canceled, and at its maturity the owner hereof, upon presentation and surrender to the company of this certificate, shall be paid by the company, from the said mutual benefit credit fund, the sum of two dollars for each calendar week of the period from and including the calendar week following the date hereof, to and including the calendar week in which the same matures; provided that there shall be sufficient money in said mutual benefit credit fund available for that purpose

to pay said amount, and provided further, that the amount so paid shall not exceed the sum of one hundred and sixty dollars; and upon payment of such sum due to the owner hereof this certificate shall be canceled by the company, and it is understood that the owner of this certificate shall be deemed at all times to be the person in whose name the same stands and appears upon the books of the company. The company is hereby authorized and directed to apply the balance of said payments, as hereinabove provided for, to the expense credit fund, to be used as the management may direct."

Walter R. Bacon, for plaintiff in error.
Oscar Lawler, U. S. Atty.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). The principal question here presented is whether the scheme referred to in the mail matter described in the indictment is a lottery. The plaintiff in error urges that it is not, that, while the scheme may involve the element of chance, it lacks the element of prize which is essential to a lottery, and counsel for the plaintiff in error quotes definitions of "lottery" which include the element of prize. But in law the term "lottery" is of wide signification. In Horner v. United States, 147 U. S. 449, 13 Sup. Ct. 409, 37 L. Ed. 237, Mr. Justice Blatchford discussed various definitions of lottery, and among others approved that found in Worcester's Dictionary, in which it is defined to be "a game of hazard in which small sums are ventured with the chance of obtaining a larger value, either in money or in other articles." That definition would include the scheme which is presented by the record in the present case. And not only is this so; but we think it clear that the element of prize is to be found in the scheme. In general, it may be said that anything of value offered as an inducement to participate in a scheme of chance is a prize. As applied to a scheme such as is disclosed in this case, a prize is any inequality in value resulting from chance in the distribution of money paid back to the contributors of the same. To constitute a prize, the inequality need not necessarily be great, and the element of prize may exist in a scheme so arranged as to return to each participant something of value, or even an equivalent for all that he pays in. It is plainly to be seen that, in the scheme under consideration, it may happen that several new members may send in their first subscriptions on the same day, and that he whose subscription is by chance first numbered may obtain a great advantage over him whose number is last. That advantage is undoubtedly in the nature of a prize. The subscriber to the scheme knows full well that no increment is to be earned by his money, but that all returns are to come from his own contributions and the contributions of others. The chance of getting back from these sources double the sum that he pays in and getting it soon is the prize which lures him to make the payments. It is evident that there can be no other inducement to subscribe than the chance of securing an early or lucky number and the hope of obtaining an advantage by chance over other subscribers. But we deem it unnecessary to enter into any extended discussion of the meaning of the word "lottery," or the decisions of the courts with reference thereto, for the questions presented in the present case are in

our opinion fully covered by the decision of the Supreme Court in Public Clearing House v. Coyne, 194 U. S. 497–512, 24 Sup. Ct. 789, 48 L. Ed. 1092. In that case the scheme involved was similar to that which is presented in the case at bar. The plan contemplated that each person who became a member should pay $3 as an enrollment fee, and $1 per month for five years, and agree to co-operate by inducing others to become members, for which he was to receive his pro rata share of the total amount realized when entitled to a realization as provided at the end of five years. The plan contemplated that in the end the member who secured new members and the member who did not should receive the same amount. The court said:

"The only money paid in was a small enrollment fee of $3 and a monthly payment of $1 for five years. The return to the subscribing member which is called a realization is not only uncertain in its amount, but depends largely upon the number of new members each subscriber is able to secure, as well as the number of members which his co-operators are able to secure. The return to members who have been able to secure a large number of other members and to pay their own monthly dues may be very large in comparison with the amount paid in, but the amount of such return depends so largely, and, indeed, almost wholly, upon conditions which the member is unable to control, that we think it fulfills all the conditions of a distribution of money by chance. In becoming a co-operator each new member evidently contemplates that a large number, probably a large majority of those subscribing, will drop out before the end of five years. * * * The uncertainty of the amount realized upon these settlements is evident from the fact that, while a member may possibly realize as high as $15 for every dollar invested by him, he may realize no profit at all, or, in case the business is suspended, may realize nothing."

The court held the scheme to be a lottery within the meaning of the statute. But it is urged that the Coyne Case is not decisive of the case at bar, for the reason that the schemes involved in the two cases differ in an essential particular. It is said that in the Coyne Case the member was to pay certain fixed sums for a certain fixed period and then his obligation ceased, and that thereby the creation of an adequate redemption fund was made dependent directly upon the contingency of lapses of members and the acquisition of new business, whereas, in the present case, the obligation is continuous and indefinite, and requires the member to continue his monthly payment until an amount sufficient to pay him $160 shall be realized. It is argued that, by virtue of this provision, the amount which each member is to receive is not only not uncertain, but that it does not depend upon the number of new subscribers. It is true that in the scheme thus detailed the amount which each member is to receive is not uncertain if he keeps on making his contributions. The uncertainty lies in the time when he shall receive it, an uncertainty so great as to vitiate the scheme as fully as would an uncertainty in the amount. But not only is there uncertainty as to time, but there is uncertainty in the amount to be received as compared with the amount to be paid in. If there were but one member in the scheme, before he could realize his $160, he would be required to pay into the company at least $240, and to continue his regular payments until he had invested that amount. If there were more members, he might be required to pay more and for a longer time, or he might realize his $160 in a much shorter time, de-

pending on the number of members who dropped out and the number of new members who joined and the order in which the subscriptions were numbered. In all its essential features it is the scheme which the court had under consideration and condemned in the Coyne Case.

It is assigned as error that the court in instructing the jury read and quoted from the decision of the Supreme Court in Public Clearing House v. Coyne; and said:

"These uncontradicted facts bring the case at bar clearly within the doctrine enunciated by the Supreme Court of the United States in the foregoing quotations, and I therefore instruct you that the business of the Cumulative Credit Company as conducted at all the times charged in the indictment and as shown by the uncontradicted evidence of the case was a lottery, and you will so find."

It is the general rule that, unless prohibited by statute, the court in charging the jury may read legal decisions or extracts therefrom containing propositions of law applicable to the case at bar. People v. Minnaugh, 131 N. Y. 563, 29 N. E. 750; People v. Niles, 44 Mich. 606, 7 N. W. 192; People v. Bowkus, 109 Mich. 360, 67 N. W. 319; State v. Dearing, 65 Mo. 530; Kirby, Ex'r, v. Wilson et al., 98 Ill. 240; State v. Chiles, 58 S. C. 47, 36 S. E. 496. But the question is not properly before us, for the only exception taken to the charge to the jury was stated at the close of the charge in these words:

"To the giving of each and all of the said instructions for the government the defendant by his counsel then and there excepted."

In Block v. Darling, 140 U. S. 234, 11 Sup. Ct. 832, 35 L. Ed. 476, it was held that the general exception "to all and each part of the foregoing charge and instructions" suggested nothing for the consideration of an appellate court.

It is contended, further, that there was no evidence to sustain the verdict, in that there was no proof that the plaintiff in error mailed the documents which are referred to in the indictment. To this it is sufficient to say that there was no request for a peremptory instruction to the jury to acquit the plaintiff in error for want of evidence of his guilt. Harless v. United States, 34 C. C. A. 400, 92 Fed. 353, McDonnell v. United States, 66 C. C. A. 671, 133 Fed. 293, and cases there cited. But we have considered the evidence, and we find no merit in the contention. It was proven, and was not disputed, that at all the dates referred to in the indictment the plaintiff in error was the ower and manager of the Cumulative Credit Company, that the documents referred to in the indictment were transferred through the mails, that the most of it bore the signature of the plaintiff in error, and that there was no one else at his place of business who did or could have mailed the same. There was proof that the plaintiff in error had directed correspondents to send mail matter to him addressed, not to him, but to fictitious names for the purpose of avoiding the exclusion thereof by the post office department, and the plaintiff in error admitted that the documents described in the indictment and others admitted in evidence were signed by him and were mailed by some one in his office, he having left them on his desk for that purpose.

We find no error. The judgment is affirmed.

FITZSIMMONS et al. v. UNITED STATES.

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

No. 1,341.

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

Walter R. Bacon, for plaintiffs in error.

Oscar Lawler, U. S. Atty.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. This case is in all respects similar to the case of Orlando K. Fitzsimmons v. United States, 156 Fed. 477, and presents upon the writ of error the questions of law which were under consideration in that case.

The judgment of the District Court is affirmed.

CAMBERS v. FIRST NAT. BANK OF BUTTE.

(Circuit Court of Appeals, Ninth Circuit. October 14, 1907.)

No. 1,408.

PLEADING—SUFFICIENCY OF COMPLAINT—ALLEGATION OF SATISFACTION OF JUDGMENT.

Where plaintiff deposited money to indemnify his sureties on injunction bonds against loss on account of a judgment rendered against them and plaintiff on such bonds, a complaint to recover such money from the depositary does not state a cause of action, where it alleges merely that the judgment was satisfied on the docket by the clerk of the court on return of an execution issued thereon "fully satisfied"; there being no allegation that the judgment has been in fact paid and satisfied. Nor is such complaint made good by an allegation that the sureties are not liable on such judgment, which is a mere conclusion of law.

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

For opinion below, see 144 Fed. 717.

A. E. Reames, Frank F. Freeman, and J. C. Veazie, for plaintiff in error.

Dolph, Mallory, Simon & Gearin, and R. L. Clinton, for defendant in error.

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

DE HAVEN, District Judge. This action was brought by the plaintiff to recover from the defendant the First National Bank of Butte the sum of $10,000, and interest from August 21, 1902, at the rate of 8 per cent. per annum, and from the defendants Andrew J. Davis and George W. Andrews interest on said sum of $10,000 at the rate of 6 per cent. per annum from April 19, 1902. The defendants Davis and

Andrews were not served with summons, and made no appearance, and the other defendant, the First National Bank of Butte, interposed a general demurrer to the complaint, upon the ground that the same does not state a cause of action against it. The demurrer was sustained, and, the plaintiff not desiring to further plead, judgment was rendered that he take nothing against said defendant, and that defendant recover its costs. The case is brought here by the plaintiff on writ of error.

The case stated in the complaint is substantially this: The plaintiff brought certain suits in the courts of Montana, in which litigation it became necessary for him to furnish injunction bonds, aggregating in amount $12,500, and the defendants Davis and Andrews became sureties for him on these bonds. The litigation referred to resulted adversely to the plaintiff, and judgment was rendered in one of the district courts of Montana, on March 20, 1902, against him and his sureties, Davis and Andrews, upon the injunction bonds, for the sum of $12,500. Thereafter, on April 19, 1902, the plaintiff having on deposit with the defendant First National Bank of Butte $10,000, all of the parties to this action on that day entered into a contract, by the terms of which it was agreed that the defendant First National Bank of Butte should retain said sum of $10,000 on deposit, for the purpose of indemnifying Davis and Andrews against loss by reason of having become sureties on such injunction bonds and their liability on said judgment; and also to indemnify the sureties upon any bond which might be given by the plaintiff to stay the execution of said judgment, pending an appeal therefrom to the Supreme Court of Montana. The judgment was not appealed from, and no such stay bond was given, and the deposit remained in the First National Bank of Butte, for the protection of defendants Davis and Andrews, against the liability on the judgment just referred to.

The complaint further alleges that neither of the defendants has paid any part of said judgment; "nor are they, or either or any of them, liable to pay such judgment, or any part thereof; nor can the same, or any part thereof, be enforced against them, or either or any of them."

The complaint further sets forth that an execution upon said judgment was duly issued and placed in the hands of the sheriff of Silver Bow county, Mont., with directions to collect the sum for which the judgment was rendered, and that on the 21st day of August, 1902, while the same was in full force and effect, the sheriff "returned said execution fully satisfied to the clerk of said district court." It is then alleged:

"That by the laws of the state of Montana then in force, it became and was then the duty of said clerk to enter satisfaction of said judgment upon the judgment docket of said court, and said clerk did thereupon, on said 21st day of August, 1902, duly enter a satisfaction of said judgment upon said judgment docket, and satisfy said judgment as to each and all the defendants in said cause, and said satisfaction, when so entered, constituted a full and complete satisfaction and discharge of said judgment, and the same was at said time fully satisfied and discharged. * * * That said satisfaction of judgment has never been vacated, set aside, or amended, and by the laws then and now in force in the state of Montana, the time within which such judgment could have been reinstated, or the satisfaction thereof vacated, has long since gone by."

The demurrer to the complaint was properly sustained. There is in it no averment that the judgment referred to therein has in fact been paid, or that the defendants Davis and Andrews have been released by the judgment creditor from their liability to pay said judgment, or that plaintiff has by any act of theirs been released from his obligation to let the said sum of $10,000 remain on deposit for their protection against liability on such judgment; and the allegation of some one of these facts is necessary in order to state a cause of action, entitling the plaintiff to the relief which he demands. The allegation that the defendants, nor either of them, are liable, "to pay said judgment or any part thereof, nor can the same or any part thereof be enforced against them, or either or any of them," is the statement of a mere conclusion of law, and gives no strength to the complaint.

The cause of action which the plaintiff attempts to state, in so far as it depends upon the satisfaction of the judgment therein mentioned, seems to rest upon the alleged facts that the sheriff returned the execution issued upon the judgment as "satisfied," and that thereupon the clerk entered such satisfaction upon the record; but the complaint does not show that the sheriff stated in his return that he had collected the amount called for by the execution, and yet, unless the sheriff made such a return, the ministerial act of the clerk in entering satisfaction of the judgment, based entirely upon the sheriff's return, was without legal justification. Indeed, the complaint seems to have been carefully framed so as to avoid alleging as a fact that the judgment therein referred to was satisfied by a levy upon and sale of sufficient property under execution to pay the same, or that the money to fully satisfy it was paid to the sheriff holding the execution; and that thereupon the sheriff returned the execution with the statement that the same was satisfied in one or the other of these ways. In short, the complaint in this respect, fails to state the ultimate fact that the judgment rendered against the plaintiff and the defendants Andrews and Davis, upon the injunction bonds executed by them, has been paid.

Judgment affirmed.

NOME BEACH LIGHTERAGE & TRANSP. CO. v. STANDARD MARINE INS. CO., LIMITED, OF LIVERPOOL, ENGLAND.

(Circuit Court, N. D. California. October 4, 1907.)

No. 13,097.

1. EVIDENCE—ADMISSIBILITY—TESTIMONY OF DECEASED WITNESS ON FORMER TRIAL.

It is competent for a party, on the second trial of an action in a federal court, under the general rule, to prove the testimony given on the former trial by a witness who has since died, there being no federal statute on the subject.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2401–2405.

Rules of evidence in federal courts, following state practice, see note to O'Connell v. Reed, 5 C. C. A. 594.]

2. NEW TRIAL—GROUNDS—ERROR IN EXCLUDING EVIDENCE.
An error in refusing to permit a party to prove the testimony given on a former trial by a witness since deceased is not ground for a new trial, where such testimony did not differ in any material respect from that given by the same witness in a deposition which was read.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, § 69.]

At Law. On motion for new trial.

Nathan H. Frank, for plaintiff.
William Rix, for defendant.

DE HAVEN, District Judge. There was technical error in sustaining the plaintiff's objection to defendant's offer to prove what Capt. John L. Panno testified to upon the former trial of this action; Capt. Panno having died since the giving of that testimony. Ruch v. Rock Island, 97 U. S. 693, 24 L. Ed. 1101; Mattox v. United States, 156 U. S. 237, 15 Sup. Ct. 337, 39 L. Ed. 409; United States v. Macomb, 5 McLean, 286, Fed. Cas. No. 15,702; Greenleaf on Evidence, § 163. Section 861 of the Revised Statutes [U. S. Comp. St. 1901, p. 661], which provides: "The mode of proof in the trial of actions at common law shall be by oral testimony and examination of witnesses in open court, except as hereinafter provided"—and the succeeding sections, providing for the taking of depositions, do not bear upon the question of the right to prove the testimony of a deceased witness; nor do Ex parte Fisk, 113 U. S. 713, 5 Sup. Ct. 724, 28 L. Ed. 1117, Diamond Coal & Coke Co. v. Allen, 137 Fed. 705, 71 C. C. A. 107, Mulcahey v. Lake Erie & W. R. Co. (C. C.) 69 Fed. 172, which are relied upon by the plaintiff, apply. The question of the admissibility of evidence to prove the testimony given by a deceased witness was not presented in any of those cases.

I am, however, satisfied that the error in sustaining the objection of this offered evidence was harmless, as the deposition of Capt. Panno taken at the instance of the defendant was received in evidence, and there was no substantial difference between it and the oral testimony given by him upon the former trial. It may be that the oral testimony was a little more full as to the maneuvers of the vessel after she had entered the ice field; but it sufficiently appears from the deposition that, when the ice was first encountered, the vessel could have returned to Dutch Harbor, or some other port, but, instead of returning, the captain continued on his voyage to Nome, in the face of the perils before him, navigating the vessel in "open leads," or channels skirted by ice, until at last she struck upon a piece of submerged ice and partially sunk. In addition to this, it appears from the testimony of Capt. Simmie, a witness for plaintiff—and the fact was not disputed by the plaintiff—that after the vessel entered the ice the floating pieces of ice became thicker and thicker, and the obstruction to navigation greater, as the voyage continued; so great at times as to make it impossible for the vessel to proceed until a new channel was opened by the drifting or moving ice. This, in connection with Capt. Panno's deposition admitted, was substantially all that would have been shown by the rejected testimony as to the master's alleged deliberate and

reckless assumption of a well-known danger, in continuing the voyage through the ice fields; and I am of the opinion that the verdict would not and ought not to have been different if the evidence had been received.

Motion for new trial denied.

FAY et ux. v. CROZER et al.

(Circuit Court, S. D. West Virginia. September 12, 1907.)

1. TAXATION—FORFEITURE OF LAND—NONPAYMENT OF TAXES.

Under Code Va. 1860, c. 35, §§ 6, 10, requiring the clerk of the county court of each county to certify annually to the assessor for entry on the land books a list of all deeds and conveyances and an abstract of all grants from the land office recorded within the year ending on December 31st preceding, a state patent issued in January and subsequently recorded was not required to be included in the certificate for that year; and, under the statute providing that the omission of land from the land books for five consecutive years should work a forfeiture of the title, the time did not begin to run against the grantee of such land until the next succeeding year.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 1664.]

2. SAME—SALE OF LAND FOR TAXES—VALIDITY.

A sale of land for taxes by a sheriff in West Virginia in 1869 was void for defects apparent on the face of the record, under the decisions of the Supreme Court of Appeals of the state, where the recorder failed to note on the lists of sales the day the sheriff returned such sale to his office, the affidavit of the sheriff to such lists was not dated, and the certificate of the sheriff was not signed by him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, §§ 1369–1374.]

3. SAME—FORFEITURE FOR NONPAYMENT OF TAXES—CONSTITUTIONAL PROVISIONS OF WEST VIRGINIA.

Const. W. Va. 1872, art. 13, § 6 [Code 1906, p. lxxxv], provides as follows: "It shall be the duty of every owner of land to have it entered on the land books of the county in which it or a part of it is situated, and to cause himself to be charged with the taxes thereon and pay the same. When, for any five successive years after the year 1869, the owner of a tract of land containing one thousand acres or more shall not have been charged on such books with state tax on said land, then by operation hereof the land shall be forfeited and the title thereto vested in the state." *Held*, that in view of the general policy of the states of Virginia and West Virginia to compel owners of land to pay taxes thereon or forfeit their lands to the state or to bona fide settlers thereon, as evidenced by nearly a century of previous legislation, rendered necessary by the evasion of taxes by the owners of large grants from the state of Virginia in the years during and following the Revolution, especially west of the Alleghanies, such constitutional provision imposed on the true owner of lands the duty of ascertaining within the time given, by judicial proceedings or otherwise, whether or not he was the true owner, and, if so, of having the same entered on the land books for taxation; that it operated to extinguish the title of a grantee of state lands, who, from the time of the grant in 1860, during 47 years, had paid no taxes thereon; and that it was immaterial that during such time there had been a void sale of the land for taxes to the state, in whose hands it was not taxable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 1664. Forfeiture for nonpayment, see note to Read v. Dingess, 8 C. C. A. 401.]

4. CONSTITUTIONAL LAW—DUE PROCESS OF LAW—TAX PROVISIONS OF STATE CONSTITUTION.

Such constitutional provision is not in violation of the fourteenth amendment to the Constitution of the United States, as depriving owners of their property without due process of law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, §§ 891–906.]

At Law. Action in ejectment.

Declaration in ejectment in this action was filed in this court at April rules, 1901, an order of survey subsequently directed and on November 13, 1906, in open court, a stipulation was filed by counsel representing the plaintiff and the trustees of the Crozer Land Association, the Houston Coal & Coke Company, and the Turkey Gap Coal & Coke Company, whereby it was agreed that the action should be tried at that term as to said parties and as to the undivided half interest claimed by plaintiffs in a certain portion of the land in controversy, fully identified by reference to the surveyor's map filed; that such trial should be by the court, in lieu of trial by jury, with like effect as if tried by a jury, and judgment rendered by instruction of the court to find for the prevailing party, with all right of appeal or writ of error in all respects preserved to the losing party. And thereupon said stipulation set forth an agreed statement of facts upon which trial should be had, which agreed statement of facts was made part of the record, and the case was, to the extent and between the parties indicated, submitted. These agreed facts, somewhat condensed, are as follows:

On January 3, 1860, the commonwealth of Virginia granted to the plaintiff Eliza T. Fay and Samuel W. Austin by patent a tract of 1,200 acres of land, situate in McDowell county, W. Va. At the time this grant was made, and ever since to the present time, Eliza T. Fay was under coverture, being the wife of the plaintiff William Fay. No part of said land so granted was ever sold by plaintiffs, nor any interest therein. This 1,200-acre tract was entered for taxation for the year 1865 in the names of Eliza Fay and E. F. Harman, and for the years 1866 and 1867 in the names of Eliza Fay and E. F. Harman, and for the years 1868 and 1869 in the names of Eli Fay and E. F. Harman. These years are the only ones from the date of the patent to the present time, in which this tract was so on the land books for taxation, and no taxes were ever paid on it by the grantees in said patent. In October, 1869, the sheriff of McDowell county sold this 1,200-acre tract, returned delinquent in the names of Eli Fay and E. F. Harman, for the nonpayment of taxes for the years 1865 and 1866, and at the same sale sold it delinquent in the same names for the nonpayment of taxes for the years 1867 and 1868. At both sales the state of West Virginia became the purchaser, and no redemption thereof has ever been made by Mrs. Fay or Harman, her co-tenant.

The trustees of the Crozer Land Association claim legal title to the larger part of the 1,200 acres in this way: Henry C. Auvil, commissioner of school lands for that county, on July 7, 1882, reported a tract of 5,000 acres (which included all the land involved, under the stipulation, in this trial) as waste and unappropriated. Upon his report the circuit court of McDowell county entered a decree directing him to sell this 5,000 acres, after first directing its subdivision into smaller tracts. He did sell, inter alia, 46 acres to J. W. Harman, 113 acres to William R. Belcher, and 1,281 acres to Straley, French & Welch. These sales were confirmed, and deeds were directed to be executed, and were executed and delivered, by said Auvil, commissioner, to said purchasers. These three tracts cover the part of the 1,200-acre tract involved in this trial under the stipulation. Fay and wife were in no way parties to the proceedings by which these three tracts were sold by Auvil, commissioner, as waste and unappropriated lands. These three tracts of 46, 113, and 1,281 acres by subsequent conveyances passed and vested for value in the defendants, trustees of the Crozer Land Association, and from 1884 down to the present time have been substantially assessed for taxation, and never returned delinquent, in the names of said land association and Harman, and such taxes assessed have been paid. These three tracts of 46, 113, and 1,281 acres were

conveyed by Harman, Belcher, and Straley, French & Welch to Samuel A. Crozer, who subsequently conveyed them to the trustees of the Crozer Land Association. While they were held by Samuel A. Crozer, he by deed of lease, dated December 12, 1887, leased a part to the Turkey Gap Coal & Coke Company, the property lines of which leasehold embrace the eastern portion of the land in controversy in this trial; and by a similar deed, dated December 16, 1887, he leased to the Houston Coal & Coke Company a part which adjoined the former lease and embraced the western portion of the land in controversy in this trial.

Said lessees went into immediate possession under their respective leases for the purposes thereof, and such possession has remained uninterrupted to the present time. The acts of possession of these lessees consist of developing and operating large and expensive coal and coke operations. On the exact land here in controversy two dwelling houses and a ventilating fan have been erected and used since 1894 or 1895, and coal headings or entries under surface have been driven by the Turkey Gap Coal & Coke Company. Timber has been cut since 1887 for mine purposes, and coal has been mined since 1893, under adverse claim of title.

Price, Smith, Spilman & Clay, for plaintiffs.

Brown, Jackson & Knight, D. J. Strother, and W. W. Hughes, for defendants.

DAYTON, District Judge, sitting specially, after stating the facts as above, delivered the opinion of the court.

The clean-cut issue in this case is whether the title of Mrs. Fay to the land in controversy has been forfeited, either by sale to the state or for non-entry for taxation on the land books. This being an action of ejectment, in which the touchstone principle is that the plaintiff can only recover upon the strength of his own title, and not upon the weakness of his adversary's, if such forfeiture has accrued, it becomes absolutely immaterial as to how the defendants hold.

At the threshold I am compelled to express my admiration for the earnestness, thoroughness, learning, and ability displayed by counsel on both sides in discussing orally and in briefs this issue, involving, as it does, some of the most difficult and perplexing questions that have confronted our courts during more than a century, in construing the land law system of Virginia and West Virginia. These propositions, quoted from brief of counsel for plaintiff, I think clearly set forth the reasons claimed by defendants for their claim of forfeiture:

"(1) Because this land was not entered upon the proper land books of Virginia and West Virginia for taxation for the five successive years of 1860 to 1864, both inclusive.

"(2) Because it was sold in October, 1869, by the sheriff of McDowell county, for the nonpayment of taxes assessed thereon in the names of Fay and Harman, for the years 1865, 1866, 1867, and 1868, and purchased by the state of West Virginia, and was not redeemed within one year after sale.

"(3) Because said land was omitted from the land books of McDowell county for the year 1870 and subsequent years, in the names of Fay and Harman, and has thereby become forfeited for nonentry for five successive years since 1870."

To meet the first two propositions counsel for plaintiff have ably argued:

First. That no forfeiture, under the law providing that omission for five successive years from the land books should work such, in fact

accrued prior to 1865, because sections 6 and 10 of chapter 35 of the Code of Virginia of 1860 required the clerk of the county court of each county to certify to the assessor for entry on the land books a list of all deeds, conveyances, and an abstract of all grants from the land office recorded within the year ending on the 31st day of December preceding in his county, and inasmuch as this patent bore date January 3, 1860, it was not to be certified for entry on the land books for that year, as not having been recorded "within the year ending on the 31st day of December preceding."

Second. That the sale of the land for nonpayment of taxes by the sheriff to the state in October, 1869, was void for defects apparent on the face of the record thereof, such as that the recorder failed to note on the lists of sales the day the sheriff returned these to his office, that the form of affidavit of the sheriff attached to such lists is not dated, and that the certificate of the sheriff was not signed by the sheriff.

I am inclined to hold both of these positions to be correct. In other words, although there may be and has been question as to the first, that the land under the law then in force depended upon the certificate by the clerk of the grant to the assessor for assessment, and could not be required to be placed on the books for 1860, whereby no forfeiture had accrued prior to 1865, yet I am inclined to concede this to be true; and as to the second proposition, that the sheriff's sales in 1869 were voidable for irregularities on the face of the records thereof, I think there can be no doubt under the rulings in such cases as Barton's Heirs v. Gilchrist, 19 W. Va. 223, Simpson v. Edmiston, 23 W. Va. 675, and McCallister v. Cottrille, 24 W. Va. 174.

It is true that under the so-called curative section 25 of chapter 31 of the Code of 1899 [Code 1906, § 884] these defects could no longer be relied on; but it has been expressly determined that this section is not retroactive, and therefore does not "cure" defects in prior sales. State v. Harman, 57 W. Va. 447, 50 S. E. 828.

To meet the third proposition of defense, the argument of counsel for plaintiff may be reduced to these propositions:

The land not having been forfeited legally, either for nonentry or by valid sale to the state for nonpayment of taxes prior to 1870, under and by virtue of section 19, c. 118, p. 157, Acts W. Va. 1863, which provides: "Real estate purchased in for the state at a sale for taxes shall not thereafter be entered in said books, but the auditor shall keep a register thereof"—was properly omitted from the books under the void sale in 1869 to the state, and was not subject to forfeiture because of such omission; that in 1882, in the proceeding by the commissioner of school lands, the state, by the attempted sale to the defendants' grantors, collected all the taxes which had been charged against said lands up to that time (in other words, all taxes due her up to 1884); that since that sale the purchasers and their alienees have paid all taxes since assessed; that this sale by the school commissioner in 1882 was absolutely null and void (a) because Mrs. Fay and the former owners were not made parties to the proceeding, which was one against waste and unappropriated, and not delinquent and forfeited, land; (b) because the land had never become forfeited to

the state, the state therefore had no title to sell and the school commissioner had no power to sell land other than that to which the state had title, and his sale was void as to the real owner. The conclusion reached is that the state has been paid her taxes, no forfeiture has accrued, the land belongs to Mrs. Fay, and the defendants can only claim a lien or quasi lien upon it for the taxes paid since their purchase.

The practical effect of this conclusion is a little startling, at least; for it holds this woman to have good title, although for 47 years she has not paid a cent of taxes, and logically could still have the same good title a century hence, if she cared to allow matters to remain in statu quo. This, too, in the teeth of a century of very numerous, determined, and positive constitutional and legislative enactments to compel payment by landowners of the taxes due from them.

"The reason of the law is the life of the law," and it is almost impossible to intelligently consider the complications arising here without to some extent considering the policy of the law running through the land legislation of the two Virginias. This legislation is both perplexing and in some particulars incongruous. It has caused many difficult questions and controversies to spring up, and the decisions of the different courts passing thereon have not been by any means always uniform and harmonious. Fortunately for me, able counsel for the defense have so clearly in a brief filed set forth the reason of the law and its policy I can do no better than to adopt and quote freely therefrom.

The commonwealth of Virginia, during the Revolution, with a plenitude of land and an empty treasury, with small resources for revenue (for her own lands paid no taxes into the treasury), to provide a "subject" for taxation, and, further, to interpose a barrier of outlying settlements between the tempting plantations of the "tidewater" and the marauding Indians to the west decided to put her lands on the market, and did so. The price theretofore had been $2 per acre. But, it being soon found that the well-to-do to the east were unwilling to leave their comfortable homes to literally risk their scalps, and that the old price was prohibitory to the adventurous, brave fellows who lived by their rifles and whose income was limited to proceeds from their pelts, a broader statesmanship conceived the plan of marketing the state's land at a nominal price (2 cents per acre); but, penny wise, adopted as the way for it that involving least possible expense to her. This plan, like all "cheap jobs," to an incalculable degree proved calamitous, with duplicate, triplicate, and quadruplicate titles, and boundary disputes without limit. Wherefore an absolute necessity arose for a forfeiting system, with an end in view of more vital importance to the commonwealth than any mere matter of revenue—the settling of her land titles, the security of her citizens in their homes, and protection for those who opened up the wilderness, tilled the soil, and supported the state.

In the beginning, when on revenue bent, there was established the land office, where whosoever would might buy to the limit of his means at 2 cents per acre as many acres of the state's lands as he chose, to

be located at his pleasure and without supervision or restriction, except that they be somewhere on the public domain. The entry was required to be surveyed at the purchaser's own cost under his own direction, and the "grant" followed, without inquiry as to whether of the "state's lands" or some other. "West of the Alleghanies" was then a mountain fastness, full of "savage beasts and still more savage men." Wherefore the market still remained dull, for want of settlers willing to face the risks in advance of protection. So, at the instance of speculators, the notorious "inclusive grants" were authorized, whereunder blanket surveys of immense acreages at minimum cost were, during the few years of their authorization, spread over the whole southwest country many deep, and by descriptions too indefinite and general to give to the subsequent bona fide settler information as to the location. As result, in time, as the home makers by degrees pushed out into the wilds with their small "improvements," locating here and there, giving value where none was before, they began to find themselves confronted with the blanket surveys long lain dormant, quietly awaiting their coming, only to appropriate the results of these labors and at the ripe moment to gather them in. When the awakening came, it was found the owners of the "big surveys" as a rule had eluded taxation, refusing to pay when assessed, but more frequently avoiding even assessment, and in either case withholding tribute to the government whose protection they demanded, leaving the whole burden to the actual settler, whose cow or mule was in touch of the tithe gatherer. As the situation developed, it was made more and more manifest how unjust, grossly inequitable, it was that the law-obeying citizens who developed the country and gave to it its value, who had borne the expense of the government and responded to its call for service civil and military, who had hazarded the savages and subdued the wilderness, should be driven from under the gourd vines of their planting and denied the fruit of their own fig trees, at the instance of those who had shirked every obligation, express or implied. Such were the conditions which originated the "system."

The "system," so called, was founded upon the universally accepted principle that every land grant by the state is upon the implied condition that the grantee takes subject to a charge in favor of the state for a just proportion of the cost of the maintenance of government, and that his tenure is subject to full, prompt, and faithful observance of his obligation. The poll tax and civil and military services are the measure of the citizen's personal obligation. The property tax is the incident to ownership, to the right of a continued holding; its prompt payment, the condition absolute upon which the patentee received and accepted the property from the commonwealth, and upon which he and those under him may enjoy its use. Upon breach of this obligation, the right of the state is instant to resume its own at its pleasure. For full and interesting statement of the above conditions and the causes, see Hutchinson on Land Titles, pp. 1, 2. We may be pardoned a brief quotation:

"The result of this loose, cheap, and unguarded system of disposing of public lands was that in less than 20 years after the adoption of the system near-

ly all of them were granted, the most part to mere adventurers, in large tracts or bodies, containing not only thousands, but in many cases hundreds of thousands, of acres in one tract. Often the grantees were nonresidents, and few of them ever saw their lands or expected to improve or use them for purposes other than speculation. The entries and surveys under warrants so cheaply and easily obtained were often made without reference to prior grants, thus creating interlocks, thereby covering land previously granted, so that in many instances the same land was granted to two or more different persons. Sometimes upon one survey actually located others were laid down by protraction —constructed on paper by the surveyors, without ever going upon the lands, thus creating on paper blocks of surveys containing thousands of acres, none of which were ever surveyed or identified by any marks or natural monuments. Thus, while the state was rapidly disposing of her large domain at 2 cents per acre, it was not attaining the main objects in view—the settlement of the country and revenue from the owners of lands. It was found that the grantees not only failed to settle upon and improve their lands, but in most instances they wholly neglected to pay the taxes due thereon, whereby revenue failed and the improvement of the territory was embarrassed and retarded. Nonoccupation of the lands and nonresidence of the owners made a resort to the lands themselves the only fund for delinquent taxes."

With the conditions and the reason such for the exercise of the right, the General Assembly of Virginia provided, first, for a sale by the sheriff for nonpayment of taxes, by a series of acts from 1781 to 1791, when, finding this to fail of the main purpose, it followed with provision for forfeiture for the nonpayment. This, too, after experience, proving short of the needs, because of the persistent neglect and refusal of many, especially nonresidents, to have their lands entered for taxation, in 1810 provision was made for forfeiture for nonentry. Of this Mr. Hutchinson says:

"We have seen that, so far, the policy of the state referred to the subject of lands delinquent for the nonpayment of taxes. Another class of cases was now discovered requiring strong measures."

In the preamble of the act of February 5, 1810, is recited:

"It being represented to the General Assembly that many persons omit to enter their lands on the commissioner's books, and thereby elude the payment of any revenue tax thereon," etc. Acts 1809–1810, p. 17, c. 16.

Wherefore it was thereupon enacted that lands not "entered" within 18 months next thereafter should be forfeited. This act was molded and remolded in varying form, and finally for the time being repealed February 9, 1814.

On April 1, 1831, the policy and prime purpose of the system, theretofore often alluded to in the several acts, was in plain terms expressly declared (section 8):

"And whereas, it is known to the General Assembly that in many cases lands, or parts or parcels of lands (especially such as have been granted and appropriated under the act passed at the May session, in the year 1779, entitled 'An act for establishing a land office, and ascertaining the terms and manner of granting waste and unappropriated lands,' and the subsequent acts on the same subject), which have heretofore been or may hereafter be returned delinquent for nonpayment of taxes, and which have been heretofore vested by law in the president and directors of the literary fund, or which by the provisions of this act shall, or may hereafter be, forfeited and vested in the said president and directors, are held by persons other than those for whose default they have been or shall be so forfeited, claiming bona fide, mediately or immediately, under grants from the commonwealth, and that the said actual

holders and bona fide claimants have settled and improved the lands so by them held and claimed, and have, moreover, paid all the public taxes thereon due and charged or justly charged to them; and it is therefore reasonable and just that the titles of such actual holders and bona fide claimants should be quieted and perfected, so far as the transfer to them of the rights vested in the said president and directors and therefore subject to the disposition of the General Assembly, can accomplish that object: Be it, therefore, further enacted," etc. Acts 1830–31, p. 91, c. 28.

The act of February 27, 1835, restored the provision for forfeiture for nonentry (section 1), prefacing the enacting clause with a recital of the occasion for it:

"And whereas, it is known to the General Assembly that many large tracts of land lying west of the Alleghany Mountains which were granted by the commonwealth before the 1st day of April, 1831, never were, or have not been for many years last past, entered on the books of the commissioners of the revenue where they respectively lie, by reason whereof no forfeiture for the nonpayment of taxes has accrued, or can accrue, under the existing laws, the commonwealth is defrauded of her just demands, and the settlement and improvement of the country is delayed and embarrassed: for remedy whereof, * * *

"Be it further enacted, that all right, title and interest which may hereafter be vested in the commonwealth by virtue of the provisions of the section of this act next preceding herein, shall be transferred to and absolutely vested in any and every person or persons, other than those for whose default the same have been forfeited, their heirs or devisees, who are now in actual possession of said lands or any part or parcel of them, for so much thereof as such person or persons have just title or claim to, legal or equitable, bona fide claimed, held or derived from or under any grant of the commonwealth, bearing date previous to the 1st day of April, 1831, who shall have discharged all taxes duly assessed and charged against him, her or them upon such lands," etc.

Acts 1834–35, pp. 11, 12, c. 13, § 3.

Next followed the acts of 1837, 1841, 1842, 1844, and 1846, reiterating the above, and whereunder the state disposed of those of the lands so acquired, not by operation of law transferred to junior bona fide claimants; and, in emphasis of the absoluteness of the transfer of title by such forfeiture, the General Assembly by act (1838) vested directly in Peter Dumas the "Swann title" to over 2,200,000 acres of forfeited lands—not by way of release to the "former owner," but by "transfer to" Dumas, theretofore a total stranger to the title.

By the act of April 12, 1852 (Acts 1852, p. 18, c. 18), the forfeiture and vestiture of title in the adverse claimant was again reiterated, and lands forfeited for nonentry, not so transferred to claimants, were made open to entry, survey, and grant; and so, too, the acts of March 20, 1858. And see Code 1849, and Code 1860, c. 114. By this act of 1852 express provision was made whereby the claimant might, should he desire an adjudication, file his petition in the circuit court and have his right determined, and so absolute was considered the forfeiture that, while the prosecuting attorney and auditor were required to be parties, the former owners were not, though required to be named in the petition so far as known.

The foregoing statutes were often under consideration by the Court of Appeals of Virginia and of this state, and have always been sustained, and the forfeiture held to be absolute and complete upon the failure to enter the lands and pay the taxes due and damages accrued.

No requisition or judicial proceeding or finding of any kind was required to consummate the forfeiture. Staats v. Board, 10 Grat. (Va.) 400; Hale v. Branscum, 10 Grat. (Va.) 418; Wild's Lessee v. Serpell, 10 Grat. (Va.) 405; Smith v. Chapman, 10 Grat. (Va.) 469; Levasser v. Washburn, 11 Grat. (Va.) 572; Atkins v. Lewis, 14 Grat. (Va.) 30. Also by the Supreme Court of the United States, approving the foregoing cases; i. e.:

"Forfeiture in such a case became absolute and complete by the failure to enter and pay the taxes on the land and the damages in the manner therein prescribed, and no inquisition or judicial proceeding or inquest or finding of any kind was required to consummate such a forfeiture." Armstrong v. Merrill, 14 Wall. 120, 20 L. Ed. 765.

The evils so sought to be remedied were peculiarly rank west of the Alleghanies; and as the omitted speculative surveys were in large degree held by the wealthy in the east, and the occupants (those needing protection) lived west of the mountains, the stronger east withdrew the protection of the beneficent acts—part of the tyrannous treatment which ultimately resulted in the division of the state.

So soon as West Virginia became a state, the people, mindful of this, as well as of other grievances suffered at the hands of a General Assembly dominated by hostile interests, in their first Constitution, first abolished the land office and its attendant evils, then adopted drastic measures for the future after due warning given and a day of grace, having first, in token of the "jubilee year," exonerated all lands owing $20 and under and all omitted lands of 1,000 acres or less, and further extended to all others as matter of favor, not "right," five years for entry, assessment, and redemption. Promptly at the expiration of the five years so allowed the Legislature proceeded to act (Acts 1869, p. 90, c. 125, § 7), reviving all the remedial features of the earlier acts and adding thereto. See Code 1868, c. 31, § 34:

"It shall be the duty of any person owning any real estate to cause the same to be entered on the land books of the proper assessor, and charged with the state taxes thereon not charged to the owner for the year 1832, or any year thereafter, heretofore, or hereafter, not released, paid, or in any manner discharged, which were and shall remain properly chargeable thereon. When any person owning real estate has not, or shall not have, for five successive years, been charged on such books with such taxes on such real estate, the same, and all the title, right and interest of the owner, legal and equitable, thereto, shall, without any proceeding, be absolutely forfeited to and vested in this state; provided, however, that such owner may, within one year after the passage of this act, cause such real estate to be charged with such taxes, chargeable for any such years heretofore, and thereby prevent a forfeiture for such years."

"All the estate, title, right and interest which has vested or shall vest in this state, or become irredeemable under the provisions of this chapter, shall be transferred to and vested in any person (other than those for whose default the same may have been returned delinquent or forfeited, their heirs or devisees), for so much thereof as such person may have title or claim to," etc.

"All the real estate forfeited as aforesaid, and not so transferred and vested, shall be sold for the benefit of the school fund."

It will be seen that by this act, not only no "redemption" was provided for, but in terms expressly inhibited by the imperative "shall be

sold," and, further, that, while the former acts were limited to omissions prior to 1832, this included all, past and future.

By the act of February 27, 1871 (Acts 1871, p. 183, c. 138), the time of one year for redemption was extended to two years from the passage of that act, subject to provision that no such redemption should impair any title transferred by law to any other person under the act of 1869. In 1872, so strongly was the importance of this provision impressed upon the people, and so vivid their experience with the Legislature of the old state, jogged by the warning contained in the act of 1871, that, to avoid further extensions and tamperings at the instance of influence and importunity, the people in even stronger language carried the "forfeiture clause" into the Constitution itself, together with the transfer of the forfeited title to the occupant taxpayer, and in almost identical language with the foregoing (article 13, § 6 [Code 1906, p. lxxxv]):

"It shall be the duty of every owner of land to have it entered on the land books of the county in which it, or a part of it is situated, and to cause himself to be charged with the taxes thereon, and pay the same. When for any five successive years after the year 1869 the owner of any tract of land containing one thousand acres or more, shall not have been charged on such books with state tax on said land, then by operation hereof, the land shall be forfeited and the title thereto vested in the state. * * * And any owner of land so forfeited, or of any interest therein at the time of the forfeiture thereof who shall then be an infant, married woman, or insane person, may, until the expiration of three years after the removal of such disability, have the land, or such interest charged on such books, with all state and other taxes that shall be, and but for the forfeiture would be, chargeable on the land, or interest therein for the year 1863, and every year thereafter with interest at the rate of ten per centum per annum, and pay all taxes and interest thereon for all such years, and thereby redeem the land, or interest therein: provided, such right to redeem shall in no case extend beyond twenty years from the time such land was forfeited."

And by section 3 of this article [Code 1906, p. lxxxiv] it was provided that all titles vested in the state by forfeiture should eo instante and by operation of law be "and are hereby transferred to and vested in any person (other than those for whose default the same may have been forfeited or returned delinquent, their heirs and devisees) for so much thereof as such person has or shall have had actual, continuous possession of under color or claim of title for ten years and who or those under whom he claims shall have paid the state taxes thereon for any five years during said possession," or, if no such person, "then to any person (other, etc.) for so much of said land as such person shall have title or claim to regularly derive, mediately or immediately, from or under a grant from the commonwealth of Virginia or this state, not forfeited, which but for the title forfeited would be valid and who, etc., has paid all state taxes, etc., for five years since 1865, or the date of said grant," etc., or, if there be none of either of the above classes, "then to any person who shall have had claim to and actual, continuous possession for any five successive years since 1865 of, 'under color of title,' and paid all state taxes charged or chargeable thereon for said period."

The status of the former owner under the above has been well defined by the state court in McClure v. Maitland, 24 W. Va. 561, 576, 581:

"The title to the land and all the right and interest of the former owner having thus by his default and the operation of the law become absolutely vested in the state and become irredeemable, she, having thus acquired a perfect title to and unqualified dominion over the land, had the undoubted right to hold or dispose of it for any proper purpose, in any manner, and upon any terms and conditions she might in her sovereign capacity deem proper, without consulting the former owner or any one else; for after the forfeiture had become complete, as it had in the case before us, the former owner had no more claim to or lien upon the land than one who never had pretended to own it. In the exercise of this perfect dominion over her own property the state saw proper to transfer and vest her title to so much of said land owned by her in any person, other than those who occasioned the default, as such person may have been in the actual possession of, or have just title to, claiming the same and was not in default for the taxes thereon chargeable to him. * * * And all the right, title, and interest of the former owner having been completely divested, he has not a particle of interest in the land, no more than if he had never owned it. * * * The whole history as well as the express language of this constitutional provision proves that it was the intention to bestow upon the former owner whatever part of the proceeds of sale might be actually paid or liable to be paid into the state treasury after the state had sold the land and paid all the taxes, costs, etc., out of the proceeds of sale, and that it was clearly not intended to give him any interest in the land or its proceeds until a surplus should be ascertained by the proceedings conducted alone by the state through her officers. 'Beggars must not be choosers' is a just maxim, and therefore it is the duty of the courts to see that the bounty of the state is not used to her detriment, by giving to this provision of her Constitution a forced construction and one that could never have been intended. I am, therefore, of opinion that said fifth section of the Constitution did not confer upon the appellant, Maitland, any claim or interest in the land, or any interest or right to participate in the proceedings for its sale, his right to the surplus proceeds not arising until after the sale."

And in Read v. Dingess, 60 Fed. 21, 8 C. C. A. 389, 397, it is held:

"The statute gives the right by its terms of redemption only after the state has commenced proceedings for sale of the forfeited land. But there is nothing in it setting a time within which the state must sell, or requiring it to sell at all. If the state desires to hold the land permanently as a state reservation, or park, or for public institutions, nothing in her legislation prevents it. It is only if sale is attempted that a right to redeem is given; and the state cannot be forced to sell."

For the person who may "take"—the claimant under "color" or "claim" to title—see Core v. Faupel, 25 W. Va. 239:

"The principal office of a 'claim' or 'color of title' is to define the boundaries and fix the extent of the adverse holding. If it is a mere claim of title, the adverse holding will be limited to the actual inclosure of the claimant. But if it is a deed or other paper title, and the possession is exclusive, it will be regarded as coextensive with the boundaries contained in such deed or paper. The 'color of title,' however, may be good or bad, legal or equitable."

As to the wisdom of the "system," see Wild's Lessee v. Serpell, 10 Grat. (Va.) 409, quoted with approval in McClure v. Maitland, 24 W. Va. 576:

"In Wild v. Serpell, supra, Judge Lee, in delivering the opinion of the court, says: 'Considering the peculiar condition of things in that portion of the state lying west of the Alleghany Mountains, and the serious check to population and the improvement of the country and the development of its resources growing out of it, a resort to the stringent measures of legislation that were adopted was, in my opinion, as wise and expedient as the constitutional power of the Legislature to enact them was clear and unquestionable.' Wild's Lessee v. Serpell, 10 Grat. (Va.) 409."

On the fourth Thursday in August, 1872, this constitutional provision became operative. By it all prior statutory provisions in conflict with it were swept out. An entire new condition was created. The act of 1869 (Acts 1869, p. 88, c. 125, § 7), first containing the provision, was legislative in character; here it became constitutional. "The head and the hoof, the haunch and the hump," of it was to compel the owner of land to have it entered on the land books for taxation. He was given more than two years substantially from the date of its adoption by the people to perform this constitutional requirement; for it gave him five years from and after the year 1869 to do so, which was equivalent to two years from and after the year 1872. It seems to me utterly immaterial whether the tract (if over 1,000 acres) had been prior to that time sold to the state under void proceedings or not. This constitutional provision required the true owner to determine for himself, within the time given, whether he was or was not the true owner of the tract, and, if he determined he was, "to have it entered on the land books * * * and to cause himself to be charged with the taxes thereon and pay the same." If there was any doubt about his being the true owner, he had need to be up and doing to settle the question by proper judicial proceeding, if necessary. If the clerk refused to enter it on the books, it was his duty to bring proper legal proceeding to compel him to do so. That he had right to resort to such proceeding is clear, because never yet has constitutional right and obligation arisen, but legal remedy to enforce that right and legal aid in discharge of that obligation necessarily followed. The courts, per force of their oath to support the Constitution, had necessarily to supply such legal remedy. To my mind, when it thus became a constitutional duty of the owner to "have entered" his land within five years after 1869, it is no answer to say that by a prior statute (section 19, c. 118, p. 157, Acts 1863) the assessor was authorized to omit it, and became, therefore, in effect clothed with judicial power to ascertain and determine the validity of tax sales and who was or was not the true owner of the land. I admit, to establish such a condition, under conditions existing and that have existed, would be a practical absurdity. But no such condition can exist or be created by this statute as against this constitutional requirement.

In letter and spirit all statutory provisions antagonistic to constitutional ones must yield and stand aside. It is true the assessor may refuse to perform his duty in this regard, as any ministerial officer is like to do. He might refuse the true owner to enter his land, when asked by him to do so. On the other hand, he might in the name of the former owner enter land that had been properly theretofore sold for taxes, and the true ownership thereby vested in another. In either case the remedy to all was open to have corrected by judicial proceeding the error of his ministerial acts, and the liability of error on his part could not excuse the obligation upon the part of the owner himself to do all things necessary to comply with that obligation. The penalty provided by this constitutional provision for failure to comply with its requirements within five years from 1869 is clear and positive—the absolute, immediate forfeiture of the land to the state, ex proprio vigore.

As an independent proposition, if I were called upon to reconcile section 19, c. 118, p. 157, Acts 1863, which was incorporated in the Code of 1899 in section 23, c. 29, with this section 6, art. 13, of the Constitution, bearing in mind the supremacy of the latter, I would simply read the former's meaning to be "real estate purchased for the state at a sale for taxes shall not be thereafter entered on the land books" in the name of the state, the purchaser, "but the auditor shall keep a register thereof." Thus construed, it would be simply a directory provision for the guidance of clerks and assessors, and in modification and harmony with those other statutory provisions requiring all lands "omitted" to be entered on the books, and all transfers by conveyance, etc., to be certified and entry made. Thus construed, its true purpose would be subserved; for it is clear, it seems to me, that the original purpose of the act was to destroy the idea that the state must keep her own lands upon the tax books and have them subjected to taxation for county, district, and municipal purposes. In this connection and as persuasive of this view, it is to be noted that very soon after the decisions of Sayers v. Burkhardt, 85 Fed. 246, 29 C. C. A. 137, and Totten v. Nighbert, 41 W. Va. 800, 24 S. E. 627, which apparently construed this statute as protecting the true owner from the constitutional obligation of causing his land to be entered on the books, regardless of at least a void sale to the state, the Legislature by Acts 1904, p. 44, c. 4, § 36, amended and reenacted in Acts 1905, p. 297, c. 35, § 36, and incorporated in our last Code (1906) as section 720, amended the provision so as to carry out this original purpose of it, without giving to it the apparent effect of protection to owners as aforesaid. The provision so amended and now in force provides:

"Real estate purchased for the state, at a sale for taxes, shall not be omitted from the land books, but no taxes shall be assessed thereon while the same remains the property of the state," etc.

Thus construed, there can be no necessity to hold the clerk or assessor to be clothed with judicial powers, and no impediment could be urged against their prompt compliance with the behest of the owner, or even claimant of ownership, seeking "to have his land entered for taxation in his name, himself charged with the taxes thereon, and to pay the same," as required by the constitutional provision. I am confronted, however, with the rulings in Sayers v. Burkhardt and Totten v. Nighbert, which it is insisted make such construction impossible. I simply, therefore, make the suggestion with all deference. But, independent of my own views of this question, I regard the conclusion reached by me as inevitable for another reason. The Supreme Court of Appeals of West Virginia has so held in two well-considered cases very recently decided. These cases are Stockton v. Craig, 56 W. Va. 464, 49 S. E. 386, and Webb v. Ritter, 54 S. E. 484.

It is, however, earnestly insisted by counsel for plaintiff that these cases are in direct conflict with the cases of Totten v. Nighbert and Sayers v. Burkhardt. This may be true, although it is to be noted that the same judge rendering the opinions in Totten v. Nighbert and Stockton v. Craig strenuously insists in the latter that there is no con-

flict, but complete harmony. It is not necessary for me to express an opinion as to this, further than to call attention to the facts that these last two cases directly and positively decide the exact question here involved, after careful review of all former decisions, that there is no doubt or confusion in their rulings, and that they are the latest decisions of the court of last resort of this state, not only construing its Constitution and local statutes, but establishing by such construction a rule of property in this state. Under such circumstances, I regard it necessary, under decisions of the Supreme Court by which I am bound, to follow these local decisions, independent of any federal decision prior to their enunciation. Polk v. Wendall, 9 Cranch, 98, 3 L. Ed. 665; Williams v. Kirtland, 13 Wall. 306, 20 L. Ed. 683; Walker v. Marks, 17 Wall. 648, 21 L. Ed. 744; Board of Supervision v. U. S., 18 Wall. 71, 21 L. Ed. 771; Leffingwell v. Warren, 2 Black (U. S.) 599, 17 L. Ed. 261; Suydam v. Williamson, 24 How. 427, 15 L. Ed. 978; Lloyd v. Fulton, 91 U. S. 479, 23 L. Ed. 363; Green v. Neal, 6 Pet. 291, 8 L. Ed. 402. It must, however, always be remembered that this rule has no application when a question arises in a federal court as to whether a local law or decision violates the Constitution or laws of the United States. In such cases these courts must remember the supremacy of the federal laws and their solemn obligation to maintain them as supreme.

In this case it is insisted that this section 6, art. 13, of the West Virginia Constitution contravenes the fourteenth amendment of the federal Constitution. This question has been fully discussed by Brannon, J., in State v. Sponangle, 45 W. Va. 415, 32 S. E. 283, 43 L. R. A. 727, where it was held this article was not in violation of the fourteenth amendment, and this decision has been affirmed by that court consistently ever since by such cases as State v. Cheney, 45 W. Va. 478, 31 S. E. 920, State v. Swann, 46 W. Va. 128, 33 S. E. 89, and Webb v. Ritter (W. Va.) 54 S. E. 484. It has also been passed upon by the Supreme Court in two cases taken there from this court, and the same conclusion reached. King v. Mullins, 171 U. S. 404, 18 Sup. Ct. 925, 43 L. Ed. 214; King v. Panther Lumber Co., 171 U. S. 437, 18 Sup. Ct. 573, 43 L. Ed. 227. In view of these decisions, I must hold the provision not in conflict with the fourteenth amendment.

Finally, I cannot agree with counsel for plaintiff in the construction given to this section 6, art. 13, of the state Constitution in its application to the lands claimed by married women and others under disability. As I read it, whenever any owner of a tract of 1,000 acres or more does not have it entered on the land books for taxation for any successive five years after the year 1869, forfeiture for such nonentry becomes complete; but, in case of those owners under disability, redemption from such forfeiture so accrued may, within three years after removal of disability, be made, "provided such right to redeem shall in no case extend beyond twenty years from the time such land was forfeited." This being true, it seems to me the conclusion to be reached is plain. In 1869 this 1,200-acre tract of land was off the land books and not assessed with taxes. By express con-

stitutional requirement it was Mrs. Fay's duty, not later than 1874, to have it entered for such taxation. She did not do so. In 1875 it had been so off the tax books for "five successive years after the year 1869," and thereby became forfeited to the state. She had 20 years, or until 1895, to redeem. She did not do so. The void sale by Auvil, commissioner, in 1882, and the subsequent claim of defendants thereunder, cannot aid her, and in this action of ejectment is immaterial. She must present and recover upon a good and valid title of her own. No privity of title or claim has ever existed between her and the defendants. Their deeds from Commissioner Auvil, though void, were sufficient claim and color to base adverse possession upon, and in time enable them to acquire good title against her and the world.

There must be judgment entered for the defendants.

BALFOUR et al. v. SAN JOAQUIN VALLEY BANK et al.

(Circuit Court, N. D. California. September 20, 1906.)

No. 13,901.

1. ACCOUNT—EQUITY—JURISDICTION—REMEDY AT LAW.

While an account, even though composed of many items, does not necessarily entitle a litigant to invoke the jurisdiction of equity, yet, the jurisdiction at law and in equity being concurrent, when it is clearly shown that the nature and extent of the dealings have been such as to require an accounting, which would be impracticable for a jury to make, a court of equity will entertain jurisdiction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1. Account. §§ 62–70.]

2. SAME.

A bill by a depositor against a bank for an accounting states a case cognizable in equity, where it shows that the business was all transacted on the part of complainants by an agent, the transactions covered a period of five years, the deposits aggregated about $2,500,000, and the items involved numbered over 5,000, and where it further alleges that defendant diverted funds from the account and applied them in payment of personal obligations of the agent, and prays for discovery.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Account, §§ 62–70.]

3. SAME—DISCOVERY.

A discovery, sought through interrogatories in a bill for an accounting or other equitable relief, does not belong to the auxiliary jurisdiction exercised by courts of equity in aid of actions at law, but is only incidental to the equitable suit, and is not in such case to be confounded with discovery in its original and strict signification.

4. SAME—LACHES.

A bill in equity, filed in a federal court within the time permitted by the state statute of limitations, and which charges actual, positive fraud on the part of defendant, is not demurrable on the ground of laches, because complainant did not sooner discover the fraud.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 237.]

In Equity. On demurrer to bill.

Charles Page, E. J. McCutchen, and W. S. Burnett, for complainants.

E. S. Pillsbury, for defendants.

WHITSON, District Judge. Defendants have demurred for want of equity in the bill of complaint. It is argued that complainants have disclosed by the bill a knowledge of the matters which they would discover; that it is shown upon its face that they are in possession of sufficient information to bring and successfully maintain, if the allegations are true, an action at law for the recovery of the amounts alleged to have been misappropriated by the defendant bank; that the facts pleaded simply disclose an indebtedness, the several amounts claimed being known to the complainants, for they are set out by appropriate allegations. For these reasons it is contended that there is a plain, speedy, and adequate remedy at law, arising out of the simple relation of debtor and creditor, and that the complications growing out of the accounts do not render the cause one of equitable cognizance.

1. In matters of account the jurisdiction in equity is concurrent with that at law. The object in either case is the recovery of a money judgment. The result sought is the same; the methods are different. Pomeroy's Equity (3d Ed.) §§ 173, 174. While an account, even though it be composed of many items, does not necessarily entitle a litigant to invoke the jurisdiction of equity, yet, the jurisdiction being concurrent, when it is clearly shown that the nature and extent of the dealings have been such as to require an accounting, which it would be impracticable for a jury to make, then a court of equity will assert its jurisdiction, and, in the interest of justice, apply its more flexible remedies, in order that a full hearing may be had with deliberation, and an accurate result be obtained. As to just when such a state of facts exists rests somewhat in discretion. 6 Pomeroy's Equity, § 930. At section 927, vol. 6, the author thus states the rule:

"It is not in every matter of account cognizable at law that equitable jurisdiction will be exercised; the general rule being that a proper case is presented when the remedies at law are inadequate."

Section 723 of the Revised Statutes [U. S. Comp. St. 1901, p. 583] prohibits the federal courts from entertaining suits in equity where "a plain, adequate and complete remedy may be had at law." While it was said in Buzard v. Houston, 119 U. S. 347–351, 7 Sup. Ct. 249, 30 L. Ed. 451, that the statute is only declaratory of the rule which existed before its passage, yet the language used certainly shows the intention of Congress to emphasize, at least, if not to enlarge upon, it; for, if an action at law cannot afford a "complete" remedy, manifestly it was intended that equity should intervene to do so. The Supreme Court has often announced this view. In Walla Walla v. Walla Walla Water Company, 172 U. S. 12, 19 Sup. Ct. 82, 43 L. Ed. 341, it was said:

"This court has repeatedly declared in affirmance of the generally accepted proposition that the remedy at law, in order to exclude a concurrent remedy at equity, must be as complete, as practical, and as efficient to the ends of justice and its prompt administration as the remedy in equity. Boyce's Executors v. Grundy, 3 Pet. 210, 215, 7 L. Ed. 655; Insurance Co. v. Bailey, 13 Wall. 616, 621, 20 L. Ed. 501; Kilbourn v. Sunderland, 130 U. S. 505, 514, 9 Sup. Ct. 594, 32 L. Ed. 1005; Tyler v. Savage, 143 U. S. 79, 95, 12 Sup. Ct. 340, 36 L. Ed. 82."

Equity has jurisdiction, unless the remedy at law is "complete, sufficient, and certain." 1 Pomeroy's Equity (3d Ed.) § 178. To the same effect are: Fidelity Deposit Company v. Fidelity Trust Company (C. C.) 143 Fed. 152–159; McMullen Lumber Company v. Strother, 136 Fed. 295, 69 C. C. A. 433; Hayden v. Thompson, 71 Fed. 60–64, 17 C. C. A. 592; Fenno v. Primrose (C. C.) 116 Fed. 49.

We must look to the bill to ascertain whether it presents features which require the interposition of equity, to the end that full relief may be granted. Briefly summarized, the allegations upon which it is sought to sustain the jurisdiction, in so far as they need be noticed, are as follows: Lane, being the agent of complainants and their predecessors, opened an account with the defendant bank in their name. To make up this account he drew drafts upon complainants from time to time, the proceeds of which were deposited as the drafts were honored. He drew checks against the account in the name of his principal, signing himself as agent. The transactions involved cover a period of about five years, during which $2,427,270.65 was deposited in said account, and checks were drawn against the account for $2,502,389.01. More than 5,000 individual drawings were made. Complainants have propounded 587 interrogatories relating to checks drawn upon this account. The bank diverted funds from the account, and applied the same to the personal obligations of Lane. It permitted him to overdraw the account, by honoring his checks without authority from the principal, and without inquiring as to the extent of his powers. It sold him a portion of its capital stock and appropriated the funds of complainants in payment therefor, and, but for the wrongful diversion and misapplication of the funds of complainants, there would be at least $100,000 to their credit now.

This involves an inquiry into the amount of money which went to the credit of the complainants in the bank, together with the amount which it paid out for the benefit of and for the account of complainants, and what amount, if any, the bank diverted in payment for its own stock which it sold to Lane. It involves the ascertainment of what amount of the funds of complainants was used by it to cover the overdraft which the bank permitted Lane to make. It involves the computation of interest upon the several amounts, if any, that the defendant may have improperly applied, either to the indebtedness of Lane, to the overdraft created by him, or to checks drawn by him for his personal account, from the several dates of misapplication. Without declaring, now, the measure of the bank's liability, or undertaking to define the rule by which it shall be determined, it is sufficient to say that the rights of the parties can never be ascertained without a full examination of the whole account and each item thereof. To reach a conclusion on the merits, an account will have to be stated between the parties. It would manifestly be impossible for a jury, in the time allotted for the consideration of a case, or at all, for that matter, to arrive at an accurate statement of the debits and credits and strike a balance. Its verdict would be guesswork. The authorities sustain the jurisdiction of equity in cases similar to the one presented by the bill of complaint. The decision in Hanks Dental Association v. International Tooth Crown Co., 194 U. S. 303,

24 Sup. Ct. 700, 48 L. Ed. 989, makes the necessity for retaining the case in equity all the more apparent.

2. This is not a suit for discovery in the technical sense. Pomeroy's Equity (3d Ed.) § 142. The object in view being an accounting, and as a result a decree for the amount found to be due, the discovery here sought does not belong to the auxiliary jurisdiction exercised by courts of equity in aid of an action at law or some other proceeding, but is only incidental to the equitable action. "The suit for a 'discovery' belonging to the auxiliary jurisdiction, as described in the foregoing paragraphs, should be carefully distinguished from the so-called 'discovery' which may be, and ordinarily is, an incident of every equitable action. It is a part of the ordinary equity procedure that whatever be the relief sought, and whether the jurisdiction be exclusive or concurrent, the plaintiff may, by means of allegations and interrogations contained in his pleading, compel the defendant to disclose by his answer facts within his own personal knowledge which may operate as evidence to sustain the plaintiff's contention. The name 'discovery' is also given to this process of probing the defendant's conscience, and of obtaining admissions from him, which accompanies almost every suit in equity; but it should not be confounded with 'discovery' in its original and strict signification, nor with that mentioned in the last preceding paragraph, which is sometimes made the ground for extending the concurrent jurisdiction of equity over cases otherwise belonging to the domain of the common-law courts." Id. § 144. The jurisdiction cannot rest upon discovery.

For the reasons already assigned, it is unnecessary to decide whether the jurisdiction may be sustained on the ground of fraud, or as involving a trust relation existing between the bank and the complainants; nor have I considered the effect to be given section 1050, Code Civ. Proc. Equity has concurrent jurisdiction with courts of law in matters involving fraud, and I incline strongly to the view that the bill is sustainable upon that ground.

3. It has been claimed that it appears by the allegations of the bill that complainants have been guilty of laches. This argument proceeds upon the theory, not that the suit was delayed, but that the complainants were guilty of such gross negligence in failure to check up, verify, and approve the accounts of their agent, Lane, that they ought not to be heard in a court of equity to complain of the defendants. Here it is alleged that the bank deliberately applied the funds of the complainants to the payment of Lane's liabilities to it. This charges an active, positive fraud. To say that complainants have been guilty of laches, because they did not sooner discover the fraud, would be carrying the doctrine to great lengths. Laches operates by way of estoppel, because of the inequity of claiming that which silence has led the other party to believe there was no claim to. It arises where there is a long acquiescence in the assertion of adverse rights. This presupposes knowledge of the facts. The rule does not apply where actual fraud is made out. Hammond v. Hopkins, 143 U. S. 224–274, 12 Sup. Ct. 418, 36 L. Ed. 134. Where jurisdiction is concurrent, courts of equity are bound by the statutes of limitations. Godden v. Kimmell, 99 U. S. 201, 25 L. Ed. 431.

Taking the strongest possible view of it as against the complainants and their predecessors, the facts would be: They knew, or had sufficient to put them on inquiry, that their agent was carrying an account in their name with the defendant bank. The bank must be held to have known that the agent had only such authority as had been delegated to him, and that authority to draw for funds and carry an account with it was not authority to overdraw that account. The complainants could, therefore, rely upon it with assurance that the bank would not permit the violation of a rule so universally understood in the commercial world, and that it would not in any event knowingly apply funds, which it must take notice belonged to complainants, to the personal liabilities of their agent. Whatever the answer may disclose by way of laches, it cannot be said that complainants have estopped themselves by their own allegations.

The demurrer will, accordingly, be overruled.

GOODNOUGH MERCANTILE & STOCK CO. v. GALLOWAY et al.

(District Court, D. Oregon. December 3, 1906.)

No. 4,851.

1. BANKRUPTCY—JURISDICTION OF COURT—SUITS BETWEEN TRUSTEE AND CLAIMANTS OF PROPERTY.

If a party contesting the right of a trustee in bankruptcy to property is claiming in the right of the bankrupt, the case is one for summary proceeding in the District Court as a court of bankruptcy; but, if claiming adversely, by title paramount, then it is a case for the Circuit Court or the state court, as the facts may warrant.

[Ed. Note.—Jurisdiction of federal courts in suit relating to bankruptcy, see note to Bailey v. Mosher, 11 C. C. A. 313.]

2. SAME—SUIT AGAINST TRUSTEE.

Where property has passed into the possession, actual or constructive, of a court of bankruptcy as part of the estate of a bankrupt, such court has jurisdiction of a plenary suit against the trustee by one claiming a lien thereon through the bankrupt to determine his rights thereunder.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, §§ 320, 324, 333.]

3. LIENS—EQUITABLE LIEN—CREATION BY VERBAL AGREEMENT.

An equitable lien upon personal property may be created by a verbal agreement, where the intention is clear to charge some particular property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Liens, §§ 26–28.]

4. BANKRUPTCY—LIENS—VALIDITY.

A verbal agreement for a lien on personal property is not required to be recorded by the statutes of Oregon, and such an agreement made in good faith to secure advances to be made to enable the borrower to carry on his business, with the knowledge of his creditors, and more than four months prior to his bankruptcy, is valid against his trustee in bankruptcy, who in such case takes only the rights of the bankrupt.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, §§ 286–295.]

5. LOGS AND LOGGING—LIENS—VALIDITY—PROPERTY TO BE MANUFACTURED.

An owner of standing timber has at least a potential interest in the logs and lumber to be manufactured therefrom, which is sufficient to sus-

tain an agreement by him to give a lien on such logs and lumber to secure advances of money to be made to enable him to manufacture the same.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Logs and Logging, §§ 54–59.]

6. BANKRUPTCY—LIENS—SUIT TO ENFORCE—PARTIES.

Where the title to standing timber had been transferred to a bankrupt prior to his bankruptcy, and passed from him to his trustee, neither the vendors nor the bankrupt are necessary parties to a suit against the trustee to establish and enforce a lien on such timber and its products in the hands of the trustee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 448.]

In Equity. On demurrer to bill.

G. W. Buck was, on June 13. 1903, adjudged a bankrupt, and on August 22d following defendant Galloway was appointed trustee of his estate. On or about September 27, 1901, Buck entered into a written contract with Albert Lewis for the purchase from the latter of the standing saw timber on certain designated lands, and on the same day entered into another contract with Jackson Lewis for the purchase of the timber upon other lands; the consideration in each instance to be paid in deferred installments. Buck was also the owner of the standing timber on 40 acres of land that he had previously purchased from George Smittle. Being unable financially to manufacture the timber thus purchased and owned by him into logs and lumber without assistance, he applied to the plaintiff therefor, and it was agreed that plaintiff should, from time to time, advance to Buck money to be used in paying for labor necessary to cut said timber from the tree and manufacture the same into lumber, and to handle such lumber in the disposition and sale thereof, and that plaintiff should also make certain payments for Buck, as they became due, upon the contracts for the purchase of the timber; it being understood that advances in the way of merchandise might be made from plaintiff's store to Buck's employés, as they might desire. In consideration whereof, it was further agreed that plaintiff should have and hold a lien on all said timber so purchased by Buck, and on all saw logs cut from said timber, and on all lumber manufactured therefrom, to secure plaintiff in repayment to it of all sums of money and for all merchandise so advanced, and that all lumber so manufactured should be sold for plaintiff, and the money received therefrom paid to plaintiff; Buck being authorized to make sale thereof subject to the approval of plaintiff, and the purchase price in all instances to be made payable to plaintiff. And it was further agreed, should Buck fail to make sale of such lumber on satisfactory terms, then that he should turn the same, and the whole thereof, over to the plaintiff, to be sold by it, and the proceeds applied in payment of such advances.

Between January 1 and May 1, 1903, Buck entered into a written contract with the Elgin Lumber Company, whereby he agreed to sell to such company, and it agreed to buy, all the lumber that he should be able to cut during the season of 1903; to which the plaintiff assented. To this contract was annexed Buck's written order, directed to the Elgin Lumber Company, requiring it to pay the purchase price to plaintiff, which order was regularly accepted by such company. No lumber, however, was delivered to the Elgin Company, and the logs of Buck were attached on or about May 8, 1903, by the First National Bank of Elgin; it being alleged that at the time of such attachment the bank had full notice and knowledge of the claim and lien of plaintiff, and, further, that the defendant Galloway prevented the carrying out of Buck's contract with plaintiff and the Elgin Company, by wrongfully taking possession of the logs and lumber, claiming the right to dispose of them in his capacity as trustee. It is further alleged that, in pursuance of said agreement, plaintiff advanced a large sum of money and considerable merchandise, which, upon an accounting with Buck, amounted to $3,850, and for which Buck executed, on April 16, 1903, his promissory note to plaintiff, payable on demand, as evidence of such indebtedness, and that plaintiff subse-

quently made further advances, under said agreement, amounting to the sum of $390.33.

Buck manufactured, prior to May 8, 1903, about 350,000 feet of logs into lumber, and on that date had on hand 300,000 feet of logs lying in the timber, and 200,000 feet in the yard at his sawmill. By stipulation of the parties, this property was sold, and the proceeds thereof, to wit, $2,873, less $705.57 paid to laborers, are now in the hands of the trustee awaiting the result of this suit; a lien being now claimed upon the fund in place of the logs and lumber. There remains yet a large amount of saw timber of the purchases from the Lewises and Smittle uncut. About May 2, 1903, Buck assigned to plaintiff his contracts of purchase with the Lewises, for the purpose of further securing it in the payment of the demands accrued as previously set forth. So, also, was the contract with Smittle assigned for a like purpose, and plaintiff is now the holder of all such contracts. All these facts are pleaded by the bill of complaint, and it is further alleged that all the advances were made in good faith, and without intent to hinder, delay, or defraud the creditors of Buck; that such creditors had at all times full notice and knowledge that plaintiff was making such advances for the purposes as stated; that the defendant Galloway claims the right to take possession of the timber remaining, as well as to retain the possession of the funds, for the benefit of Buck's estate; and that the defendant the First National Bank of Elgin claims some interest therein; but that whatever interest or right either may have in or to such property is subordinate to the claim of plaintiff. The plaintiff prays, among other things, that a lien be declared in its favor upon the property and funds described, and for a foreclosure and sale, and an application of the proceeds and funds in payment of its demands.

To this bill of complaint the defendants interposed demurrers, assigning as grounds therefor: (1) Want of jurisdiction in this court of the subject-matter; (2) want of jurisdiction over the persons of defendants; (3) want of the statement of appropriate facts to entitle the plaintiff to relief in equity; (4) defect of parties defendant, in that Albert Lewis, Jackson Lewis, George Smittle, and G. W. Buck are necessary parties to the suit.

Ramsey & Oliver, for plaintiff.

F. S. Ivanhoe and J. D. Slater, for defendants.

WOLVERTON, District Judge (after stating the facts as above). The first objection, that there is want of jurisdiction of the subject-matter, is based upon the hypothesis that the bill is for a foreclosure, and it is urged that jurisdiction for such purpose is vested exclusively in the Circuit Court.

The District Courts of the United States are constituted, by the bankruptcy act, bankruptcy courts. To determine their jurisdiction in that relation, therefore, it is necessary to turn to the act itself, for such jurisdiction exists by reason thereof, or not at all. By Act July 1, 1898, c. 541, § 2, subd. 7, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3421], these courts are vested with original jurisdiction in bankruptcy proceedings, to cause the estates of bankrupts to be collected, reduced to money, and distributed, and to determine controversies with relation thereto, except as otherwise provided. The exception evidently has reference to section 23 of the act, the general scope and object of which, as indicated by its title, are to define the "jurisdiction of United States and state courts." So that section 2, subd. 7, is limited by the provision of the latter section. By this latter section the United States Circuit Courts are accorded 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 trustee, in the same manner and to the same extent as

though bankruptcy proceedings had never been instituted, and such controversies had been between the bankrupts and such adverse claimants; and, further, it provides (subdivision b) that 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.

This section has been construed by the Supreme Court, in Bardes v. Hawarden Bank, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175, a case wherein the trustee in bankruptcy sought, in the District Court sitting in bankruptcy, to set aside an alleged fraudulent sale of goods by the bankrupt; it being adjudged that the court was without jurisdiction. In the course of its consideration, the court said:

"Had there been no bankruptcy proceedings, the bankrupt might have brought suit in any state court of competent jurisdiction; or, if there was a sufficient jurisdictional amount, and the requisite diversity of citizenship existed, or the case arose under the Constitution, laws, or treaties of the United States, he could have brought suit in the Circuit Court of the United States. Act August 13, 1888, c. 866, 25 Stat. 434. He could not have sued in a District Court of the United States, because such a court has no jurisdiction of suits at law or in equity between private parties, except where, by special provision of an act of Congress, a District Court has the powers of a Circuit Court, or is given jurisdiction of a particular class of civil suits. * * * Congress, by the second clause of section 23 of the present bankrupt act, appears to this court to have clearly manifested its intention that controversies, not strictly or properly part of the proceedings in bankruptcy, but independent suits brought by the trustee in bankruptcy to assert a title to money or property as assets of the bankrupt against strangers to those proceedings, should not come within the jurisdiction of the District Courts of the United States 'unless by consent of the proposed defendant,' of which there is no pretense in this case."

Thus does the law leave the parties to litigate as to those matters falling within the purview of the section in the courts that have jurisdiction, notwithstanding the adoption of the bankrupt act. If there be diversity of citizenship, or if the Constitution, laws, or treaties of the United States are called in question, the Circuit Courts of the United States would have jurisdiction either at law or in equity, otherwise, the state courts would constitute the proper forum for adjudication; the measure being whether the bankrupt could have brought a proceeding concerning the property had there been no adjudication in bankruptcy. As to these matters, however, the District Court may entertain jurisdiction on condition of the consent of the defendant; that is, the party claiming the property acquired by the trustee adversely to the latter.

In another case (White v. Schloerb, 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. Ed. 1183) decided at the same term of court as the Bardes Case, it was held that:

"After an adjudication in bankruptcy, an action of replevin in a state court cannot be commenced and maintained against the bankrupt to recover property in the possession of and claimed by the bankrupt at the time of that adjudication, and in the possession of a referee in bankruptcy at the time when the action of replevin is begun."

This was an action for the legal custody of the goods, and did not concern the trial of the title thereto. The principle upon which the

case rests is that property in the custody of a court of the United States cannot be taken out of that custody upon any process from a state court. And it was further held that the District Court sitting in bankruptcy had jurisdiction by summary proceedings to compel the return of the property seized; the same having been taken by writ from the custody of the trustee.

A later case (Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405) is illustrative. That was a summary proceeding upon order to show cause why the bankrupt, or his agent in possession for him, should not turn over certain moneys alleged to be the property of the estate. The question came up whether a plenary suit or action was the remedy to recover possession, or whether the court had power upon summary proceeding to require the bankrupt, or his agent holding for him, to account to the trustee for the property withheld from the latter. The court held that the filing of a petition in bankruptcy is a caveat to all the world, and in effect an attachment and injunction, and, on adjudication, title to the bankrupt's property becomes vested in the trustee, with actual or constructive possession, and placed in the custody of the bankruptcy court; and it was further adjudged that the court—that is, the trustee for it or the law—having the custody, could appropriately deal with parties disturbing such custody, so as to secure the rightful possession in the trustee for the due and regular administration of the estate. It is clear from the court's discussion, however, that had there been an adverse holding or claim—that is, a holding with claim of right or title adverse to the trustee—the case would have been different. And thus it is apparent that the court differentiates between a case where the party claims in the right of the bankrupt and one where he claims adversely to the latter, or to his trustee, who succeeds to all his rights and interests.

An earlier case (Bryan v. Bernheimer, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814) is also illustrative. There the bankrupt, nine days before the filing of the petition in bankruptcy, made a general assignment for the benefit of his creditors; but, subsequent to the filing of the petition, the assignee sold the property to Bernheimer, a third party. Upon the application of certain creditors, interposed after adjudication in bankruptcy, the court directed the marshal to take charge of the property, and that notice be given the purchaser to appear and set forth his claim thereto. The purchaser came in, and the property rights were accordingly adjudicated, and held to be in the trustee. The court determined that, as the property was not held by the assignee under any claim of right in himself, but under a general assignment, which was in itself an act of bankruptcy, and, as the sale to Bernheimer was made after, and with knowledge of, the petition in bankruptcy, the latter had no title superior to that of the bankrupt's estate, and hence that the District Court had jurisdiction in a summary proceeding to determine respecting the conflicting rights of the parties. The court, however, alluded to the fact with some emphasis that Bernheimer had consented to the form of proceeding, thus bringing the case within the purview of subdivision "b" of section 23.

These cases indicate, with more or less directness, the principle on which the District Court should and ought to take jurisdiction in

matters involving the property rights incident to the estate of the bankrupt. If the party contesting the right of the trustee to the property is claiming in the right of the bankrupt, the case is one for summary proceeding; but if claiming adversely, by title paramount, then it is a case for the Circuit Court or the state court, as the facts may warrant.

The case of Whitney v. Wenman, 198 U. S. 539, 25 Sup. Ct. 778, 49 L. Ed. 1157, presents a different phase of the controversy. There the trustee brought suit, in the District Court sitting in bankruptcy, against third parties claiming a lien upon goods alleged to be the property of the bankrupt, but which had been turned over by the receiver in bankruptcy, though without an order of court or other authority, to such parties to be subjected to their claim of lien. The trustee brought a plenary suit to determine the validity of the lien and his right to the possession of the property freed of the alleged incumbrance. The jurisdiction of the court was challenged, and it was held that, quoting from the head note:

"The bankruptcy court has jurisdiction of a proceeding in the nature of a plenary action brought by the trustee to determine controversies in relation to property held by the bankrupt or by other parties for him, and the extent and character of liens thereon."

In the course of the opinion, the court alluded to the Bardes Case, and was of the view that it did not determine the authority of the District Court to entertain jurisdiction of a proceeding instituted for the adjudication of rights in or a lien upon property which had come into the possession of the bankruptcy court; and further on it says:

"We think the result of these cases is, in view of the broad powers conferred in section 2 of the bankrupt act, authorizing the bankruptcy court to cause the estate of the bankrupt to be collected, reduced to money and distributed, and to determine controversies in relation thereto, and bring in and substitute additional parties when necessary for the complete determination of a matter in controversy, that when the property has become subject to the jurisdiction of the bankruptcy court as that of the bankrupt, whether held by him or for him, jurisdiction exists to determine controversies in relation to the disposition of the same and the extent and character of liens thereon or rights therein."

The relation of the parties in the case at bar is the exact reverse of that of those in that case, but the principle involved appears to me to be the same. The purpose is to determine the validity of the alleged lien claimed upon the property of the bankrupt. The fund derived from the sale of the lumber and logs has passed into the hands of the trustee, and, although the contracts for the timber with the Lewises are in the hands of plaintiff by assignment as collateral, yet the corpus of the lien, to wit, the timber, whatever may be the interests of the bankrupt, has passed into the constructive possession, at least, of the trustee, so that the whole property is within the possession, actual or constructive, of the bankrupt court, and the suit is brought in that court, by the lienholder, to determine the correlative rights of the parties. The plaintiff does not in any way hold, or assume to hold, adversely to the trustee in bankruptcy, and I see no reason why a plenary suit may not be maintained by the lienholder against the trustee to determine those rights, as well as by the trustee against the lienholder. The suit

is plenary in either case, and the court is in the possession of the property involved. That the case is in name one for a foreclosure does not in itself determine the jurisdiction. The court will not foreclose in the way that foreclosure proceedings are finally adjusted, but it will declare the lien, if any exists, and leave the trustee to dispose of the property, and the assets will be marshaled in accordance with the relative rights of the creditors of the estate; the legitimate lienholder being preferred, of course, to the general creditor. This disposes of the question of jurisdiction.

It is next insisted that, under the allegations of the bill, the plaintiff has no lien, or, in other words, that no mere verbal agreement that a party shall have and hold a lien is competent to impose upon the property such an incumbrance. Whatever may be the rule as it relates to realty, I shall only inquire for the present, as it concerns personal property.

To create an equitable lien, it is essential that there be a contract showing an intention to charge some particular property, and it is said by the authors of the American and English Enc. of Law (volume 19, p. 14) that:

"Such contracts will create a lien on personal property though only verbal."

Mr. Pomeroy gives consideration to the subject as follows:

"The doctrine may be stated, in its most general form, that every express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund, therein described or identified, a security for a debt or other obligation, or whereby the party promises to convey or assign or transfer the property as security, creates an equitable lien upon the property so indicated, which is enforceable against the property in the hands, not only of the original contractor, but of his heirs, administrators, executors, voluntary assignees, and purchasers or incumbrancers with notice. Under like circumstances, a merely verbal agreement may create a similar lien upon personal property." 3 Pomeroy's Equity, § 1235.

The general doctrine as here announced has the apparent sanction of the Supreme Court of the United States, in Ketchum v. St. Louis, 101 U. S. 306, 25 L. Ed. 999, and Walker v. Brown, 165 U. S. 654, 17 Sup. Ct. 453, 41 L. Ed. 865, and is expressly approved in Chattanooga National Bank v. Rome Iron Co. (C. C.) 102 Fed. 755. In the latter case, while there was a writing, there was no delivery of the personalty sought to be charged, and the point was made that there was a want of delivery, thus differentiating the transaction from a pledge; but the court held that, by reason of the doctrine thus expressed, the lien attached notwithstanding there was no delivery.

Another objection urged against the validity of the alleged lien is that it was not recorded. The answer to this is that the law does not require such an agreement to be recorded. What it does require to be recorded is any mortgage, deed of trust, or other instrument of writing intended to operate as a mortgage of personal property, and the penalty denounced against the nonrecording of such an instrument, unless its execution is accompanied by an immediate delivery and an actual and continued change of possession of the property, is that it shall be void as against subsequent purchasers and mortgagees

in good faith and for a valuable consideration. Sections 5630, 5631, and 5633, B. & C. Comp. Or. Another statute, namely, section 788, subd. 40, B. & C. Comp. Or., prescribes that every sale of personalty capable of immediate delivery, and every assignment of such property by way of mortgage or security, unless accompanied by delivery and followed by actual and continued change of possession, creates a presumption of fraud as against creditors or subsequent purchasers in good faith and for a valuable consideration, disputable, however, by making it appear on the part of the person claiming under the sale or assignment that the same was made in good faith, for a sufficient consideration, and without intent to defraud.

It has been determined 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." Yeatman v. Savings Institution, 95 U. S. 764, 24 L. Ed. 589.

See, also, Stewart v. Platt, 101 U. S. 731, 25 L. Ed. 816, and Hauselt v. Harrison, 105 U. S. 401, 26 L. Ed. 1075.

So it is said, in the recent case of Security Warehousing Co. v. Hand, 143 Fed. 32, 74 C. C. A. 186, cited and much relied upon by counsel for defendants, that:

"Liens that remain undisturbed are those that were good against both the bankrupt and his creditors immediately preceding the adjudication."

The complaint here, however, shows, not only good faith in agreeing with Buck for the lien, but in advancing the money for labor and supplies necessary for the manufacture of the timber into logs and the logs into lumber. Not only this. The bill further sets forth that the creditors "had full notice and knowledge all the time" of said agreement, thus bringing home to them the very conditions contemplated by the statute touching sales and the mortgaging of personal property. As a legal proposition, it is quite true that section 67a of the bankruptcy act "vitiates as liens all claims which, for want of record or for other reasons, the bankrupt's creditors might have avoided as liens; that is, no secret liens or equities shall prevail against the trustee that were not good against the general unsecured creditors represented by the trustee." But the bill puts the matter beyond the local statute, and shows good faith on the part of plaintiff, and notice and knowledge on the part of the creditors, which, if true in fact, would subordinate the claims of the creditors to that of plaintiff. If the creditors or the trustee can show to the contrary, that will be a matter of defense under a proper answer. I am passing on the complaint only for the present.

The two recent cases of Morgan v. First National Bank, 145 Fed. 466, 76 C. C. A. 236, and Moore v. Green, 145 Fed. 472, 76 C. C. A. 242, are controlled by a local statute peculiar to West Virginia, and do not seem to me to be applicable to the present controversy.

A further suggestion is that the arrangement with the Elgin Lumber

Company could not take effect by relation back to the verbal agreement, so as to relieve it of the objection that the lien was procured within four months of the adjudication in bankruptcy. While it is alleged this arrangement was in furtherance of the verbal agreement, it was not the transaction that conferred the lien. The verbal agreement did that, if one attached. Furthermore, no lumber came into the hands of the Elgin Lumber Company, so that the arrangement can scarcely be relied upon as an aid to the agreement in the way of imposing a lien. Having been set out by the complaint, it merely shows the good faith in which the agreement was being carried out between the parties.

Another suggestion is that it was incompetent for the parties thus to impose a lien upon after-acquired property. It is sufficient answer to this that Buck had at least a potential interest in the logs and lumber, and it is believed that it was competent for him to affix the lien, looking first to the manufacture of such logs and lumber; the timber out of which the product was to be manufactured being his by indisputable purchase.

What I have said relates to the logs and lumber; they being unquestionably personal property.

It is insisted that the standing timber is realty, and that in any event no lien attached thereto. But it is not necessary that I decide that question now. It is sufficient, in view of the demurrers, that the bill states a cause of suit; and this it does, at least as it relates to the logs and lumber, and the funds derived therefrom. The question whether the timber is realty under the law, and whether plaintiff's alleged lien attached thereto or not, may be determined at the final hearing.

The demurrers also go to the want of necessary parties. The title of the Lewises and that of Smittle in the timber, however, had passed to Buck, and from Buck to the trustee. The vendors and Buck, therefore, having no interest remaining in the property, it was not essential that they be made parties.

The judgment of the court will be that the demurrers be overruled.

THE NINFA.

(District Court, D. Oregon. October 7, 1907.)

No. 4,725.

1. SHIPPING—RELATION OF SHIP TO CARGO—HARTER ACT.

Section 3 of the Harter act (27 Stat. 445, c. 105 [U. S. Comp. St. 1901, p. 2946]), which provides that, if the owner of a vessel shall exercise due diligence to make such vessel in all respects seaworthy and properly manned and equipped and supplied, neither the vessel nor owner shall be liable for loss or damage to cargo resulting from faults or errors in navigation or management, nor from perils of the sea, as construed by the Supreme Court, does not exempt the vessel nor owner from liability for the consequences of unseaworthiness, even though due diligence was exercised to make her seaworthy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, § 492.

Statutory exemptions of shipowners from liability, see note to Nord-Deutcher Lloyd v. Insurance Co. of North America, 49 C. C. A. 11.]

2. SAME—SEAWORTHINESS—DUE DILIGENCE.

Due diligence to make a vessel in all respects seaworthy, within the meaning of section 3 of the Harter act (27 Stat. 445, c. 105 [U. S. Comp. St. 1901, p. 2946]), does not require merely due diligence on the part of the owner himself, nor in respect to construction only, but on the part of those to whom the owner has intrusted the duty, and in respect, not only to construction, but also to inspection, maintenance, and repair.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, § 492.]

3. SAME—LIABILITY FOR DAMAGE TO CARGO—BURDEN OF PROOF.

Where the proof shows damage to the cargo, the burden is cast upon the ship to establish the fact of seaworthiness, or to show due diligence in ascertaining whether or not she was in fact seaworthy, and in making her so at the beginning of the voyage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, §§ 481, 482.]

4. SAME.

The iron ship Ninfa, 20 years old, was purchased and soon thereafter chartered by the new owner to carry a cargo of cement from London to the port of Los Angeles, Cal., and Portland, Or. At the time of the sale she was examined cursorily by agents of the purchasers, one of whom tested the deck somewhat with a hammer and a small knife, but no thorough inspection was made. In the north Atlantic she encountered rough weather for several days, during which the seas washed over her decks, and at the end of that time it was found that there was a considerable quantity of water in the hold, which was pumped out. Such water admittedly entered through her deck seams, which were open in places and were partially calked by the master before reaching Portland. The weather encountered was no worse than might have been anticipated, and the ship during the most of the time did not greatly shorten sail and did not suffer material injury. On reaching port the cargo was found to have been seriously damaged by water; the cement in the lower tier of barrels being completely solidified. *Held*, that the damage was not due to perils of the sea in a legal sense, but to the unseaworthiness of the ship, and that the owners did not exercise due diligence in inspection and to make her seaworthy before the commencement of the voyage, such as to relieve the ship from liability.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, § 492.

Loss by perils of the sea, see notes to The Dunbritton, 19 C. C. A. 465; Southerland-Innes Co. v. Thynas, 64 C. C. A. 118.]

In Admiralty. Suit for damage to cargo.

Libelants chartered the ship Ninfa (J. A. Maresca & Sons being the owners) for the carriage of a cargo of cement and other lawful merchandise from London, England, to the port of Los Angeles, Cal., and Portland, Or. The charter party contained the ordinary warranty that the ship was tight, staunch, and strong, and in every way fit and seaworthy for the carriage of the cargo upon the voyage contemplated. When the ship arrived at Los Angeles, a large part of the cargo was discharged at that port, and was found to have been seriously damaged by contact with sea water taken into the ship's hold. The ship then continued on to Portland, where it was ascertained that other portions of the cargo were damaged from the same cause. The purpose of the libel is to recover compensation for the damages to cargo thus sustained; the grounds assigned therefor being the unseaworthiness of the vessel and negligent stowage and dunnage of the cargo.

The ship is an English craft, of iron, and was constructed in about the year 1882. It was purchased by Maresca & Sons in December, 1902. Capt. Lauro Lauro, who was in charge on this voyage, states that at the time of the purchase he went over the ship with another captain, and "at that time it was in very good condition"; that he examined her carefully all over, her "hull," "portholes," "decks," "in every place; looked all over the ship;" and that it

was a few days afterwards that he commenced to load the cargo. On cross-examination he testifies as follows: "Q. How long were you on the ship? How long did you spend examining her? A. I went in the day two or three times. Q. Two or three times in one day? A. No; not one day. I went around to look. I was very careful to look around. Q. Did you try her decks? A. Yes. Q. How? A. I try with— What do you mean? Q. Did you examine her decks? A. Yes; I look at the decks. Q. How long did you spend looking at the decks? A. Half or three-quarters of an hour. Q. Did you try the decks in any manner? Did you test them? A. No— Well, the captain, the nephew of the owner, tried the decks. Q. You didn't? A. I did not." And further, on redirect examination: "Q. But when you got down to look at the ship, do I understand you rightly that you were with him? A. Yes. Q. Now, did you see, or did you not see—I want to know what the fact is—what Mr. Maresca did when he was looking over the ship? A. He got a hammer and went to knock around the ship in every place he can. Q. Did he have anything else but a hammer? A. He got a knife—a small knife. Q. What did he do with the knife, if anything? A. To try to take off some rust, if any. Q. He went around with a knife and tried the deck. You saw him do that, did you? A. Yes; but I don't try the deck. Q. But he did, though? A. Yes; he did." Surveys of the ship by the Italian consul at London, and by Lloyd's agent at the same place, show that the ship, prior to the time of her loading, and at the time she was ready to sail, was seaworthy and properly stowed.

In describing the weather and the sea from about February 5, 1903, Capt. Lauro testifies: "From that time to the tropics always bad weather. * * * Very changing weather. One hour calm; by and by plenty of wind; always very confused sea, big swell. Sometimes I take in the sails; sometimes I loose them. * * * Nearly always bad weather, with plenty of water on deck; always water on deck. * * * The ship was rolling and pitching, * * * rolling and laboring very much. * * * The last bad weather was very bad weather. I found water in the well. * * * I ordered the pump just to dry that water as soon as I can. There was always plenty of water on deck, and the ship was straining and laboring heavily, and the crew was pumping and was doing the best they can." It was some days before the well was pumped out. The witness continues: "When I reached the trade wind—the good weather—I calked the fore peak, the deck, and some seams on deck fore and aft the ship, along the ship. * * * In some places three or four feet here; three or four feet here; four or five feet another seam. Perhaps in the same seam alongside the ship I calked two or three places in the seam, and so on, around the deck. * * * When I finished that bad weather I came into the trade wind, north Atlantic trade wind. Then I calked that part under the forecastle." A gale of wind was encountered off Staten Island, lasting for about two days; and after rounding the Horn it is related that "bad weather with big sea and water on deck" prevailed for from 15 to 20 days, but no water was found in the well or hold of the ship again upon the entire voyage. In the south Pacific it was found that the oakum had squeezed out or spewed up somewhat upon the deck. Capt. Lauro says further: "I found the oakum spewed out in the north Atlantic after that bad weather. After that I calked some seams, in the north Atlantic, and coming to Los Angeles I saw that the deck need all to be calked; and after that, coming up from Los Angeles to Portland, I calked the deck, just to prepare the ship—the deck can't pass—just to avoid expense in Portland. I calked that deck from Los Angeles to Portland just to prepare the ship for survey." Being asked, "Why did she leak from the deck, if you know?" witness answered: "I know that, when the ship was straining in the very bad weather, the deck might leak."

The damage sustained by the ship up to the 23d of February, which is all that she suffered on the entire voyage, consisted in breaking the fore topmast staysail, the first jib sheets, a wooden ladder leading up on the poop, and a fastening of the anchor, and, further, a piece of the figure-head was lost; but nothing was loosened on deck. At Los Angeles the captain made a protest, which shows, among other things, the following: "That in the morning of

said 23d February, while running under lower topsails, there was a very strong southwest gale blowing, and a very rough sea; the ship laboring heavily and taking large quantities of water. That on examining the well it was found that a considerable quantity of water had leaked into the hold, owing to the deck of the ship being strained by the heavy laboring in the rough sea." This he explains as not stating the full fact, because the officer who drafted the protest did not insert therein the full and true information given him, which the captain says was contained in his record, as follows: "In the morning of the 23d of February, having wind from sou'west of exceeding force and tempestuous sea boiling up from different points, which from every part broke outside of the ship and on deck, causing the ship to labor extraordinarily. We found much water in the well. We pump constantly until the well was dry. The water came up mixed with cement." Capt. Lauro states, however, that the protest was fully explained to him in English before he subscribed and swore to the same.

A. Lester Best, one of Lloyd's agents, of Los Angeles, made a survey of the vessel upon its arrival at that port, and reported that: "On an examination of the 'tween-decks and the hold of the ship, we find that the water came in freely through the decks in a number of places, especially on the starboard side of the ship abreast of the mainmast, and also aft and round the mizzen mast." Capt. Hoben, a man of large experience as a marine surveyor, made a survey of the ship in this port, at the request of libelants, and in answer to the question, "Where did that ship show evidence of having leaked in the decks—in what portion of the ship?" says: "Oh, there was practically all over the main deck. It appeared to me that the deck wasn't in good condition when the ship left home, and that they found out the deck was leaking, and they calked it here and there, wherever they thought it was leaking the most."

It was shown by competent witnesses that the dunnage consisted of four or five inches along the keelson, extending on either side from four to ten feet, but that there was none at the bilge or in the wings of the ship. It was further shown that a proper and sufficient dunnage would have consisted of from four to six inches at the keelson, and not less than ten at the bilge or in the wings. There is further evidence tending to show that the vessel had received no perceptible strain in the parts usually affected by heavy gales and stress of weather. The cargo was found on arrival in this port to be damaged. The cement in the bottom tier of barrels was hardened by contact with the water, and that in the next tier above considerably affected by the same cause.

Williams, Wood & Linthicum, for libelants.
W. C. Bristol, for respondent.

WOLVERTON, District Judge (after stating the facts as above). It has been made a question as to what bearing the Harter act has upon the determination of this controversy. The respondent maintains that it has a distinct and persuasive bearing, while the libelants, upon the other hand, put it beside the case, and assert that, under its proper construction, it is without important application, in view of the facts as substantiated by the evidence. In this relation I will make some inquiry as to the state of the law prior to the adoption of the Harter act and the causes that led up to its enactment.

Where not qualified or restricted by an express agreement, there was an implied warranty by the shipowner attending every contract for the carriage of goods at sea that his vessel was seaworthy at the outset of the voyage, which warranty was absolute, not depending in any measure upon the observance of diligence, or upon knowledge or ignorance respecting her actual condition in any particular. Chancellor Kent expresses the rule in the following language:

"The ship must be fit and competent for the sort of cargo and the particular service in which she is engaged. If there should be a latent defect in the vessel, unknown to the owner and not discoverable upon examination, yet the better opinion is that the owner must answer for the damage caused by the defect. It is an implied warranty in the contract that the ship be sound for the voyage, and the owner, like a common carrier, is an insurer against everything but the excepted perils." 3 Kent's Com. 205.

The rule was expressly applied in England in The Glenfruin, 10 P. D. 103, and The Cargo ex Laertes, 12 P. D. 187. In each of these cases there was a breakage caused by a latent defect not discoverable by the exercise of reasonable care. In the former it was held that under the implied warranty of seaworthiness the shipowner contracts, not merely that he will do his best to make the ship reasonably fit, but that she shall really be fit for the voyage; and in the latter that the ship was not seaworthy, and that, but for a limitation on the implied warranty in the bills of lading, there would have been a breach. The Supreme Court of the United States has adopted the following language, stating the doctrine, being an utterance of Mr. Justice Gray while sitting in the Circuit Court, namely:

"In every contract for the carriage of goods by sea, unless otherwise expressly stipulated, there is a warranty on the part of the shipowner that the ship is seaworthy at the time of beginning her voyage, and not merely that he does not know her to be unseaworthy, or that he has used his best efforts to make her seaworthy. The warranty is absolute that the ship is, or shall be, in fact seaworthy at that time, and does not depend on his knowledge or ignorance, his care or negligence." The Edwin I. Morrison, 153 U. S. 199, 210, 14 Sup. Ct. 823, 825, 38 L. Ed. 688.

And Mr. Chief Justice Fuller, in the decision rendered in The Caledonia, 157 U. S. 124, 131, 15 Sup. Ct. 537, 540, 39 L. Ed. 644, where it was urged that the warranty was not absolute and did not cover latent defects not ordinarily susceptible of detection, after a citation of the case of The Edwin I. Morrison and a review of many authorities, says, with perspicuity:

"In our opinion the shipowner's undertaking is not merely that he will do and has done his best to make the ship fit, but that the ship is really fit to undergo the perils of the sea and other incidental risks to which she must be exposed in the course of the voyage; and, this being so, that undertaking is not discharged because the want of fitness is the result of latent defects."

This case was determined shortly prior to the adoption of the Harter act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946]), and is conspicuous as showing the state of the law at the time as it relates to the rule pointed out. Mr. Justice Brown has shown the purpose of the Harter act, and the causes that led to its adoption, in The Delaware, 161 U. S. 459, 471, 16 Sup. Ct. 516, 522, 40 L. Ed. 771. He says:

"It is entirely clear, however, that the whole object of the act is to modify the relations previously existing between the vessel and her cargo. This is apparent, not only from the title of the act, but from its general tenor and provisions, which are evidently designed to fix the relations between the cargo and the vessel, and to prohibit contracts restricting the liability of the vessel and owners in certain particulars connected with the construction, repair, and outfit of the vessel and the care and delivery of the cargo. The act was an outgrowth of attempts, made in recent years, to limit, as far as possible, the liability of the vessel and her owners, by inserting in bills of lad-

ing stipulations against losses arising from unseaworthiness, bad stowage, and negligence in navigation, and other forms of liability which had been held by the courts of England, if not of this country, to be valid as contracts and to be respected, even when they exempted the ship from the consequences of her own negligence. As decisions were made by the courts from time to time, holding the vessel for nonexcepted liabilities, new clauses were inserted in the bills of lading to meet these decisions, until the common-law responsibility of carriers by sea had been frittered away to such an extent that several of the leading commercial associations, both in this country and in England, had taken the subject in hand and suggested amendments to the maritime law in line with those embodied in the Harter act."

So Mr. Justice Shiras says, as to the purpose of the act:

"Plainly the main purposes of the act were to relieve the shipowner from liability for latent defects not discoverable by the utmost care and diligence, and, in event that he has exercised due diligence to make his vessel seaworthy, to exempt him and the ship from responsibility for damage or loss, resulting from faults or errors in navigation or in the management of the vessel." The Irrawaddy, 171 U. S. 187, 192, 18 Sup. Ct. 831, 833, 43 L. Ed. 130.

The first section of the act relates to and inhibits any agreement whereby the vessel, its owner, master, or agents, may be relieved of the consequences of its or their own negligence, fault, or failure in the proper loading, stowage, care, or delivery of any goods or property committed to its or their charge for carriage. Obviously, in view of the causes, as related by Mr. Justice Brown, leading up to and inducing the adoption of the act, such a provision was deemed essential to prevent the shifting of burden for the consequences of fault or failure of duty to those who were innocent thereof and had a right to expect faithful service. In other words, the statute anchors the duty where it lay under the old and long-established rule in maritime law, which is so just and equitable that fair dealing would not admit of its being obviated by stipulation or contract. Note the section relates to loading, stowage, care, and proper delivery.

The second section relates to and inhibits any agreement whereby due diligence on the part of the vessel, or its owner, master, or agents, to properly equip, man, provision, and outfit the vessel, and to make her seaworthy and capable of performing her intended voyage, may be relieved against. It also inhibits any relief by contract against the existing obligations of the master, officers, agents, or servants to carefully handle and stow the cargo, and to care for and properly deliver the same. This section has, in effect, been construed as authorizing the vessel to contract against the obligation of seaworthiness, but not against the duty of exercising due diligence to render her in all respects seaworthy and fit for the voyage contemplated, but that, without a contract for the purpose, the section does not, of its own force and operation, relieve against the obligation of providing a seaworthy vessel. In other words, by the intendment of the provision under consideration, it is still incumbent upon the owner, master, or agents to provide a seaworthy ship, unless by contract he or they shall limit their obligation to the exercise of due diligence to make her so. This latter obligation cannot, however, under any conditions, be relieved against. The Carib Prince, 170 U. S. 655, 18 Sup. Ct. 753, 42 L. Ed. 1181.

The third section provides that, if the owner shall exercise due diligence to make his vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel nor her owner shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of the vessel, nor shall either be held liable for losses arising from dangers of the sea, acts of God, public enemies, etc. In the case last cited Mr. Justice White has placed a construction on this section in language following:

"The exemption of the owners or charterers from loss resulting from 'faults or errors in navigation or in the management of the vessel,' and for certain other designated causes, in no way implies that, because the owner is thus exempted when he has been duly diligent, thereby the law has also relieved him from the duty of furnishing a seaworthy vessel. The immunity from risks of a described character, when due diligence has been used, cannot be so extended as to cause the statute to say that the owner, when he has been duly diligent, is not only exempted in accordance with the tenor of the statute from the limited and designated risks which are named therein, but is also relieved, as respects every claim of every other description, from the duty of furnishing a seaworthy ship."

To understand the point in controversy in the case, it should be stated it was found that the sole cause of the accident giving rise to the suit was a latent defect in a rivet passing through a ballast tank, from which the head had broken off, leaving a hole through which water poured in and upon the merchandise of the libelant. This defective condition of the rivet was found to have been caused by the fact that the quality of iron had been injured during the construction of the vessel by too much hammering, so that it became brittle and weak, rendering it unfit to sustain the reasonable pressure caused by filling the tank with water while at sea, and consequently causing the vessel to be unseaworthy at the time the bills of lading were issued and the goods were received on board. The contention made was that, as the owner exercised due diligence to make the vessel seaworthy, he was consequently not liable, because, under the present state of the law, the shipowner is no longer under the obligation to furnish a seaworthy ship, but only to exercise due diligence to do so. Wallace, Circuit Judge, sitting in the Court of Appeals, Second Circuit, places this interpretation upon the language of Mr. Justice White:

"The provisions of the statute known as the Harter act (section 3), by which, if the owner 'has exercised due diligence to make the said vessel in all respects seaworthy, neither the vessel, her owners, agent, or charterer, shall be held liable for losses arising from dangers of the sea' (27 Stat. 445), does not relieve the vessel, notwithstanding it is satisfactorily proved that due diligence was thus exercised by the owner." The Sandfield, 92 Fed. 663, 664, 34 C. C. A. 612, 613.

And such was the understanding of Dallas, Circuit Judge, in the case of Farr & Bailey Mfg. Co. v. International Nav. Co., 98 Fed. 636, 637, 39 C. C. A. 197, 198, wherein he says:

"This act has not modified the obligation of owners to furnish a seaworthy ship."

And such is undoubtedly the correct rendering of the decision. But, if there was any question about the understanding, it is set at rest by the declaration of Mr. Justice Brown in his dissenting opinion ren-

dered in the same cause, wherein he says (page 664 of 170 U. S., and page 757 of 18 Sup. Ct. [42 L. Ed. 1181]):

"I agree with the majority of the court that the Harter act cuts no figure in this case. While it is possible that the framers of this act may have intended to exonerate ships from the consequences of unseaworthiness, where due diligence had been used to make them seaworthy, it must be conceded that the language of the third section does not express such intent, since it only exonerates them from loss or damage resulting from faults or errors in navigation or management."

And also by the explicit enunciation of the court in the later case of The Silvia, 171 U. S. 462, 464, 19 Sup. Ct. 7, 8, 43 L. Ed. 241, that:

"The Harter act has not released the owner of a ship from the duty of making her seaworthy at the beginning of her voyage"—citing The Carib Prince.

I have been impressed that the statute (this third section) prescribes a condition which in respect of its operation has the same effect as if a stipulation were inserted in the bill of lading exempting the vessel or owner from the consequences of unseaworthiness, provided due diligence was observed in rendering the vessel seaworthy. In illustration, in the case of The Friesland (D. C.) 104 Fed. 99, 100, the bill of lading contained, among other things, the following exceptions:

"It is also mutually agreed that the carrier shall not be liable for loss or damage occasioned by * * * any latent defect in hull or machinery or appurtenances, * * * or by unseaworthiness of the ship at the time of shipment, or the commencement of or any period of the voyage, provided the owners have exercised due diligence to make the vessel seaworthy."

The court says, commenting upon the agreement, that:

"Assuming the validity of this stipulation (The Carib Prince, 170 U. S. 655, 18 Sup. Ct. 753, 42 L. Ed. 1181), the question presented is whether the evidence shows the exercise of due diligence by the respondent to make the steamer seaworthy as respects the condition of the valve chest."

And further:

"The stipulation in the bill of lading releases the shipowner from responsibility for absolute seaworthiness, provided due diligence is exercised; but it does not release him, nor does it profess to release him, in the least from his previous obligation to make such careful inspection as the circumstances require."

It was there found that a certain valve was out of order, from wear and corrosion, rendering the vessel unseaworthy, and that it was a lack of the exercise of due diligence in making her seaworthy.

In the case of The Ontario (D. C.) 106 Fed. 324, it was held that, under the facts obtaining, the shipowners were exempted from liability for injury to the cargo, under a provision of the bill of lading that they should not be accountable for the unseaworthiness of the vessel at the commencement of the voyage, provided all reasonable means had been taken to provide against such unseaworthiness.

The Phœnicia (D. C.) 90 Fed. 116, presents another case wherein the question of latent defects and due diligence in securing seaworthiness under bill of lading is considered. And the later case of International Navigation Co. v. Farr & Bailey Manufacturing Co., 181 U. S. 218, 225, 21 Sup. Ct. 591, 593, 45 L. Ed. 830, by some expressions found in the opinion by the eminent Chief Justice, seems to lend sup-

port in the same direction. There the vessel was found unseaworthy by reason of both the covers of the after port on the starboard side being left unfastened and open when she entered upon her voyage. I quote the expressions alluded to:

"We do not think that a shipowner exercises due diligence, within the meaning of the act, by merely furnishing proper structure and equipment; for the diligence required is diligence to make the ship in all respects seaworthy, and that, in our judgment, means due diligence on the part of all the owners' servants in the use of the equipment before the commencement of the voyage and until it is actually commenced."

Then, referring to the second section:

"The obligation was to use due diligence to make her seaworthy before she started on her voyage."

And, finally:

"We repeat that, even if the loss occur through fault or error in management, the exemption cannot be availed of unless the vessel was seaworthy when she sailed, or due diligence to make her so had been exercised; and it is for the owner to establish the existence of one or the other of these conditions."

The impression is also in harmony with the interpretation by an English decision of a bill of lading incorporating the Harter act (Dobell & Co. v. Steamship Rossmore Co., 2 Q. B. 408), cited in the opinion quoted from, wherein it was held that:

"To exempt the shipowner from liability it was not sufficient merely to show that he had personally exercised due diligence to make the vessel seaworthy, but that it must be shown that those persons whom he employed to act for him in this respect had exercised due diligence."

In that case, through the negligence of the ship's carpenter, who was a competent person, the ship entered upon her voyage with a port improperly calked, which rendered her unseaworthy.

Referring again to the act, the second section renders the obligation of the owner or owners to exercise due diligence to make the vessel seaworthy and capable of performing her intended voyage binding at all events and notwithstanding any stipulation to the contrary. So, with that obligation irrevocable and insusceptible of being thrown off, the third section has provided, by bringing the pertinent clauses into juxtaposition:

"If the owner of any vessel * * * shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied * * * nor shall the vessel, her owner or owners, charterers, agent or master be held liable for losses arising from dangers of the sea or other navigable waters."

And I was constrained to the view that this provision answers the stipulation that could be made under the old law, and is now proper to make, against latent defects or unseaworthiness when due diligence is exercised to detect or remedy the deficiency. But such rendering is not in accord, as it seems, with the holding of the Supreme Court in the case of The Carib Prince; and I cannot say that it was the purpose of the court by the later decision of International Navigation Co. v. Farr & Bailey Manufacturing Co. to overrule or modify such hold-

ing. I am therefore bound by the clear ruling of the court in the former case.

However, a distinction has been observed between latent defects attending the construction of a ship and those deficiencies, arising subsequently, which may be discovered and remedied through "inspection, maintenance, and repair." I refer to the case of The Alvena (D. C.) 74 Fed. 252. There the damage to a consignment of sugar was caused by means of cracks in some manner produced in a layer of cement designed to protect the iron plate of the vessel, through which sugar drainage had set up a corrosion of such iron plate and produced an aperture admitting sea water, to the injury of the cargo. Brown, District Judge, in determining the cause, has this to say:

"This act has been supposed to relieve the vessel from the consequences of all latent defects in her construction, where 'due diligence' has been used to make her perfect; and in the case of The Millie R. Bohannon (D. C.) 64 Fed. 883, I stated that understanding of the act. See, also, The Silvia, 15 C. C. A. 362, 68 Fed. 230, 232. The language of the third section of the act, however, extends only to 'damage or loss resulting from faults, or errors in navigation or in the management of the vessel' or 'from dangers of the sea'; and it is at least doubtful whether any loss arising solely from a latent defect in the ship, and not through any fault or error of navigation or management, is covered by the act. The requirement of 'due diligence,' however, is not satisfied by the mere appointment of competent persons to repair. Due diligence in repair and equipment must be exercised in fact. The Mary L. Peters (D. C.) 68 Fed. 919; The Flamborough, 69 Fed. (D. C.) 470. See The Rossmore (1895) 2 Q. B. 408. There is no question here of latent defects in the structure of the ship, but only of due diligence in inspection, maintenance, and repair; and the Harter act does not establish any new rule of diligence as to either of those subjects. The obligations of due diligence to make the ship seaworthy are in all respects the same as before the act."

Upon the authority of this case I am impelled to the application of the test of "due diligence" in discovering faulty conditions and maintaining the ship under inquiry in all respects in suitable repair for undergoing the voyage contemplated, rather than that of absolute seaworthiness. This I do because whatever injury was sustained by the cargo in the present case came about by leakage through the deck, and the defects or deficiencies conducing to the leakage were in all probability not a matter pertaining to structure, but such as were brought about by use and the deterioration of time. As observed in the opinion rendered in the case just cited, the "due diligence" required must have been exercised in fact.

A ship is seaworthy if it is reasonably fit to carry the cargo which it has undertaken to transport. Says Mr. Justice Curtis, in Dupont de Nemours & Co. v. Vance et al., 19 How. 162, 167, 15 L. Ed. 584:

"To constitute seaworthiness of the hull of a vessel in respect to cargo, the hull must be so tight, staunch, and strong as to be competent to resist all ordinary action of the sea and to prosecute and complete the voyage without damage to the cargo under deck."

It is unnecessary to seek further definition as to seaworthiness, as the authorities all concur. The Silvia, 171 U. S. 462, 19 Sup. Ct. 7, 43 L. Ed. 241; The Sandfield, supra; The Orient (C. C.) 16 Fed. 916.

Where there is a warranty of seaworthiness under the charter party, and the proof shows damage to the cargo, the burden is cast upon the

ship to establish the fact of seaworthiness, or to show due diligence in ascertaining whether or not the ship was in fact seaworthy before entering upon her voyage. It is said in The Edwin I. Morrison, supra:

"Perils of the sea were excepted by the charter party; but the burden of the proof was on the respondents to show that the vessel was in good condition and suitable for the voyage at its inception, and the exception did not exonerate them from liability for loss or damage from one of those perils to which their negligence, or that of their servants, contributed."

After further consideration, the court makes this observation, which applies very nearly to the facts developed in the present controversy, to wit:

"The obligation rested on the owners to make such inspection as would ascertain that the caps and plates were secure. Their warranty that the vessel was seaworthy in fact 'did not depend on their knowledge or ignorance, their care or negligence.' The burden was upon them to show seaworthiness, and, if they did not do so, they failed to sustain that burden, even though owners are in the habit of not using the precautions which would demonstrate the fact. In relying upon external appearances in place of known tests, respondents took the risk of their inability to satisfactorily prove the safety of the cap and plate if loss occurred through their displacement."

This authority is often alluded to with approval in subsequent decisions. See The Phœnicia, supra; In re Meyer (D. C.) 74 Fed. 881; The Nord-Deutscher Lloyd v. President, etc., 110 Fed. 420, 49 C. C. A. 1.

"Perils of the seas" are defined and construed as follows:

"The words 'perils of the seas' embrace all kinds of marine casualties, such as shipwreck, foundering, stranding, etc., and every species of damage done to the ship or goods at sea by the violent and immediate action of the winds and waves, not comprehended in the ordinary wear and tear of the voyage, or directly referable to the acts and negligence of the assured as its proximate cause." Tuckerman v. Stephens, etc., Transp. Co., 32 N. J. Law, 320.

Judge Story gives this definition:

"The phrase 'danger of the seas,' whether understood in its most limited sense as importing only a loss by the natural accidents peculiar to that element, or whether understood in its more extended sense as including inevitable accidents upon that element, must still, in either case, be clearly understood to include only such losses as are of an extraordinary nature, or arise from some irresistible force, or some overwhelming power, which cannot be guarded against by the ordinary exertions of human skill and prudence." The Schooner Reeside, 2 Sumn. 567, Fed. Cas. No. 11,657.

With these observations as to the rules of law applicable in cases of this nature, I will now determine the cause as it seems to me the facts warrant. It must be first premised that the ship Ninfa was 20 years old. Shortly after leaving port, namely, about February 7th, she encountered heavy seas, with more or less wind, not amounting to a gale, which continued until the 23d, when water was discovered in her hold. On the latter date the log book shows that she was sailing "with the lower topsail only, furious wind and chopped sea breaking all over the ship, shaking very much." She continued through the stress until the evening at 8 o'clock, when the discovery was made that she was taking water. It was only upon the 23d, and not prior thereto, that the sails were reefed so as to leave the lower topsail only for propelling the ship. The day previous the log book at 1 a. m. reads:

"On starboard tack, with all the lower sails except the main, fresh wind and heavy sea."

At 1 p. m.:

"Wind still freshening. We cannot hold the foresail any longer, so we furl it."

The day previous to that:

"With the lower sails, sea from starboard, fresh wind, and very heavy sea; the ship suffering very much for the heavy rolling."

On the 20th:

"More steady wind, running with lower sails and main topgallant."

And on the 19th:

"With all the sails except the small ones; little wind."

And so on back, with some change of sail, but not of material moment.

The stress of weather thus encountered on the 23d continued for some five days before the hold was cleared of the water by the vigorous use of the pumps. Immediately after this experience the captain calked nearly the whole deck, under the forecastle, and at numerous places about the ship, running midship and aft. It appears that thereafter the vessel met with heavy seas and weather, when the deck was flooded constantly, almost, if not quite, as bad as that experienced in the north Atlantic just described; but water was not at any time discovered in the ship after it was relieved thereof from the occurrence of the 23d. It is in evidence that the captain considered it necessary, after leaving Los Angeles, to calk nearly the entire deck, and this to enable the ship to pass survey. Even after the ship arrived in Portland, it was required to replace some of the planking amidship before she was allowed to depart again upon her voyage. The evidence is strong that the water came in in many places through the deck, and, while it is not apparent that much of the cargo near the top was injured, yet it is shown, by the evidences of where the water ran through amidship, that it undoubtedly came in in that way, and that the cause of the damage is attributable to the water pouring through her decks. Manifestly a large amount of water was taken into the hold, because the first tier of barrels of cement was entirely solidified, showing that it had been wet through thoroughly; and a portion of the second tier was injured. The captain is himself of the opinion that the water came through the deck, and there is no testimony that it came in otherwise. It will be understood that the leakage from under the forecastle did not enter the hold, but the water was taken into the fore peak, where no cargo was stored, and bailed out by means of buckets, so that there can be but one conclusion; that is, that the water entered the hold through the main deck, and in great quantities.

The question resolves itself, therefore, into whether due diligence was exercised by the owner of the vessel in rendering her staunch, tight, and in every way fit and suitable to undergo the voyage upon which she was about to enter. This is a burden resting with the owner, as it is a matter conceded that the cargo sustained damages through

the admission of large quantities of water into the ship's hold. The fact appears that the owner made but slight investigation to determine whether or not the deck of the ship was well-calked and safe prior to her leaving port. The only testimony in the record in this regard is that of Capt. Lauro Lauro, who states that he made very little effort to discover the condition of the deck. He applied no tests whatever to ascertain whether it was staunch and secure. He relates that another captain—Maresca—who is a nephew of one of the owners of the ship, made some tests; but they were of cursory character. He simply secured a hammer, and with it tapped around in different places on the deck and upon the inside of the boat, and with a small knife examined the calking. And this was the full extent of any tests applied by the owner or any one in his behalf to determine the sufficiency of the deck to withstand the voyage. It is further in evidence that, after thorough examination of the ship on its arrival in port, no strains or openings were apparent in and about those parts or sections of the ship where it is usual to find them after having passed through heavy or unusual seas. There was but small breakage about the ship, and nothing upon deck was loosened or swept away. These things go a long way in refutation of the testimony of Capt. Lauro touching the severity of the sea and the weather through which he passed.

Considering the age of the ship, as one witness states it, the "original deck should have been all out of her." But, notwithstanding, there has been no attempt to establish whether she had been redecked, or what repairs had been made so as to render her decks substantial and tight. Assuredly due diligence in ascertaining the condition of her decks required that more attention be paid thereto than the evidence indicates there was. But, even if we admit all that has been testified to upon this subject, when the facts just alluded to are taken into consideration, it does not seem to me that the damage was caused through what the law denominates "perils of the sea." The ship was evidently not staunch and tight, as a ship ought to be contemplating a voyage from London around the Horn to this port. It is always to be expected that severe weather may be encountered in the north Atlantic, after leaving London, on the course taken, and, of course, the ship should have anticipated the usual perils incident to such a voyage. The ship Ninfa should have been so repaired as to have enabled her to withstand the kind of weather that she actually encountered. I am convinced, at least, that there was lack of due diligence on the part of her officers and servants in determining whether or not she was seaworthy before she left port. As was said in The Edwin I. Morrison:

"In relying upon external appearances in place of known tests, respondents took the risk of their inability to satisfactorily prove the safety of the cap and plate, if loss occurred through their displacement."

And so it is here. Having relied upon their warranty that the ship was seaworthy, and finding that she was unable to withstand the stress of weather, the burden, as has been previously stated, was cast upon the owners to show that they had exercised due diligence before she left port to determine whether or not she was in reality seaworthy as it relates to her deck, which proved insufficient. In this aspect of the case, the respondent has not shown due diligence, or any diligence of

merit to overcome the prima facie case made by the libelants. The Friesland, International Mfg. Co. v. Farr & Bailey Mfg. Co., and The Alvena, supra. I place but slight value on the surveys of the Italian consul and Lloyd's surveyors, made before the ship left London, as their duties do not call for that rigid inspection and the application of known tests for the discovery of fault required of the owner for the determination of whether his vessel is seaworthy.

As it relates to the dunnage of the cargo, there can scarcely be a question that there was negligence on that account. In all probability, had the cargo been properly dunnaged, the damage would not have been nearly so great; possibly there would have been none at all. So I hold, therefore, that the vessel is liable for the damage sustained by the cargo.

I allow libelants damages in amounts as follows:

On 1,147 barrels K. B. S. cement, at $2.18 per barrel	$2,500 46
" 298 " loss by repacking, at $2.50 per barrel	745 00
" 538 " reconditioned, decrease in value, at 23½ cents	126 43
" 7 " loss by breakage, at $2.50	17 50
Cost of inspection, 1,147 barrels	22 94
" " repacking, 872 " at 33 cents (labor)	287 76
" " sacks in repacking 538 barrels damaged, 2,152 sacks, at 10 cents	215 20
Wharfage and storage on 1,147 barrels, 1 month	57 35
On 238 barrels crown cement abandoned, at $2.08	495 04
" 46 " entire loss in reconditioning, at $2.40	110 40
" 232 " reconditioned, decrease in value, at 25 cents	58 00
Cost of inspection, 238 barrels at 2 cents	4 76
" " repacking, 278 " at 33 cents (labor)	91 74
" " 928 sacks used in repacking, at 10 cents	92 80
Wharfage and storage on 238 barrels, at 5 cents	11 90
On 75 barrels bleaching powder	150 00
Extra stevedoring	20 07
Aggregating	$5,007 35

—and interest thereon, at the rate of 6 per cent. per annum, from the 27th day of November, 1903.

Judgment will therefore be entered accordingly.

In re HOPPER-MORGAN CO.

(District Court, N. D. New York. October 26, 1907.)

1. BILLS AND NOTES—TRANSFER OF NEGOTIABLE NOTE—DEFENSES AGAINST INDORSEE.

The holder of an accommodation note, with authority to use it as collateral only, has no right to sell it outright, nor can a person dealing with him, with knowledge of the limited use to which the note may be put, obtain title thereto by an outright purchase.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 817.]

2. SAME—BONA FIDE PURCHASER.

Bad faith on the part of the purchaser of a negotiable note may be shown by a willful disregard of and refusal to learn the facts when avail-

able and at hand, which would have shown an infirmity in or want of title to the note.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, §§ 821–824.]

3. SAME.

A purchaser of a negotiable note from one to whom it was transferred by indorsement, with knowledge that the indorser was not the owner of the note and was authorized to use it as collateral only, is not entitled to protection as a bona fide holder.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 829.]

4. BANKRUPTCY—PROVABLE DEBTS—INDORSEE OF ACCOMMODATION NOTE OF CORPORATION.

The treasurer of a bankrupt corporation, prior to the bankruptcy, executed an accommodation note in its name without authority and without consideration. Claimant, which was a commercial corporation not engaged in the banking business, outside of its usual course of business, purchased such note from an indorsee, having knowledge at the time that the person from whom the latter obtained it was not the owner of the note and was authorized only to use it as collateral. *Held*, that claimant was not a bona fide holder of the note, and that, its invalidity in its inception being shown, it was not entitled to prove the same against the estate of the maker in bankruptcy without proving affirmatively that its immediate indorser was a bona fide holder for value.

In Bankruptcy. Proceeding to review the decision of referee in bankruptcy disallowing the claim of the Robertson Paper Company on a promissory note of $2,500, dated July 25, 1905. No payment had been made on said note, and the claim is for the face thereof, with interest.

See 154 Fed. 249.

Fish, Richardson, Herrick & Neave, for claimant.
Brown, Carlisle & McCartin, for trustee.

RAY, District Judge. The bankrupt, the Hopper-Morgan Company, is a manufacturing corporation organized and existing under the laws of the state of New York. The claimant, Robertson Paper Company, is a corporation organized and existing under the laws of the state of Vermont.

Prior to July 25, 1905, the treasurer of the bankrupt company, one Roger Morgan, without authority from the company, issued and delivered to one Trautwine a number of notes purporting to be the notes of the company, upon the agreement that they were to be used as collateral only and for the accommodation of the Emerson Manufacturing Company, a corporation, and would be taken up and returned before due so as not to become a charge upon the Hopper-Morgan Company. Trautwine was to pay 3 per cent. for this use of such notes. After these notes had passed into the hands of Trautwine, and at about the time same were to become due, Morgan, without authority of the company, made the note in question, and delivered the same to one Morton, upon the agreement that it should be used for the same purpose only for which one of the original notes, and which it was to replace, had been issued. Morton paid nothing for this renewal note. It does not appear who held the note of which the note in question was

a renewal, but it is conceded in the agreed state of facts that the note in question "with others, had been fraudulently diverted from the purpose for which it was issued by Trautwine, Morton, and their agents." In short, Trautwine and Morton and their agents did not use the note in question in place of the original note, but disposed of it in some way in violation of the agreement made when it was issued. The note in question, with its indorsements, reads as follows:

"$2,500. Watertown, N. Y., July 25, 1905.

"Four months after date we promise to pay to
Seal. the order of ourselves twenty-five hundred
dollars at 395 Broadway, New York City.

"Value received.

"Due ..... Hopper-Morgan Company,
"Roger Morgan, Treasurer."

Indorsements.

"Hopper-Morgan Co., by Roger Morgan, Treasurer."
"Frederick M. Prescott."

One Frederick H. Babbitt was the treasurer of the claimant, Robertson Paper Company, and had general charge of its business. Some four or five years prior to the taking of this note in question by the Robertson Paper Company, that company had sold paper to the Hopper-Morgan Company in car load lots, but had not sold it any paper during the year preceding the purchase of same. In July, 1905, when Babbitt was purchasing an automobile from one F. M. Prescott in the city of Boston, Prescott inquired of Babbitt whether the paper of the Hopper-Morgan Company was good, and stated to Babbitt that he could sell an automobile to a man named Mugler if he (Prescott) would take a note of the Hopper-Morgan Company of Watertown, N. Y., in part payment. Babbitt told Prescott that he knew the Hopper-Morgan Company and considered its paper good. Subsequently, Harry Prescott, a brother and associate in business of F. M. Prescott, telephoned Babbitt inquiring if the Robertson Paper Company would be willing to take a note of the Hopper-Morgan Company signed by Roger Morgan as treasurer at the regular discount of 6 per cent. Babbitt telephoned the secretary of the Hopper-Morgan Company in relation to the matter, and was informed that Roger Morgan, the treasurer, had charge of all the financial affairs of the Hopper-Morgan Company, and suggested that Babbitt communicate with Morgan. Thereupon, on July 27, 1905, Babbitt, as general manager of the Robertson Paper Company, wrote Morgan, as treasurer of the Hopper-Morgan Company, as follows:

"We are offered in the way of trade notes to the value of $2,500, which we understand were given by the Hopper-Morgan Company, signed by Roger Morgan as treasurer, to H. H. Mugler of Boston, or if we are correctly informed in regard to this, said H. H. Mugler is now owner of said notes. Inasmuch as we have had very pleasant relations with your company in the past, we venture to ask you if these notes are all right. If the transaction is all straight so far as Mr. Mugler is concerned, and if you will kindly advise me as to when these notes reach maturity. I feel that knowing us as you do in a business way, I am not asking for any information that it will not be perfectly acceptable for you to give. My only idea in this matter is that I am perfectly willing to take this commercial paper in the way of trade if there is nothing wrong about the transaction. Thanking you in advance for

the courtesy of a reply, for which we inclose stamped envelope herewith, we remain."

In reply, Morgan wrote Babbitt, as treasurer, as follows:

"Received your letter just as I was starting to take train for Springfield. In regard to notes which are in possession of H. H. Mugler, would say that I sent them to a man in whom I have every confidence for another purpose. He called me on telephone stating that he had this opportunity to make arrangement with Mr. Mugler, whom he states is a reliable person, for the use of notes. Mr. Mugler does not own them, but is free to use them as collateral, and I don't think you are running any risk in dealing with Mr. Mugler."

A day or two after the receipt of this letter, Babbitt notified F. M. Prescott that, if he still wished to negotiate the note, the Robertson Paper Company would take it. Shortly thereafter Prescott went to Mr. Babbitt at Plymouth, Mass., and there indorsed the note in question, and delivered it to Babbitt, and received therefor the check of Robertson Paper Company for $2,450, and which check was signed by Babbitt, as treasurer, and was duly paid on presentation at the Robertson Paper Company's bank.

It is conceded in the statement of facts, and agreed therein, that Babbitt never saw the note until Prescott delivered it to him, as above stated, and that Babbitt "had no notice of any defect or irregularity in the issue of title of the note, unless the letter from Mr. Morgan of July 28th, and above quoted from, constituted notice." Babbitt testified that the letter from Morgan, above quoted, aroused no suspicion in his mind of anything wrong; also, that he showed this letter to Prescott at the time he received the note from him; also, that when he delivered the check to Prescott in exchange for the note he had no knowledge of a defect of any kind in the title of the note or of any irregularity in its issue; and that he first learned of the irregular issue of the note about 60 days after the Robertson Paper Company became the owner of it. It does not expressly appear how, when, from whom, or upon what consideration Prescott received the note. It does not expressly appear that Prescott took same in good faith and for value.

It may be inferred that Prescott received the note from Mugler, above mentioned, in exchange and in part payment for an automobile. It is not stated as a fact that Prescott did sell an automobile to Mugler, or that Mugler delivered the note to Prescott, but I think this was the fair inference for Babbitt to draw, for Prescott had told Babbitt that he could sell Mugler an automobile if he would take a note of the Hopper-Morgan Company in part payment. It follows that when Babbitt took the note from Prescott he had some reason to believe that it was the same note which Prescott had suggested he could obtain in exchange for an automobile from Mugler. When Harry Prescott inquired of Babbitt if his company would be willing to take a Hopper-Morgan note, Babbitt wrote Morgan for information, and was informed by him that the note had been issued and delivered to some person for a different purpose, and that Mugler did not own the note and could only use it as collateral. It may be that Babbitt was justified in believing that Mugler had transferred the note to Prescott as collateral. If so, Babbitt knew that Prescott held the note as collateral merely, and that it was issued for a special purpose, and that its

use was limited to that of collateral only. He therefore knew that he was purchasing a note issued to be used as collateral of a person who held it for use as collateral merely. When he purchased the note, he therefore purchased the collateral without purchasing the debt it was held to secure.

When Babbitt purchased the note, he showed Morgan's letter to Prescott, of whom he purchased the note, but it does not appear that he inquired of Prescott, or received any information, as to how Prescott came by the note, other than it may be inferred that he assumed Prescott had received it from Mugler in exchange for an automobile. If so, then Babbitt had knowledge, when he took the note, that Prescott had received it in payment for an automobile from a person who did not own it and whose right to use it was limited to its use as collateral. It follows that Babbitt took the note from a purchaser from Mugler with full knowledge that Mugler had no title and could confer none, and with full knowledge that the note was to be used as collateral merely.

Under the agreed state of facts, I do not see how it is possible to hold that the claimant, Robertson Paper Company, is a holder of this note in good faith and for value. The claimant did not take this paper in the regular course of business. It was a seller of paper, and not engaged in the banking business. The note was not presented for discount in the regular course of business. It was purchased in a peculiar way, under peculiar circumstances, and with knowledge that the note had been issued for some particular purpose, not disclosed, but that Mugler, who had disposed of it to Prescott, from whom the claimant obtained it, was not the owner and had the right to use it as collateral merely.. When a promissory note is out as collateral, and its use is limited in that way, it may pass from hand to hand as collateral, and it may be redeemed by the person parting with it for that purpose; but, when it is sold outright, the person given the right to use it as collateral parts with all control over it and can no longer redeem and return it to the maker or person issuing it before maturity. In this case, the note in question was to take the place of, and was issued under the same conditions as, the original notes, which were to be used as collateral merely for the accommodation of the Emerson Manufacturing Company, and taken up and returned to Morgan, who made them without authority before maturity and before they should become a charge upon the Hopper-Morgan Company. I think the referee was right in holding that the Robertson Paper Company was not a purchaser and holder of this note in good faith; that the claimant had such knowledge and information when it purchased the note that it is charged, and must be charged, with bad faith in taking the note.

The fact that Babbitt says the letter aroused no suspicion of anything wrong in his mind, and that when he took the note he had no knowledge of a defect of any kind in the title of the note, cannot change the facts. He knew, or had good reason to believe, that Prescott received the note from Mugler, and that Mugler had no right to sell it, and that the note could only be used as collateral, and that it was originally issued for a purpose other than to be used in part payment for property of any kind. Babbitt said in his letter of July 27th

that the note was offered them in the way of trade, for property it is presumed, and was informed in reply, July 28th, that they had been sent to a man for another purpose, and that, while Mugler did not own them, he was at liberty to use them as collateral. It is quite true that the information in such a case as this must be such as will arouse more than a suspicion; but absolute knowledge of all the facts is not required.

Again, I do not think that a person who holds an accommodation note, with the right to use it as collateral merely, has the right to sell it outright, or that a person dealing with him with knowledge of the limited use to which the note could be put has the right to purchase same outright. If the purchaser of the note has actual knowledge of the infirmity in the note, or want of title in the one from whom he takes it, that, of course, ends the case. If he has no such actual knowledge, then bad faith or a willful disregard of known facts showing the infirmity or want of title or a willful evasion of knowledge of the facts will be sufficient to defeat recovery. Facts sufficient to create a suspicion of the truth are not sufficient to show knowledge or bad faith, nor is mere gross negligence in making inquiry, or in failing to make inquiry, alone, sufficient. There must be either actual knowledge or bad faith. Bad faith may be shown by a willful disregard of and refusal to learn the facts when available and at hand. Joyce, Defenses to Commercial Paper, § 475, p. 596; Goodman v. Simonds, 20 How. 343, 15 L. Ed. 934; Lytle v. Lansing, 147 U. S. 59, 71, 13 Sup. Ct. 254, 37 L. Ed. 78; Swift v. Smith, 102 U. S. 442–444, 26 L. Ed. 193; Brooklyn City & N. R. Co. v. National Bank of the Republic, 102 U. S. 14–38, 41, 26 L. Ed. 61; Shaw v. Nat. Bank of St. Louis, 101 U. S. 557, 564, 25 L. Ed. 892; Cromwell v. County of Sac, 94 U. S. 362, 24 L. Ed. 195; Commissioners of Marion County v. Clark, 94 U. S. 278, 286, 24 L. Ed. 59; Hotchkiss v. National Bank, 21 Wall. 354, 359, 22 L. Ed. 645.

A person about to take a negotiable promissory note cannot willfully shut his eyes to information or means of information or knowledge which he knows are at hand. He cannot willfully evade knowledge which he knows, or has reasonable cause to think, would show a defect in the note or want of title. He must act in good faith, not in bad faith. Circumstances may be such as to impose an active duty of inquiry and investigation, and, if such duty is not performed, it may be conclusive evidence of bad faith; that is, the law may charge the party with knowledge which was at hand, available, and to which he willfully shut his eyes; that is, he might have known the truth, ought to have known the truth, had good reason to suspect the truth, and did, but willfully refused to become fully acquainted with it. Hazlehurst v. The Lulu, 10 Wall. 192, 201, 19 L. Ed. 906; Doe v. Northwestern Coal & Transportation Co. (C. C.) 78 Fed. 62, 68; Atlas National Bank v. Holm, 71 Fed. 489, 491, 19 C. C. A. 94, affirmed in Holm v. Atlas National Bank, 84 Fed. 119, 28 C. C. A. 297.

In Hallock v. Young, 72 N. H. 416, 419, 420, 57 Atl. 236, 238, the court said:

"It was said, in the leading case on the subject in this country, that 'every one must conduct himself honestly in respect to the antecedent parties when

he takes negotiable paper, in order to acquire a title which will shield him against prior equities. While he is not obliged to make inquiries, he must not willfully shut his eyes to the means of knowledge which he knows are at hand, * * * for the reason that such conduct, whether equivalent to notice or not, would be plenary evidence of bad faith.' "

In Raphael v. The Bank of England, 17 Common Bench, cited by the claimant, Willes, J., cites with approval and quotes Parke, J., in May v. Chapman, 16 M. & W. 355, viz.:

"Notice and knowledge mean not merely express notice, but knowledge or the means of knowledge to which the party willfully shuts his eyes—a suspicion in the mind of a party—and the means of knowledge in his power willfully disregarded."

If the party in good faith makes inquiry pursuant to his suspicion, when it is his duty so to do, and is even grossly negligent in so doing, if his failure be negligence only, however gross, he cannot be charged with knowledge or bad faith, but if he willfully fails to gain the information when it is at hand, and when it is his duty so to do, then he shows bad faith, for it is a willful evasion of knowledge for a purpose and which he ought to obtain.

In this case, it is conceded that the note in question was void and nonenforceable against Hopper-Morgan Company except in the hands of a bona fide holder in good faith and for value. It was issued for a special purpose, and its use limited. It was issued without consideration and without authority from the company. When the Robertson Paper Company presented its claim with the note attached, and showed that it took same before due, as the note is fair on its face, the presumption attached that it was executed and delivered to Prescott; he being first indorser after Hopper-Morgan Company, the payee, for value, and that he received it in good faith. The presumption was also that the Robertson Paper Company was a holder of the note in good faith and for value.

We will assume that it became incumbent upon the trustee in bankruptcy to show that the note was illegal in its inception, issued without consideration or authority, and that the Robertson Paper Company was not a holder for value, or, if so, was not a holder in good faith. Starting with this assumption, what actual or express information did the Robertson Paper Company have as to the infirmity of the note? It is conceded that the company paid value. The claimant company had express information, in accordance with the fact, that the note was delivered to a man not named for a purpose other than to be used in the trade and for the payment of property purchased. The note has been offered in the way of trade, wrote Babbitt, and he adds, in substance, that he understands that it was delivered originally to Mugler, or, at least, that Mugler is the owner of the note. Prescott had also informed Babbitt that he could get the note of one Mugler in exchange for an automobile. The conceded facts show that Babbitt knew the note was in the hands of Mugler, and that he was proposing to transfer it to Prescott in part payment for an automobile. Babbitt is informed by the treasurer of the bankrupt, the person who made the note, that Mugler does not own the note, but is at liberty to use it as collateral. The claimant therefore had actual knowledge that the note was not

issued to be sold; that the holder at that time had no right to use it except as collateral, therefore that Prescott had no right to take it in part payment for property sold; that if he did so take it, with knowledge of the facts, he would not obtain title or the right to sell the same to any person. Babbitt had some reason to think that Prescott had purchased the note in good faith and for value. In face of the facts which he did know and which have just been recited, it was his duty to inquire, and he could easily have learned, the exact purpose for which the note was issued, and whether or not it was issued by authority and for a consideration; in short, whether or not it had a legal inception; also, how Prescott came by it. The claimant company made no further inquiry. Nor was it necessary, in my judgment, except as to Prescott's ownership, for the reason that the information already given to Babbitt informed him that the note could only be used as collateral by Mugler, and that Mugler had parted with it outright not being the owner, and that Prescott, who offered the note to the claimant, had in fact obtained no title. Prescott saw the letter from Morgan to Babbitt before parting with the note to the claimant company. So far as appears, he gave no information to Babbitt as to how he came by the note, and Babbitt made no inquiry, assuming, we will presume, that Prescott had taken it in part payment for an automobile.

It may be regarded as settled law in the state of New York that if Prescott took the note from Mugler in good faith, and in part payment for an automobile, he could give good title to the claimant company, for, if such were the facts, then Prescott could have enforced the note against the maker. If so, he could transfer the note, and all the rights to enforce same which he had, to a third person, even if that third person had obtained knowledge of the illegal inception of the note.

Do the conceded facts in this case show by fair inference that Prescott had become the owner of the note when he parted with it to Babbitt? Possession by Prescott was evidence of ownership. There is no direct evidence that Prescott had any notice whatever of any infirmity in this note when he took it from Mugler, if he did take it from him, or, if he did not, when he took it from some other person. In short, there is no direct affirmative evidence that Prescott was not a holder in good faith and for value. This note was not obtained from the Hopper-Morgan Company by duress, but it was, in my judgment, obtained by fraud. The company never authorized the issue and delivery of the note for any purpose. Morgan, its treasurer, issued it without authority, in violation of his duty, and in so doing committed a fraud upon the company itself, which in fact did not know the notes were made or issued. It was not made or issued in the business of the company. For this reason I am of the opinion that, when the trustee had shown the illegal inception of the note and the circumstances under which it was issued and the fraudulent diversion, the burden was thrown on the claimant company to show that it took the note for value and in good faith. It has failed to show that it took the note in good faith. In fact, bad faith is shown. Failing in this, the burden was on the claimant company to show that it took the note from one who held the same in good faith and for value. The claimant company has not shown affirmatively that Prescott took the note from Mugler or some other

person in good faith and for value. The evidence fails to show affirmatively and directly that Prescott was a holder of the note either without consideration or in bad faith, but I think the burden was upon the claimant company to show affirmatively that Prescott purchased the note for value and in good faith from some one; that the statement, in the statement of facts, that Prescott informed Babbitt that he could sell an automobile to Mugler in exchange for the note of Hopper-Morgan Company, and the further fact that subsequently Prescott had possession of the note, is insufficient to show that Prescott purchased the note from Mugler or any other person in good faith and for value, in part payment for an automobile, or otherwise.

It is not necessary to go extensively into the authorities, as they are collated in the case In re Hopper Morgan Co. (D. C.) 154 Fed. at pages 261 and 257. In First National Bank v. Green, 43 N. Y. 298, Rapallo, J., said:

"A plaintiff, suing upon a negotiable note or bill purchased before maturity, is presumed, in the first instance, to be a bona fide holder. But when the maker has shown that the note was obtained from him under duress, or that he was defrauded of it, the plaintiff will then be required to show under what circumstances and for what value he became the holder. 2 Greenl. Ev. § 172; McClintick v. Cummins, 2 McLean, 98, Fed. Cas. No. 8,698; Munroe v. Cooper, 5 Pick. (Mass.) 412; Holme v. Karsper, 5 Bin. (Pa.) 469; Vallett v. Parker, 6 Wend. (N. Y.) 615; 1 Camp. 100; 2 Camp. 574; Case v. Mechanics' Banking Ass'n, 4 N. Y. 166. The reason for this rule, given in the later English cases, is that: 'Where there is fraud, the presumption is that he who is guilty will part with the note for the purpose of enabling some third party to recover upon it, and such presumption operates against the holder, and it devolves upon him to show that he gave value for it.' Bailey v. Bidwell, 13 Mees. & W. 73, approved in Smith v. Braine, 3 Eng. L. & Eq. 379, and in Harvey v. Towers, 4 Eng. L. & Eq. 531."

This case has been repeatedly recited and approved. See Vosburgh v. Diefendorf, 119 N. Y. 365, 23 N. E. 801, 16 Am. St. Rep. 836.

The fraud is imputed to and affected Prescott, unless it is shown that he took in good faith. On the whole case, and in every view of it, I am satisfied that the referee arrived at the correct conclusion and was right in rejecting the claim presented by the Robertson Paper Company upon this note.

The order rejecting the claim is therefore affirmed.

In re HOPPER-MORGAN CO.

(District Court, N. D. New York. October 28, 1907.)

BANKRUPTCY—PROVABLE CLAIMS—FRAUDULENT NOTES OF CORPORATION.

A holder of notes of a bankrupt corporation fraudulently executed by its treasurer without authority or consideration, and which had at once been diverted from the purpose for which they were delivered, *held* to have failed to sustain the burden of proof resting upon him to show that he was a bona fide purchaser for value to entitle him to their allowance as debts of the estate in bankruptcy.

Review of decision of referee in bankruptcy disallowing the claim of W. Clarke Smith upon two notes purporting to be made by the

Hopper-Morgan Company by Roger Morgan, treasurer, one for $5,000 and the other for $2,500.

See 154 Fed. 249.

E. M. Schwarzenberg, for claimant.
Brown, Carlisle & McCartin, for trustee.

RAY, District Judge. The claimant, W. Clarke Smith, presented his claim against the bankrupt estate upon two notes, one dated April 4, 1905, payable four months from date, for $5,000, and the other, dated June 7, 1905, payable four months from date, for $2,500. The Hopper-Morgan Company is a corporation of the state of New York, and prior to its bankruptcy was engaged in the business of manufacturing, etc. The notes in question, with many others of the same character, were made and issued by Roger Morgan, the treasurer of the company, without authority of the company, and not in its business, for the accommodation of an alleged corporation, the Emerson Manufacturing Company. They were placed in the hands of one Trautwine by Morgan under an agreement between them that they should be used as collateral security only, and taken up and returned to Morgan before maturity, so as not to become a charge on the company. The $5,000 note was dated April 4, 1905, and was one of a number of notes aggregating $50,000 issued by Morgan under the agreement and for the purpose stated. March 29, 1905, Morgan had issued another batch of notes, without authority, for the same purpose and under a like agreement. The $2,500 note was issued by Morgan under an agreement that it was to be used for the purpose of renewing the note of like amount of one or the other of the issues above mentioned. Both of these notes were fraudulently diverted from the purpose for which issued in the very beginning, and found their way into the market. These notes came into the hands of the claimant at a time when a large number of the notes of this company of these issues were being hawked about Boston and possibly elsewhere.

As these notes were fraudulently issued without the knowledge of the company, and not in its business, and without consideration, and were at once fraudulently diverted from the purpose for which issued by the treasurer, and as these facts fully appeared, the burden of proof was thrown upon Smith, the claimant, to show when and how he became the owner of the notes, and to show that he became the holder thereof in good faith and for value, or that he took same from some person who had acquired them in good faith and for value. This burden was upon the claimant, and he undertook to discharge this burden of proof. The claimant says, in substance, that he purchased the note of $2,500 on or about June 13, 1905, of one Frank L. Wheeler for $2,000. He says Wheeler owed him $500 and that he canceled this indebtedness, and gave Wheeler his own promissory notes for $500, $500 and $250, respectively, and that he paid the balance by check on the State Street Trust Company of Boston, where he had an account. He claims that he subsequently paid these promissory notes. The $5,000 note he says he purchased of Wheeler July 13, 1905, and that he gave in payment therefor an automobile which was called worth $3,-

000, and his two promissory notes for $500 and $700, respectively. He says that he subsequently paid these notes.

Considerable evidence was taken before the referee, and he had an opportunity to see the witnesses and judge of their credibility. Taking Smith's evidence all together, and assuming it to be true, he only gave $3,200 for the $5,000 note. Smith had knowledge that quite a large number of these Hopper-Morgan notes were out, and that they were being traded off and hawked about at a very large discount. On reading the entire evidence, including Smith's own testimony, I cannot bring myself to believe that, in fact, Smith ever owned either of the notes in question. I think the party from whom Smith obtained the notes had knowledge that there was something wrong about them, that they were not regularly issued, and that Smith was used and permitted himself to be used in the transactions relating thereto for the purpose of making the claim that he was a purchaser for value and a holder in good faith. To go through with the evidence in detail and recite the facts and circumstances leading to this conclusion would be wearisome and unprofitable. This is my irresistible conclusion. The claimant has not shown himself a purchaser and holder of these notes in good faith. He was associated with and aiding those who were hawking about and dickering in these notes.

Persons who purchase commercial paper in the regular course of business for value, and without knowledge of any infirmity in the paper, are entitled to protection. To my mind in this case there are too many badges of bad faith for a court to hold that the claimant was a holder in good faith, or for value actually parted with. Smith's dealing in automobiles and in these notes, and giving his own notes to Wheeler and their close association in this and other transactions under all the evidence, so far discredited the testimony of the claimant that in my judgment the referee was fully justified in holding that the claimant was not a holder of the notes in question in good faith. The large discounts made on these notes, even if Smith did take them in the way of trade for some purpose, are indications of bad faith.

I hold with the referee that the claimant did not discharge the burden of proof cast upon him; and the order disallowing the claim is therefore affirmed.

CRITTENDEN v. COBB et al.

(Circuit Court, M. D. Pennsylvania. September 2, 1907.)

No. 55, May Term, 1906.

1. EVIDENCE—PAROL EVIDENCE—CONTRACTS—CONSTRUCTION.
   Where a written contract uses a term which is not self-explanatory as applied to the subject-matter, parol evidence is admissible to show its meaning, including what was said when the contract was made.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2104.]

2. CONTRACTS—CONSTRUCTION—SALES—"UNDIVIDED" BONDS—PLEDGE.
   Plaintiff and defendants, being interested with others in the construction of a railroad, which was to be paid for in stock and bonds of the

company at so much a mile, the interest of each being measured by the amount of money respectively contributed therefor, after such stock and bonds had been received, and the interest of each therein had been definitely determined and agreed upon, and a part of the same distributed, entered into an agreement in writing by which the plaintiff sold and the defendants agreed to buy at 75 cents on the dollar all the bonds which the plaintiff owned, "divided or undivided." At the time this agreement was executed certain of the said bonds, which had been received on joint account of all the parties interested, had been put into the hands of one of the defendants, in trust to secure outstanding obligations incurred in the construction of the railroad, which obligations, prior to the bringing of the suit, but not until after the execution of the agreement in question, the said defendant had individually paid off. It being practically undisputed that by the expression "undivided bonds," used in the agreement, the bonds so held in trust were intended to be referred to, the plaintiff was entitled to recover from the defendants the price of his share of them, subject to a deduction and reimbursement of the defendants for a proportionate part of the joint indebtedness for which they stood pledged, without any prior settlement between the parties, or the payment by him of his part of such indebtedness, or the segregation in his favor of a definite number of said bonds; nor did it matter that upon a foreclosure sale of the railroad but 41 cents on the dollar was received for said bonds, which did not pay the amount for which they were pledged.

2. SAME—PROHIBITED CONTRACT—DIRECTOR OF RAILROAD INTERESTED IN CONSTRUCTION—ACTION FOR PRICE OF BONDS GROWING OUT OF SUCH ILLEGAL CONTRACT—SALE OF BONDS NOT IN ESSE.

The plaintiff, being also interested with the defendants in the construction of an extension of the said railroad, which was to be similarly paid for, was further entitled to recover the price of the bonds which were coming to him as his share of the profits arising therefrom, which could be determined by the jury in this action, without a previous settlement between the parties, by charging up the costs of construction against the amount to be received therefor; nor was this affected by the fact that the plaintiff, as a director of the road, was prohibited by law from being interested in its construction, the action being for the price of the bonds into which the transaction had ripened, and not for the profits arising out of it, even though the number of bonds which he was to receive was to be measured thereby; nor was it of any significance that at the time of entering into the agreement of sale the bonds in question had not yet been delivered, it being testified by the plaintiff and others that they were mentioned at the time as intended to be included under the head of "undivided bonds," and the parties having thus treated them as in posse, if not in esse.

4. PARTNERSHIP—ACTION BY PARTNER TO RECOVER INTEREST IN ASSETS—FORM.

Where a partnership has merely to do with a single completed transaction, an action at law may be maintained by one partner against another to recover his share of the profits of the transaction where an accounting is not necessary to ascertain the amount.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, § 170.]

5. NEW TRIAL—GROUNDS—PLEADING—VARIANCE—FAILURE TO OBJECT.

A variance not objected to during the trial cannot be taken advantage of on a motion for a new trial when of such a character that it did not mislead and could have been obviated by an amendment of the pleadings at the time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, § 38.]

At Law. On rule for new trial.

Thomas H. Murray, W. I. Lewis, and A. F. Jones, for the rule.
W. K. Sweatland and A. S. Heck, opposed.

ARCHBALD, District Judge. By the agreement in suit, the plaintiff in terms contracted to sell, and the defendants to buy, the stock and bonds which he owned of the New York & Pennsylvania Railroad. The stock is specifically designated in the writing, but the bonds are not, it being impossible to do so, as it is stated, for the reason that some of them are "undivided," it being the declared intention, however, that the plaintiff should sell and the defendants should buy all that the plaintiff owned, whether divided or undivided, being restricted only to those which he then owned, the plaintiff not having the right to acquire and deliver others. As to what was meant by undivided bonds, the agreement not being self-explanatory, parol evidence was properly admitted to identify the subject-matter, including what was said at the time the agreement was executed. Lowry v. Hawaii, 206 U. S. 206, 27 Sup. Ct. 622, 51 L. Ed. 1026. This is not making a new contract for the parties, as charged, but simply interpreting and rendering intelligible the one that they have made. A division of stock and bonds, upon a settlement between the parties to the agreement and others, is there spoken of, based on the amount of money advanced in the common enterprise out of which the bonds in suit in large measure grew; the undivided portion of the stock and of the bonds being declared to be the same. But this is as far as it goes. And it leaves the contract as so entered into to be made certain by extraneous evidence by which alone the intent of the parties, and that to which it is to apply, can be ascertained. The rule operates in favor of one side as much as the other, being open to the defendants, as buyers, if the plaintiff were the recalcitrant party, in order to enforce the sale, and being equally available in consequence in his behalf as seller, at this time.

If this be the correct view, it is conceded that the verdict of the jury has settled a part at least of the controversy. It was testified, for instance, that of the $16,000 of bonds which were found due and turned over to the plaintiff, as the result of the settlement of September 8, 1898, referred to in the agreement, $5,000 was given by him to William Cobb to take to his brother Theodore as additional security for certain lumber contracts upon which the plaintiff was obligated, and for which Theodore already had $6,000 of bonds, but did not think them enough. The receipt of the $6,000 is not disputed, and, the labor contracts having been taken care of by the plaintiff, these bonds were settled for by the defendants shortly before the trial. But that $5,000 additional bonds were ever given to William for his brother is denied, and was one of the questions submitted to the jury. They believed the plaintiff and his witnesses, however, and found in his favor with regard to them, and, these bonds unquestionably coming within the designation of divided bonds, that is the end of the matter.

But growing out of the same transaction by which the plaintiff got $16,000 of bonds, of which the $5,000 was a part, there were $60,000 others, which by the agreement of all concerned were put into the hands of Theodore Cobb in trust to secure the payment of some $30,000 of indebtedness which had been incurred on joint account in the building of the railroad, for which stock and bonds, at the rate of $10,000 of each per mile, had been taken in payment. That the plaintiff had an interest

in these bonds, proportioned to the amount which he put into the venture as fixed by the settlement of September 8, 1898, subject only to the payment of the indebtedness for which they were pledged, there can be no question. It is also practically undisputed that, under the head of undivided bonds, whatever was coming to the plaintiff out of this particular lot was intended to be included and be made the subject of purchase by the defendants. Mr. Orcutt, a prominent attorney of Hornellsville, N. Y., now general counsel for the Erie Railroad, who drew the contract, and was a witness for the defendants at the trial, so testified, as did every one else who was present at the time, except the defendants, even William Cobb admitting it qualifiedly, in the face of which the general denial which is made on their behalf is of little consequence. The fact is that except the Millport Extension bonds, to be presently referred to, there was nothing besides to which the term "undivided bonds" could apply, and the jury, upon this branch of the case, could not well do otherwise than to find, as they did, in the plaintiff's favor.

It is said, however, that the bonds were pledged to secure the $30,000 of indebtedness mentioned, all of them for every part of it, and that the plaintiff had no separable or distinct interest to dispose of, until the whole of it had been taken care of. This, to a certain extent, no doubt, is true; and if the joint obligations, to secure which the bonds were pledged, were still outstanding, the right of the plaintiff to recover for them might be involved in some difficulty, the ultimate amount realized for them upon a foreclosure sale of the road having been but 41 cents on the dollar. But whatever might be said, if the situation remained that way, the fact is that in January, 1900, some four or five months after the agreement in suit was made, and long before action brought, Theodore Cobb, into whose hands the bonds had been intrusted, paid off the notes at bank, for which they stood, after which the indebtedness was due to him alone, each party involved, the plaintiff and the defendants with the rest, being severally responsible for his part of it. And the bonds being at the same time held by Mr. Cobb for the purpose of reimbursement, when he and his brother William agreed to buy the plaintiff's undivided share of them, at the rate of 75 cents on the dollar, owing the plaintiff on this account, as he and his brother so did, by virtue of the purchase, and the plaintiff on the other hand owing him a proportionate part of the joint indebtedness, the one offset the other, the defendants having in their own hands the means of payment, releasing the rest of his share and making the defendants liable to him therefor. And this answers the objection that a settlement had first to be made between the parties, the bonds having to be segregated in that way, according to the argument, before there was anything for the plaintiff to sell, or to recover for here. Nothing of the kind is to be deduced from the agreement; the parties apparently not being impressed with the necessity for it. But, without regard to that, there can be no question that, subject to the reimbursement of Theodore Cobb for a proportionate part of the $30,000 indebtedness, the plaintiff was entitled to a definite number of bonds, about $8,800 of them, according to the ratio established by the settlement of

September 8, 1898, and this, such as it was, the defendants could buy and the plaintiff sell, as they respectively did, leaving the mutual indebtedness so resulting to adjust itself in the way suggested, and rendering the balance recoverable here.

The remaining controversy was over the bonds received for the building of the Millport Extension, some $54,800. The contract with the company for building this road was taken by Theodore Cobb, as the other had been by J. B. Rumsey, but the plaintiff claimed an interest by virtue of an arrangement, proposed, as he testified, by the defendants, by which he, they, Rumsey, McConnell, and Richardson, were to participate, each to put up $5,000 to cover the cost which was estimated at $30,000. McConnell and Richardson admittedly never went in; and Rumsey dropped out soon after the work started. But the others went on, according to the plaintiff, he superintending the construction and doing practically all that was done by any one in that direction, the defendants furnishing the money, including his share, which he had arranged to raise, but was excused by them from doing. All this, of course, was denied, but the jury have accepted it, and it is therefore to be taken as true. The road was something over five miles long, and cost from $26,500 to $29,000, the railroad company at the contract rate paying $58,400 for it, both in stock and bonds. These bonds, as testified by the plaintiff and his witnesses, were also mentioned at the time of the agreement, and were intended to be covered by it. The jury so believed, and have allowed for them, but without interest. Strongly supporting this finding, it is to be observed that not only, like the $60,000, do they come within the description of undivided bonds, but that, if the latter were the only ones of the kind intended, there would be no such difficulty in specifying them, as is spoken of in the agreement, as Mr. Orcutt who drew it himself admits. There might have been, as to the divided ones, which were considerably scattered, but that is not the way it is put; the difficulty being distinctly attributed to the undivided ones, and there it must rest.

It is objected that Crittenden was a director in the road, as were the others, the defendants with the rest, and was therefore prohibited by both Constitution and statute from having any interest in its construction. Const. Pa. art. 17, § 6, Act May 15, 1874 (P. L. 178). But we have passed the point where that would be material. Suit is not brought on the asserted arrangement between the parties with regard to building the road to recover a share of the profits, nor yet for the bonds representing this, but for the price of the bonds, which simply accrued to the plaintiff out of it, which the defendants agreed to buy. It is the same as if, the transaction having been completed and the stock and bonds coming to the plaintiff having been turned over to him, the defendants had offered him a certain sum for them, which he had agreed to take. It would be no answer in that case, to an action by the plaintiff on the sale, that the bonds came from a tainted source, or that he became entitled to them in an unlawful way. Nor is this changed by the fact that at the time of the bargain, as well as of suit brought, the bonds were in the defendants' hands. It is true that, in consequence of this, the prohibited arrangement has to be resorted to, to establish and determine the plaintiff's interest, and that except for

it he would have none. But, as already stated, the thing trafficked in and now sought to be enforced is not the gains coming to him out of it, but the bonds into which it had ripened, or rather the price of them, which the defendants agreed to pay. Suppose, to put it another way, the defendants had said, "You have so many bonds due you from the building of the Millport Extension, for which we will give you so much"; and the plaintiff had accepted the offer—can there be any question but that the defendants would be bound? And yet, except, perhaps, in definiteness of expression, there is nothing different from that here.

It is said, however, that Crittenden was a partner with the Cobbs, if anything, and that the bonds to which he was entitled could only be determined in consequence by a settlement of the partnership affairs which it is not competent to make here. But, assuming that technically there was that relation, it has long been held that, where a partnership has merely to do with a single, completed, transaction, assumpsit by one partner against the other may be maintained. Brubaker v. Robinson, 3 Pen. & W. (Pa.) 295; Galbreath v. Moore, 2 Watts (Pa.) 86; Hamilton v. Hamilton's Ex'rs, 18 Pa. 20, 55 Am. Dec. 585; Kutz v. Dreibelbis, 126 Pa. 335, 17 Atl. 609; Welch v. Miller, 210 Pa. 204, 59 Atl. 1065. The railroad in the present instance was long since built, and the stock and bonds which paid for it were received by the defendants and appropriated to their own use. Over against them, they were entitled, of course, to charge up the cost of the road, and, while this is variously estimated at from $26,500 to $29,000, made up of various items, they are all on one side, with nothing to do but to add them up and strike a balance. This represents the profits of the transaction, for a proportionate share of which the defendants were accountable to the plaintiff, determining the number of bonds to which he was thereupon entitled, which by the agreement in suit they in turn undertook to buy. And this could just as well be settled by a jury, as to send the plaintiff elsewhere to a bill. It is to be observed, moreover, as already pointed out, that the plaintiff is not suing for his share in the partnership business, if such it was, but for the price of the bonds coming to him out of it, which he had necessarily to pursue by action; and that, if the defendants agreed to buy these bonds as testified, they are liable for them here whatever may be the complication in getting at the amount. It would be absurd to hold that, in order to arrive at what was due to the plaintiff on the purchase, he would be compelled to the circuity of first bringing a bill in equity to settle the partnership affairs, after which alone an action would lie.

But it is further said that the bonds for the Millport Extension had not been issued on August 30, 1899, the date of the agreement, having been held up by the executive committee, who refused their approval until certain unfinished matters of construction had been fixed up. But $40,000 of them, at least, were authorized by resolution of the company in January previous; and, while there was no issue or delivery of them at that time, the basis was laid for it to that extent. The unfinished matters, moreover, were remedied the same summer, and the approval of the committee was given September 1, 1899, two days

after the agreement, which removed the bar. That they were not actually issued, and that Theodore Cobb did not get them, until two months afterward, is not material. The parties could well treat them, under the circumstances, as in posse, if not in esse, and bargain with regard to them as they did, without its being open to question here. That the bonds were not in existence no doubt affords an argument against the intention of including them, but if, as the jury have found, the purpose was otherwise, it is idle to argue that there was anything in the way of the parties doing so.

It is finally said that the plaintiff in his statement has in terms declared for bonds, which prior to August 30, 1899, were "the individual property of the plaintiff," and which "were then and there in the possession and control of defendants," and that this, whatever the scope of the agreement, excludes all bonds of which it was not, in fact, true. This point was not made at the trial when it might have been met by amendment if material, and so might be passed over, or an amendment allowed to cure the matter now. But the averment to which reference is thus made is a mere matter of description, by which the defendants could not be and were not misled. Taking the whole statement together, the plaintiff unmistakably declares upon the agreement for all the bonds covered by it, which in so many words extends to all that he then owned. There may have been a certain inaccuracy in speaking of these particular bonds as in the possession of the defendants, but not, as in their control, which from the standpoint of the plaintiff they practically were. But, if there was a variance in the evidence, objection should have been distinctly taken to it at the time, which the obscure reference to the pleadings in one or two of the defendants' points cannot be held to do.

There being no occasion therefore for disturbing the verdict, for any of the reasons assigned, the rule for a new trial is discharged.

MATHIEU v. GOLDBERG.

(Circuit Court, S. D. New York. August 22, 1907.)

1. BANKRUPTCY—EFFECT OF DISCHARGE—LIABILITIES DISCHARGED.

The liability of a factor to his principal for the proceeds of goods consigned to and sold by him is one dischargeable in bankruptcy, and it is immaterial that he was to receive for his services a share of the profits of the sales, instead of the usual percentage commission.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 799.]

2. SAME—DEBTS CREATED BY FRAUD OR MISAPPROPRIATION AS AGENT.

In the absence of an agreement to the contrary, a principal has the right at any time to retake possession of goods consigned to a factor on payment of advances and liens; and where a factor, without legal excuse, refused to return goods on demand of the consignor, his liability therefor is a debt created by his fraud, embezzlement, or misappropriation while acting in a fiduciary capacity, within the meaning of Bankr. Act 1898, c. 541, § 17a (4), 30 Stat. 551 [U. S. Comp. St. 1901, p. 3428], form which he

is not released by a discharge in bankruptcy; and this rule applies, although by agreement he was to be paid a part of the profits for his services, instead of a commission.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 795.]

3. FACTORS—CONVERSION BY FACTOR—REFUSAL TO RETURN GOODS.

A factor was not legally justified in refusing to return goods consigned to him, on demand of the consignor, because of advances made by him thereon which had not been repaid, where the consignor offered to pay such advances on receipt of an itemized statement of the same, which the factor did not furnish.

In Equity.

Gould & Wilkie (Learned Hand, of counsel), for complainant.

Tison & Goddard (Everett P. Wheeler, of counsel), for defendant.

HOLT, District Judge. This is a suit in equity, brought by the complainant, a French manufacturer and merchant doing business at Lyons, France, to obtain an accounting from the defendant, who acted as the complainant's factor or selling agent at New York. The defendant, since the suit was begun, has been adjudicated a bankrupt. He does not contest complainant's right to an account. The substantial point actually litigated is whether the defendant's liability to the complainant is one dischargeable in bankruptcy.

The legal relation between Mathieu and Goldberg was that of principal and factor. I do not think that the fact that Goldberg was to be paid for his services half the profits, instead of the usual commission, changed or affected that relation. Goldberg's liability, therefore, for the proceeds of all the silk goods and of all the gold thread which he had sold before receipt of Mathieu's letter of July 18, 1904, demanding the return of all such goods remaining unsold, was dischargeable in bankruptcy. Crawford v. Burke, 195 U. S. 176, 25 Sup. Ct. 9, 49 L. Ed. 147. But I think that his liability for the goods unsold at the time of his receipt of such demand, which must have been not later than August 1, 1904, or for their proceeds, if since sold, is, on the evidence, a debt which, within the meaning of section 17 of the bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 551 [U. S. Comp. St. 1901, p. 3428]), was created by his fraud, embezzlement, or misappropriation while acting in a fiduciary capacity. His grounds of refusal to return the goods demanded, in my opinion, were not only legally untenable, but were interposed in bad faith, as a ground for misappropriating the goods, or, at least, for coercing Mathieu into acquiescence in unjust demands.

His claims that the goods should have been charged to him at the price stated in the consular invoices, and not at the cost price, that Mathieu had no right to sell to other Americans, and that he was therefore entitled to half the profits of goods sold to other Americans, and that the agreement was to continue for six years, are entirely unsupported by any evidence, are directly contradicted by the terms of the contract stated in Mathieu's letter of August 8, 1903, by the affirmative evidence of Mathieu and Bergmann, and, on the question of the cost price, by the course of dealing between the parties during many months before the question was raised.

The claim that Mathieu is liable to Goldberg for damages resulting from neglect to comply with orders is unsustained by evidence.

The defense that Goldberg had a right to detain the goods until his advances were paid seems to me, under the circumstances, inapplicable. Goldberg had, of course, a right to reimbursement for his advances; but Mathieu, in his letter of September 6th, demanded an itemized statement of them, and offered to settle for them at once if it was furnished. Goldberg never gave any statement of his disbursements, except his claim for the lump sum of $1,583.60 in his letter of August 24, 1904. It was Goldberg's duty to furnish an itemized statement in response to Mathieu's demand, and he could not, while he neglected to furnish it, justify a detention of the goods on the ground that his advances must first be paid. Moreover, he did not, at the time, put his refusal to deliver the goods on that ground.

The claim that, because Goldberg's compensation was to be half the profits, he had an absolute right to detain the goods until he could sell them, seems to me untenable. On that theory he could detain them forever. Assuming that he was entitled to a reasonable time in which to sell them, he had had about a year; and his letters contain repeated assertions to the effect that they could not be sold at all in New York. But the general rule I understand to be that a principal, in the absence of an agreement, express or implied, to the contrary, has a right at any time to retake possession of unsold goods consigned to a factor, on payment of all advances and liens (19 Cyc. p. 117, and cases cited); and I do not think that the fact that Goldberg, under the arrangement, was to be paid for his services by a part of the profits, instead of by the usual percentage, makes the rule inapplicable.

Upon the whole case I am satisfied that all of Goldberg's grounds of refusal to deliver the goods unsold were sham excuses, fraudulently made to cover the deliberate and intentional detention of the goods without right. A careful reading of Goldberg's letters, the peculiar obscurity of which makes it difficult at first to understand them, creates an unfavorable impression. His repeated intimations that, if his demands were not acceded to, there was danger of a sale of the goods by the revenue authorities, are very suggestive.

I have signed the decree submitted by the complainant, with certain modifications.

In re WOLF.

(District Court, S. D. New York. June 28, 1907.)

No. 9,632.

BANKRUPTCY—DISCHARGE—DESTRUCTION OF BOOKS OF ACCOUNT.

Under Bankr. Act July 1, 1898, c. 541, § 14b (2), 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428], as amended by Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 [U. S. Comp. St. Supp. 1907, p. 1026], which makes it a ground for refusal of a discharge if the bankrupt has, "with intent to conceal his financial condition, destroyed, concealed or failed to keep books of account or records from which such condition might be ascertained," a bankrupt is not entitled to a discharge where he admittedly destroyed his

books of account with intent to conceal the record of his business, although he testifies that it was done to destroy evidence of his violation of a statute of the state and to defeat a criminal prosecution therefor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 739.]

In Bankruptcy. On application for discharge.

M. A. Lesser, for bankrupt.

L. M. Berkeley, for objecting creditor.

HOLT, District Judge. This is a motion to confirm a referee's report recommending a discharge. The discharge was objected to on the ground that the bankrupt had destroyed his books of account with intent to conceal his financial condition. The bankrupt admits that he destroyed his books of account, and testifies, in substance, that he did so because he had been engaged in the business of making loans upon usurious interest, that the district attorney had instituted criminal prosecutions under the usury laws against others in the same business, and that he had destroyed his books in order to prevent the district attorney obtaining through them evidence upon which to prosecute him, and not for the purpose of concealing his condition from his creditors. The referee has reported that his purpose was to thwart a prosecution for crime, and not to conceal his financial condition, and recommends his discharge.

The language of the act (Bankr. Act July 1, 1898, § 14b[2], as amended in 1903, 32 Stat. 797, c. 487 [U. S. Comp. St. Supp. 1907, p. 1026]) is that the court shall discharge the bankrupt unless he has, "with intent to conceal his financial condition, destroyed, concealed or failed to keep books of account or records from which such condition might be ascertained." Perhaps the first impression which the language "with intent to conceal his financial condition" gives is an intent to conceal such condition from his creditors, but the act does not say so. In this case the bankrupt admits that he destroyed his books with intent to conceal the records of his business, which, if exhibited, would show that he had been doing business in violation of a criminal statute; and I think that he therefore destroyed his books with intent to conceal his financial condition. It would be a dangerous precedent to establish in the bankrupt law that a man who willfully destroyed his books with the intent thereby to conceal evidence of a crime, and defeat a criminal prosecution, could thereby defeat objections to his discharge. Such an act is a willful destruction of the evidence which the bankrupt act contemplates should be preserved for the benefit of creditors. It is an act which, in fact, conceals his financial condition from his creditors. I think that such an act, if actually done with the intent of concealing a crime, and not of injuring the creditors, comes within the language of the act. If such a defense should be held good, it might be falsely set up.

In my opinion, upon the whole, the specification of objection to the discharge was proved, and the discharge should be refused.

DUNLOP v. MERCER et al.

In re DUNLOP.

(Circuit Court of Appeals, Eighth Circuit. October 31, 1907.)

Nos. 86, 2,711.

1. SALES—"CONDITIONAL SALE"—DEFINITION—CONTRACT IN QUESTION.
A conditional sale is one in which the vesting of the title in the purchaser is subject to a condition precedent, or in which its revesting in the seller is subject to a failure of the buyer to comply with a condition subsequent.
An agreement that the purchaser will buy and pay for merchandise, that he may sell it in the regular course of his business, but that the proceeds shall be applied as a credit or as collateral security to the debt of the vendee at the option of the vendor, and that the latter will sell and deliver the goods on condition that the title to them shall remain in him until the notes and accounts of the vendee are paid in cash, is a valid contract of conditional sale.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 1321.
For other definitions, see Words and Phrases, vol. 2, pp. 1408–1410.]

2. SAME—OPTION OF PURCHASER TO PAY IS NOT AN INDISPENSABLE ELEMENT.
An option in the purchaser to pay, or to refuse to pay, for the property, is not essential to a conditional sale.

3. SAME—PERMISSION TO VENDEE TO SELL AND TO APPLY PROCEEDS TO HIS DEBT DOES NOT RENDER CONTRACT VOIDABLE.
A stipulation that the purchaser may sell the merchandise in the regular course of business, and that he shall apply the proceeds to his debt as a credit or as collateral security, at the option of the vendor, does not render such a contract fraudulent or voidable against creditors. It does not make it a chattel mortgage with a secret lien.

4. SAME—BANKRUPTCY—FAILURE TO RECORD.
The failure to record a contract of conditional sale renders it voidable by attachment creditors, judgment creditors, and bona fide purchasers only, in Minnesota; and, where there were no such creditors and purchasers when the petition in bankruptcy was filed, such failure did not render it voidable by the trustee, because he had no better title, in the absence of fraud, than the vendee and his creditors had at the filing of the petition.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 1370.]

5. BANKRUPTCY—SECTION 70a (5) IS INAPPLICABLE TO PROPERTY HELD BY THE VENDEE UNDER SUCH CONTRACT.
Section 70a (5) of the bankruptcy law (Act July 1, 1898, c. 541, 30 Stat. 566 [U. S. Comp. St. 1901, p. 3451]), is inapplicable to property held by a bankrupt purchaser under such a contract. The "property which prior to the filing of the petition he could by any means have transferred" is property which he could have transferred lawfully on the same terms that he transfers it by law to the trustee. It does not include property of a third party which he was authorized to transfer only on condition that he sold it for value, or on condition that he sold it and held the proceeds for its owner.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 199.]

6. SALES—CONDITIONAL SALE—FOREIGN CORPORATION STATUTE—IF CONTRACT VOID, TITLE TO UNSOLD PROPERTY STILL IN VENDOR.
If a contract of conditional sale is void because violative of a statute which permits a foreign corporation to do business in the state only upon certain conditions, and prescribes penalties other than the invalidity of contracts for doing business without a compliance with the conditions,

it is void in every part, and the property in the possession of the vendee under it for which he has not paid remains the property of the vendor.

7. SAME—CONTRACT OF ABSOLUTE SALE—SAME.

If a contract of absolute sale is void for the same reasons, and the property sold remains in the possession of the vendee, who has not paid for it, an implied contract to return it arises, and the property or its value may be restored to the vendor. Pullman's Palace Car Company v. Central Transportation Co., 171 U. S. 138, 151, 18 Sup. Ct. 808, 43 L. Ed. 108.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 1420.]

8. CORPORATIONS—FOREIGN CORPORATION STATUTE OF MINNESOTA—CONTRACTS OF FOREIGN CORPORATIONS DOING BUSINESS WITHOUT COMPLIANCE ARE NOT VOID.

The statute of Minnesota provides that before a foreign corporation of the character of the vendor here shall be authorized to do business in the state, or to acquire or hold property, or to maintain suits in its courts, it shall have a public place of business in the state, shall appoint a resident agent to accept service of process, and, perhaps, shall pay a license fee, and that, if such a corporation does business in the state and fails to comply with these conditions, it shall be subject to a fine of $1,000, and shall not be permitted to maintain any suit or action in the courts of the state. *Held*:

Contracts innocent or beneficial in themselves, made by foreign corporations while doing business in the state without complying with this statute, were not intended to be and were not made void thereby. The purpose and effect of the statute were to require foreign corporations doing business in the state to subject themselves to the jurisdiction of its courts and to a compliance with the other prescribed conditions, and in case of their failure to do so to refuse to permit them to use those courts to maintain their suits and to impose upon them a penalty of $1,000 for each offense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 2540.]

9. CONTRACTS—ILLEGAL CONTRACTS NOT ALWAYS VOID—EXCEPTION WHEN THAT PENALTY IS NOT PRESCRIBED AND IS MANIFESTLY NOT INTENDED.

The general rule that illegal contracts are void is not of universal application.

It is qualified by the exception that where a contract is not evil in itself, and its invalidity is not denounced as a penalty for its violation by the express terms of the statute, or by rational implication from the language of the statute which it violates, and that statute prescribes other specific penalties, it is not the province of the courts to do so, and they will not thus affix an additional penalty not intended by the lawmaking power.

The true rule is that the court should carefully consider in each case the entire statute which prohibits an act under a penalty, its object, the evil it was enacted to remedy, the effect of holding contracts in violation of it to be void, for the purpose of ascertaining whether or not the Legislature intended to make agreements violative of it void, and if from all these considerations it is manifest that the Legislature had no such intention, such contracts should be sustained and enforced; otherwise, they should be adjudged void.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 681–699:]

10. COURTS—FEDERAL COURTS—MINNESOTA STATUTE NOT INTENDED TO, AND IT DOES NOT, AFFECT JURISDICTION OF FEDERAL COURTS.

The provision of the Minnesota statute which prohibits unqualified foreign corporations doing business in that state from maintaining suits in its courts, was not intended to, and it does not, restrict or affect the power or duty of the national courts to determine controversies in bankruptcy proceedings or other controversies of which the Constitution and the acts of Congress gave them jurisdiction.

The power of the federal courts was not granted by, and it may not be revoked, impaired, or restricted by, any law or act of a state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Courts, §§ 795, 796.]

(Syllabus by the Court.)

No. 2,711: Appeal from the District Court of the United States for the District of Minnesota.

No. 86, Original: Petition to Revise Proceedings of the District Court of the United States for the District of Minnesota, in Bankruptcy.

Geo. S. Grimes (Victor J. Welch and Frank R. Hubachek, on the brief), for appellant.

Nathan H. Chase (M. H. Boutelle, on the brief), for appellees.

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

SANBORN, Circuit Judge. Two corporations of Arizona, which had been doing business in Minnesota, were adjudged bankrupts in the United States District Court in that state. The trustee of one of them, of the Waterbury-Zimmer Implement Company, filed a petition in the court below in the matter of the bankruptcy of the other, the Western Implement Company, for an order that certain vehicles, machinery, and other merchandise, which were in the possession of the Western Company when it was adjudged a bankrupt and thence came to the possession of the trustees of its estate, be delivered to the trustee of the property of the Zimmer Company, because, as he alleged, this property had been sold and delivered by the Zimmer Company to the Western Company under an agreement, dated February 5, 1906, to the effect that the title and ownership thereof should remain in the vendor until the goods were paid for in cash, and no payment on account of them had been made. The trustees of the Western Company defended on the grounds that the contract was not made until September 8, 1906, after most of the property had been delivered; that it was made with the intent to defraud the creditors of the Western Company; that it was withheld from record with like intent; that the Zimmer Company was not qualified to do business in Minnesota until June 30, 1906, after the larger part of the property had been delivered; and that the contract on its face evidenced an absolute sale of the property to the Western Company. Evidence was introduced, and the court overruled all the defenses except the last, but sustained that, and denied the prayer of the petition. This ruling was assigned as error, and the case is presented by petition to revise and by appeal. As it involves the consideration of the evidence of the relation of the parties and of their acts in making and performing the contract, it will be considered on the appeal, and the petition to revise is dismissed.

While the evidence is not conclusive, and there is proof of suspicious circumstances surrounding the execution and performance of the contract, the conclusion of the court below that the agreement was made on or about February 5, 1906, the day of its date, that it was not made nor withheld from record with any actual intent or purpose to defraud the creditors of the Western Company, and that the vehicles and mer-

chandise in question were delivered by the Zimmer Company to the Western Company in the performance of the contract, and in that way came to the possession of the trustees of its estate, is supported by the weight of the testimony and is affirmed. Counsel insist, however, that if there was no actual intent to defraud, yet the contract upon its face evidenced an absolute sale, so that the title to the property delivered under it vested in the Western Company before it was paid for. The terms of the agreement pertinent to this question are that the Zimmer Company, in selling the goods to the Western Company, does so with the distinct understanding that the title to them shall remain in the Zimmer Company until all the accounts and notes of the Western Company are paid in cash, when the former will give a bill of sale of the remaining goods to the Western Company, and that the Western Company shall have the privilege of selling the articles shipped in the regular course of business, with the understanding that their proceeds shall remain the property of the Zimmer Company, to be held as collateral or credited on the notes or accounts of the Western Company at the option of the Zimmer Company. Does this contract evidence an absolute or a conditional sale?

A conditional sale is one in which the vesting of the title in the purchaser is subject to a condition precedent, or in which its revesting in the seller is subject to a failure of the buyer to comply with a condition subsequent. In re Columbus Buggy Company, 74 C. C. A. 611, 613, 143 Fed. 859, 861. The provision of this contract that the title to the goods delivered under it should remain in the vendor until the notes and accounts of the vendee had been paid in cash, and that when they were so paid the vendor would execute a bill of sale of the goods remaining in the vendor's possession, discloses the intention of the parties to impose, and effectually imposes, the precedent condition of the payment of the notes and accounts of the vendee upon the vesting of the title to the property in the Western Company. There is no other rational explanation of its presence in the agreement. It could have been inserted for no other purpose, it can have no other effect, and it cannot be annulled or disregarded by construction in the absence of conflicting terms in the contract. No such terms are perceived. The provision that the vendor might sell the merchandise in the regular course of its business, with the understanding that the proceeds should remain its property and be held as collateral to or credited upon the notes and accounts of the vendee, is not inconsistent, but consonant, with the retention of title to the unsold goods in the vendor. The option of the latter, there secured, was not to recover or to transfer the title to the goods, but to credit the proceeds or to hold them as collateral security. It had no right under the contract to require a restoration of the goods if the purchaser paid the agreed prices for them. The purchaser had no option to pay for, or to return, the property, but was bound to the vendor by an enforceable obligation to pay the agreed prices for the goods it ordered. The agreement has every element of a conditional sale—a vendor, a vendee, agreed prices, an obligation of the vendee to pay them, an obligation of the vendor that, upon condition that the vendee pays the agreed prices, but not otherwise, the title of the vendor shall vest in the pur-

chaser. Thus it evidenced a sale in which the vesting of the title in the vendee was made subject to a condition precedent, and it became a contract of conditional sale. Bierce v. Hutchings, 205 U. S. 340, 348, 27 Sup. Ct. 524, 51 L. Ed. 828.

The arguments and decisions in Andrews v. Bank, 20 Colo. 313, 36 Pac. 902, 46 Am. St. Rep. 291, and Herryford v. Davis, 102 U. S. 235, 26 L. Ed. 160, to the effect that contracts, in some respects similar to that in hand, evidence absolute sales, chattel mortgages, and secret liens, because the purchasers are absolutely bound to pay the agreed prices and have no option to pay, or to refuse to pay, and because the only right of the sellers was to take and sell the property to pay the debt, have been considered, but they are not persuasive. It is not true in the case under consideration that the only right of the vendor to the property remaining in the hands of the vendee was the right to take and sell it, to pay the latter's debt. It had the right, upon the default of the purchaser, to take and keep it as its own, without selling it or applying the proceeds of it to pay the vendor's debt, and the legal effect of that taking, under the established rule of property in Minnesota would be to annul the obligation to pay the agreed price of the property taken. Aultman v. Olson, 43 Minn. 409, 45 N. W. 852; Harvester Works v. Hally, 27 Minn. 495, 8 N. W. 597; Keystone Mfg. Co. v. Casselius, 74 Minn. 115, 76 N. W. 1028; Alden v. Dyer, 92 Minn. 134, 99 N. W. 784. Nor is it true that an option in the purchaser to pay, or to refuse to pay, for goods it buys, is an indispensable element of a conditional sale. An agreement that the title shall vest in the purchaser, and that the sale shall become effective only on condition that the purchaser pays the notes he has given for, or performs an absolute promise he has made to pay the purchase price, is as valid and as conclusively evidences a conditional sale as a stipulation that the title shall pass on condition that he agrees to pay the purchase price or that he pays the purchase price he has not agreed to pay. Bierce v. Hutchings, 205 U. S. 340, 348, 27 Sup. Ct. 524, 51 L. Ed. 828; Harkness v. Russell, 118 U. S. 663, 667, 679, 680, 7 Sup. Ct. 51, 30 L. Ed. 285; In re Great Western Manufacturing Co., 81 C. C. A. 341, 152 Fed. 123, 125.

The next contention of counsel for the trustees of the Western Company is that the agreement was fraudulent and voidable against the trustees, because it permitted the conditional vendor to sell the merchandise in the regular course of business, but provided that the proceeds should be credited upon its notes and accounts, or held as collateral security therefor, and because it was not filed or recorded in due time in any public office; and they cite authorities from New York, Illinois, and Oregon, which sustain that position. In re Garcewich (N. Y.) 115 Fed. 87, 53 C. C. A. 510; In re Carpenter (D. C. N. Y.) 125 Fed. 831; In re Galt (D. C. Ill.) 120 Fed. 443; In re Rodgers (Ill.) 125 Fed. 169, 177, 60 C. C. A. 567; In re Rasmussen's Estate (D. C. Or.) 136 Fed. 704, 706. But the general rule and the weight of authority in this country, the established rule of property in Minnesota, and the established rule in this court are otherwise. Trustees of bankrupt estates have no better title, in the absence of fraud, than the bankrupt and his creditors had at the time of the fil-

ing of the petition in bankruptcy. Hewit v. Berlin Machine Works, 194 U. S. 296, 297, 303, 24 Sup. Ct. 690, 48 L. Ed. 986; Thompson v. Fairbanks, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577; York Mfg. Co. v. Cassell, 201 U. S. 344, 352, 26 Sup. Ct. 481, 50 L. Ed. 782; In re Great Western Mfg. Co., 81 C. C. A. 341, 152 Fed. 123, 125. Agreements of conditional sale, whereby the title is retained in the vendor until the agreed purchase price is paid, which are not filed or recorded in any public office, are voidable by bona fide purchasers, attaching creditors, and judgment creditors only, under the statutes of Minnesota (Rev. Laws Minn. 1905, § 3476; Clark v. B. B. Richards Lbr. Co., 68 Minn. 282, 288, 71 N. W. 389; Bradley Clark & Co. v. Benson, 93 Minn. 91, 94, 100 N. W. 670), and there were no such purchasers or creditors in this case.

Contracts of conditional sale whereby the title is retained in the vendor until payment of the purchase price, and the vendee is permitted to sell the goods in the regular course of business on condition that he applies the proceeds in payment, or as security to pay the purchase price, do not constitute chattel mortgages with secret liens, but are valid agreements of conditional sales in the state of Minnesota. Bradley Clark & Co. v. Benson, 93 Minn. 91, 94, 100 N. W. 670; In re E. M. Newton & Co. (C. C. A.) 153 Fed. 841, 844; In re Great Western Mfg. Co., 81 C. C. A. 341, 152 Fed. 123, 125.

The suggestion that this property vested in the trustee under section 70a (5) of the bankruptcy law (30 Stat. 566, c. 541; U. S. Comp. St. 1901, p. 3451; Act July 1, 1898) is not well founded. A trustee is not a purchaser for value. The "property which prior to the filing of the petition, he [the bankrupt] could by any means have transferred" within the meaning of this clause of section 70, is property that he could by any means have transferred to another lawfully under the same terms that he transfers it by law to the trustee; that is to say, without consideration. It does not include the property of another, which the bankrupt is authorized to transfer only on the condition that he sells it for value, or sells it and holds its proceeds for its owner. And this property could not have been lawfully "levied upon and sold under a judicial process against" the bankrupt at the time the petition in bankruptcy was filed. The result is that the contract evidenced a sale on the lawful condition that the notes and accounts owing by the Western Company to the Zimmer Company were paid in cash. They were never paid. The title and ownership of the property, which remained in the possession of the Western Company when the petition against it was filed, had never vested in it, and hence they never passed to the trustees of its estate, because the condition of the sale was never fulfilled. They are still in the Zimmer Company.

The Zimmer Company made this contract and carried on this business under it in the state of Minnesota, without complying with its laws, which provide that before such a corporation "shall be authorized or permitted to transact any business in this state, or to continue business herein if already established, or to acquire, hold or dispose of property within this state, or to sue or maintain any action at law or otherwise in any of the courts of this state," it shall have a public

office in the state, shall appoint an agent resident therein to accept service of process, and perhaps shall pay a license tax, and that if any such corporation doing business in the state neglects or fails to comply with these conditions it shall be subject to a fine of $1,000, and shall not maintain any suit or action in any of the courts of the state. Rev. Laws Minn. 1905, §§ 2888, 2889, 2890. This statute has received the consideration of the highest judicial tribunal of Minnesota, and it has held that such a foreign corporation cannot maintain an action in the courts of that state to recover the purchase price of goods sold by it in the transaction of business in the state without complying with the conditions of this statute (G. Heileman Brewing Co. v. Peimeisl, 85 Minn. 121, 124, 125, 88 N. W. 441; Sherman Nursery Co. v. Aughenbaugh, 93 Minn. 201, 204, 100 N. W. 1101), or for the recovery of moneys collected for it by its agent on account of the sale of its goods and evidenced by the agent's note (Thomas Mfg. Co. v. Knapp, 101 Minn. 432, 112 N. W. 989, 992). The reason which induced the Supreme Court of Minnesota to reach these conclusions, as we understand its opinions, was not that the contracts upon which the actions were brought were void because violative of the statute, but it was that the state had the undoubted right to exclude foreign corporations which would not submit themselves to the jurisdiction of the courts of the state from the privilege of enforcing rights and litigating controversies in those courts, and that it had clearly done so in the cases which have been cited.

But the provision of the state statute which forbids the maintenance of suits in the courts of that state was not intended to apply to, and it does not affect, suits and proceedings in the federal courts. A state is without power to prohibit or condition the exercise by a foreign corporation of its right to institute and defend its suits in the national courts and to invoke their independent judgment upon its controversies in the cases and in the manner prescribed by the Constitution and laws of the United States, which are the supreme law of the land. By section 8, art. 1, of the Constitution, the Congress was empowered to establish "uniform laws on the subject of bankruptcy throughout the United States" and by the bankruptcy law of July 1, 1898 (30 Stat. 546, c. 541, § 2 (7) [U. S. Comp. St. 1901, p. 3421]), jurisdiction was conferred on the District Courts of the United States to "cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto except as herein otherwise provided." This jurisdiction was not granted by, and it could not be revoked, annulled, or impaired by, the law or act of any state. Payne v. Hook, 7 Wall. 425, 430, 19 L. Ed. 260; Barber Asphalt Pav. Co. v. Morris, 66 C. C. A. 55, 58, 132 Fed. 945, 948, 67 L. R. A. 761; Butler Bros. Shoe Co. v. U. S. Rubber Co. (C. C. A.) 156 Fed. 1, and the cases there cited.

There is nothing in the opinion of the Supreme Court in Missouri, Kansas & Texas Trust Co. v. Krumseig, 172 U. S. 351, 19 Sup. Ct. 179, 43 L. Ed. 474, which is cited by counsel for appellees, in conflict with this principle. The legal effect of that decision is that a federal court may enforce a new right created, or administer a new remedy given, by a state to its citizens according to the terms of the state stat-

ute which provides it to the same extent as may the courts of the state. National Surety Co. v. State Bank, 120 Fed. 593, 603, 56 C. C. A. 657, 61 L. R. A. 394; Barber Asphalt Pav. Co. v. Morris, 132 Fed. 945, 949, 66 C. C. A. 55, 67 L. R. A. 761. In that case the state of Minnesota had by statute granted to the makers of usurious obligations the right to have them canceled by the courts of the state, as the Supreme Court of that state held, without repaying the moneys which they had borrowed upon them; and the Supreme Court of the United States decided that, where a suit for such a cancellation founded upon the state statute was pending in a national court, the complainant was entitled to the same measure of relief under the statute that he could obtain in the courts of the state. If there was a statute of the state of Minnesota which provided that, whenever a foreign corporation in the conduct of unauthorized business in that state delivered any of its property to a vendee upon the condition that the title and ownership of it should remain in the vendor until the vendee paid for it, the vendee might immediately maintain a suit against the vendor in the courts of the state to confiscate that property to the use of the vendee without paying the vendor any compensation for it, and if the courts of the state had sustained suits of that nature and had granted complainants in such actions judgments of confiscation therein, there might be some analogy between the Krumseig Case and the controversy now in hand; but no such statute has been enacted, and no such decision has ever been rendered.

This is the situation in the case at bar: A controversy has arisen in the court of bankruptcy regarding the ownership of a part of the estate of the Western Company which is in the possession of that court for administration. The Constitution and the act of Congress invested the federal courts with the power, which may not be lawfully renounced, and imposed upon them the duty, the discharge of which they may not rightfully evade, to determine that controversy by the exercise of their independent judgment according to the very right of the matter (Chicot County v. Sherwood, 148 U. S. 529, 533, 534, 13 Sup. Ct. 695, 37 L. Ed. 546; Barber Asphalt Pav. Co. v. Morris, 132 Fed. 945, 952, 66 C. C. A. 55, 67 L. R. A. 761), and the statutes of Minnesota have not deprived them of that power or relieved them from the performance of that duty.

But counsel argue with great ability and admirable ingenuity that the contract of conditional sale was violative of the qualifying statute, that it was consequently void, and therefore that the title and ownership of the property vested in the Western Company. But the premises of this syllogism fail to support its conclusion. If the contract was void because the corporation was not authorized to do business in Minnesota under its statutes, it was void in every part—in the agreement to sell, in the condition of the sale, and in the agreement to buy. An agreement of absolute sale would have been equally void. The contract was that the title and ownership of this property, which was in the vendor, should pass to the Western Company on condition that it paid its notes and accounts, and not otherwise, and that the Western Company would pay them. The latter company defaulted, and, if the agreement was valid, the ownership and title remained in

the vendor. If the agreement was void, then there was no contract that the Western Company should pay the agreed price for the goods, or that the Zimmer Company would sell them, or that the ownership or the title to them should ever pass to the Western Company, either with or without condition, and they remained in the vendor. If the fact that the corporation could not lawfully make any contract whatever in Minnesota concerning these goods made its conditional sale of them upon which the minds of the parties met void, it could not have had the effect to create a contract of absolute sale to which neither party agreed, and which would have been equally void. What the appellees really ask here is that because, as they contend, the agreement of conditional sale was illegal and void, this court of equity shall make for the parties a new agreement of absolute sale to which neither of them agreed, and which would have been equally void, and that it proceed to enforce this new agreement, so that the creditors of the vendee may appropriate to themselves property of the value of about $12,000 which belongs in equity to the creditors of the vendor. This petition does not appeal with compelling force to the conscience of a chancellor, and it must be denied. The title and ownership of the property in controversy remained in the Zimmer Company, and they never passed to the Western Company, or to its trustees, whether the effect of the statutes of Minnesota relative to the authority of a foreign corporation to do business in that state rendered the contract of sale void or left it valid.

Moreover, if the sale had been an absolute one, and if it had been void, the trustee of the Zimmer Company might still have recovered this property. In Pullman's Palace Car Co. v. Central Transportation Co., 171 U. S. 138, 151, 18 Sup. Ct. 808, 43 L. Ed. 108, the Central Company had made a lease which was beyond its powers, in restraint of trade, against public policy, illegal, and void. Central Transportation Co. v. Pullman's Car Co., 139 U. S. 24, 53, 11 Sup. Ct. 478, 35 L. Ed. 55. It had made this lease in the year 1870, and had thereby stripped itself of all its property, and the lessee, which had been in possession of this property and of its proceeds under this void contract for more than 10 years, refused to perform its part of the agreement, or to deliver back or to account for the property, it had received. The Supreme Court held the contract illegal and void, but compelled the lessee to pay back to the lessor $17,000 in cash and the value of the cars and other property which it had received from the lessor under the void agreement, and which amounted in all to $727,846.50 and interest. That court said:

"The courts, while refusing to maintain any action upon the unlawful contract, have always tried to do justice between the parties, so far as could be done consistently with adherence to law, by permitting property or money, parted with on the faith of the unlawful contract, to be recovered back, or compensation to be made for it." Central Transp. Co. v. Car Co., 139 U. S. 60, 11 Sup. Ct. 488, 35 L. Ed. 55; Pullman's Palace Car Co. v. Central Transp. Co., 171 U. S. 150, 18 Sup. Ct. 808, 43 L. Ed. 108.

If, as counsel for the appellees claim, the contract evidenced an absolute sale, and it is void, no payment has ever been made for the property under consideration which the vendee and the trustees of its es-

tate obtained under this agreement. No legal obstacle is perceived, in the light of the decision in Pullman's Palace Car Company's Case, to requiring them to restore it to the trustee of the vendor for the benefit of its creditors to whom it in equity belongs, and no court which strives to do justice and succeeds would fail to do so. There would be in such a case an implied and an enforceable contract by the vendee to return the property, or its value, which it had secured without consideration under the void contract. Planters' Bank v. Union Bank, 16 Wall. 483, 21 L. Ed. 473; In re Hovey's Estate, 198 Pa. 385, 48 Atl. 311, 315.

But was the contract void? Its only infirmity was that the Zimmer Company failed to comply with the regulations of the statute of Minnesota which conditioned its authority to make the contract, regulations with which it had ample power to comply, and that the statute imposed a penalty of $1,000 and a disqualification to maintain suits in the courts of that state for a failure to comply with those regulations. The making and performance of the agreement were not morally wrong. In the absence of the statute there was no more evil in the doing of business by a foreign corporation in the state of Minnesota without a principal place of business, an appointed agent to accept service, and the payment of a license tax, than there was in so doing with them. The business which this corporation transacted was not, like the sale of liquor, a peril to the welfare of the citizens of the state and subject to regulation by its police power. It was the sale of machinery. It was a transaction of commerce, which was a benefit to the state and to its people. There was no moral turpitude and no peril to the citizens in the making or the performance of this contract. Still, it was undoubtedly violative of the statute and illegal.

Counsel invoke the general rules that an illegal contract, a contract in violation of the law of a state, is void and unenforceable in any court sitting in the state, and that the federal courts follow the construction of the Constitution and statutes of a state given by its highest judicial tribunal in cases which involve no question of general jurisprudence, of commercial law, or of right under the Constitution and laws of the United States, and they cite Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 5 Sup. Ct. 739, 28 L. Ed. 1137, in which the Supreme Court held that the contract of an unqualified foreign corporation for the sale of an engine and machinery in Colorado was not void because in making that sale the corporation was not doing business within the state of Colorado and because the business which it transacted was interstate commerce; Miller v. Ammon, 145 U. S. 421, 12 Sup. Ct. 884, 36 L. Ed. 759, in which a contract for the sale of liquor in Chicago without a license was held void, with the prefacing statement that its sale was a peril to the welfare of the community and its regulation within the police power of the state; Diamond Glue Co. v. U. S. Glue Co., 187 U. S. 611, 613, 23 Sup. Ct. 206, 47 L. Ed. 328, in which a contract of an unqualified corporation to superintend the construction of and to operate a glue factory in the state of Wisconsin was held void under the statute of that state, which expressly declared, and which the Supreme Court of that state had held, made such a contract "wholly void" on behalf of the foreign corporation, but valid and enforceable

against it in favor of the other party to the agreement (Ashland Lumber Co. v. Detroit Salt Co., 114 Wis. 66, 89 N. W. 904); Chattanooga N. B. & L. Ass'n v. Denson, 189 U. S. 408, 23 Sup. Ct. 630, 47 L. Ed. 870, in which a note and mortgage taken by an unqualified corporation in Alabama were held void because the Supreme Court of the state had held like contracts void under a statute of that state; Trust Company v. Krumseig, 172 U. S. 351, 19 Sup. Ct. 179, 43 L. Ed. 474, which has been reviewed supra; and Kibbe v. Stevenson Iron Min. Co., 136 Fed. 147, 69 C. C. A. 145, and other cases which do not relate to this specific question. Many other cases, however, which treat of this subject, have been carefully read and considered, and they are cited, and some of them are reviewed, in Butler Bros. Shoe Co. v. U. S. Rubber Company (C. C. A.) 156 Fed. 1, which was considered and decided with this case, and to which reference is made for citations.

The general rule that an illegal contract is void and unenforceable is, however, not without exception. It is not universal in its application. It is qualified by the exception that where a contract is not evil in itself, and its invalidity is not denounced as a penalty by the express terms of or by rational implication from the language of the statute which it violates, and that statute prescribes other specific penalties, it is not the province of the courts to do so, and they will not thus affix an additional penalty not directed by the lawmaking power. Fritts v. Palmer, 132 U. S. 282, 289, 293, 10 Sup. Ct. 93, 33 L. Ed. 317; National Bank v. Matthews, 98 U. S. 621, 629, 25 L. Ed. 188; Logan County Bank v. Townsend, 139 U. S. 67, 76, 11 Sup. Ct. 496, 35 L. Ed. 107, 13 Sup. Ct. 66, 36 L. Ed. 956; Blodgett v. Lanyon Zinc Co., 120 Fed. 893, 896, 897, 58 C. C. A. 79, 82, 83; Sioux City, etc., Co. v. Trust Co., 82 Fed. 124, 134, 27 C. C. A. 73, 83; Hanover Nat. Bank v. First Nat. Bank, 109 Fed. 421, 426, 48 C. C. A. 482, 487; Speer v. Board of County Com'rs, 88 Fed. 749, 758, 32 C. C. A. 101, 110; National Bank of Xenia v. Stewart, 107 U. S. 676, 2 Sup. Ct. 778, 27 L. Ed. 592; Gold Mining Co. v. Nat. Bank, 96 U. S. 640, 24 L. Ed. 648; O'Hare v. Bank, 77 Pa. 96; Pangborn v. Westlake, 36 Iowa, 546; Chattanooga R. & C. R. Co. v. Evans, 14 C. C. A. 116, 121, 122, 66 Fed. 809, 815.

The case of Fritts v. Palmer, 132 U. S. 282, 287, 10 Sup. Ct. 93, 33 L. Ed. 317, is an apt and striking illustration of this exception. The Constitution of Colorado read, "No foreign corporation shall do business in the state without having one or more known places of business, and an authorized agent or agents upon whom process may be served," and the statutes required that such a corporation before doing any business in the state should file a certificate of its articles and appoint an agent upon whom service of process could be made. They expressly prohibited any foreign corporation from doing any business and from purchasing or holding any real estate until it had filed its articles and appointed its agent, and they imposed as a penalty for a violation of this prohibition the personal liability of every officer, agent, and stockholder of the corporation for the obligations incurred by it while it was doing business in the state in violation of the statutes. A foreign corporation acquired, held, and conveyed real estate in Colo-

rado in violation of this Constitution and these statutes. The Supreme Court held that the deeds were illegal, but that they were valid, and that they conveyed the property, and it sustained the title on the ground that the imposition of the penalty of the personal liability of the officers and stockholders, without any imposition of the penalty that contracts and deeds in violation of the statute should be void, indicated that the Legislature did not intend to make, and did not make, such deeds and contracts void by the statute.

In Harris v. Runnels, 12 How. (U. S.) 84, 85, 86, 13 L. Ed. 901, slaves were brought into the state of Mississippi and sold in violation of a statute of that state which prohibited their introduction without a certificate, under a penalty of $100 for every slave so sold and purchased, and an action was brought and sustained upon a promissory note for the purchase price of the slaves. In defense of the action the rule that an illegal contract is void was invoked. But the Supreme Court, after citing and discussing authorities said:

"We have concluded, before the rule can be applied in any case of a statute prohibiting or enjoining things to be done, with a prohibition and a penalty, or a penalty only, for doing a thing which it forbids, that the statute must be examined as a whole, to find out whether the makers of it meant that a contract in contravention of it should be void, or that it was not to be so; in other words, whatever may be the structure of the statute in respect to prohibition and penalty, or penalty alone, that it is not to be taken for granted that the Legislature meant that contracts in contravention of it were to be void in the sense that they were not to be enforced in a court of justice. In this way the principle of the rule is admitted, without at all lessening its force, though its absolute and unconditional application to every case is denied. It is true that the statute, containing a prohibition and a penalty, makes the act which it punishes unlawful, and the same may be implied from a penalty without a prohibition; but it does not follow that the unlawfulness of the act was meant by the Legislature to void a contract made in contravention of it. When the statute is silent, and contains nothing from which the contrary could be properly inferred, a contract in contravention of it is void."

The court then called attention to the fact that the avoidance of the contract would work inequality and injustice, that it would subject the seller to the loss of his slaves and the penalty of $100 upon the sale of each slave, while it would grant to the purchaser a substantial reward for a violation of the law, and it refused to hold the contract void, and rendered judgment for the plaintiff. The rule announced in this case has been repeatedly applied by the Supreme Court, notably in Fritts v. Palmer, supra, and the cases cited in that opinion, and has become an established canon of interpretation in the national courts. The true rule is that the court should carefully consider in each case the terms of the statute which prohibits an act under a penalty, its object, the evil it was enacted to remedy, and the effect of holding contracts in violation of it void, for the purpose of ascertaining whether or not the lawmaking power intended to make such contracts void, and, if from all these considerations it is manifest that the Legislature had no such intention, the contracts should be sustained and enforced; otherwise, they should be held void. Harris v. Runnels, 12 How. (U. S.) 79, 84, 85, 86, 13 L. Ed. 901; Pangborn v. Westlake, 36 Iowa, 546, and cases there cited; Fritts v. Palmer, 132 U. S. 287,

10 Sup. Ct. 93, 33 L. Ed. 317; Kindel v. Lithographing Co., 19 Colo. 310, 314, 35 Pac. 538, 24 L. R. A. 311; Chattanooga R. & C. R. Co. v. Evans, 14 C. C. A. 116, 121, 122, 66 Fed. 809, 815.

Let us apply this rule to the statute of Minnesota. The object of it was not to prohibit or to avoid contracts of foreign corporations for the sale of merchandise. The evil which the Legislature sought to remedy was not the making or the performance of such agreements. Such contracts were not deleterious to the citizens or to the state, but they were beneficial to both. The purpose of the Legislature was to subject foreign corporations doing business in the state to the process of its courts, and perhaps to a license tax; hence it provided that before they should be authorized to do business therein they should appoint agents to accept service of process and should have a public place of business in the state, and that, if they transacted business in the state without making such appointments and complying with the other conditions prescribed, they should not be permitted to maintain suits in the courts of the state and should be subject to a penalty of $1,000 for each offense. The effect of the statute was to provide that, if such a corporation would not subject itself to the process of the courts of the state, it should not be permitted to resort to such courts for relief, and it should pay a penalty of $1,000. There is no declaration in the statute that contracts of unqualified corporations doing business in the state without complying with the prescribed conditions shall be void. So far as we are able to ascertain, the Supreme Court of the state has never held that such was the meaning or the effect of the law. If that had been the purpose of the Legislature, it would have been easy to have made it manifest. A single line would have expressed and accomplished that purpose. The legal presumption is that the Legislature specified all the penalties it intended to impose, and it is not the province of the court to inflict more by construction. If contracts in violation of this statute are void, they are absolutely void, and none of the parties to them can enforce them. Such a result is unjust, inequitable, and inconsistent with the purpose of the law. The terms of the statute prohibit foreign corporations from enforcing contracts of this nature in the courts of the state, but they permit the other parties to the agreements to enforce them by suits in those courts, and they do not prohibit the unqualified foreign corporations from defending such actions. The invalidity of such contracts is inconsistent with these terms of the statute, because, if they are void, neither party can maintain a suit upon them, and the prohibition of the maintenance of such suits by the foreign corporations was futile. If the penalty of the invalidity of such contracts is added by construction to those denounced by the plain terms of the statute, and if, as counsel for the appellees argue, such invalidity deprives parties of any recovery of the moneys or property delivered under them, the effect of the statute would be absurd and iniquitous. Take the case at bar: The vendor would lose and the vendee would gain merchandise worth more than $12,000. The latter would receive a premium of $12,000 for violating the statute, and a penalty of $12,000 more than the statute fixes would be imposed upon the vendor. It happens in this case that the foreign corporation would suffer the penalty, and the other party to the contract would

receive the premium. But suppose that an unqualified foreign corporation, doing business in the state, purchases of a citizen and secures goods upon credit of the value of $12,000, and then refuses to pay for them because it was doing business in the state and the contract is void. It pays a penalty of $1,000 and reaps a reward of $11,000 for violating the statute, while the other party to the agreement pays a penalty of $12,000. The Legislature of Minnesota could never have intended results so unreasonable. The object of the statute, the evil it was intended to remedy, the plain language of the entire act, the inequitable effect of the avoidance of contracts in violation of it, make it manifest that the lawmaking power of the state never intended that contracts of unqualified corporations doing business in the state should be void. The evident intention of the Legislature and the legal effect of the statutes were, in accordance with the plain words it contains, to leave such contracts valid, enforceable in all courts by the parties to them other than the unqualified foreign corporations, but unenforceable in courts of the state by them, and to subject them to a penalty of $1,000 for each violation of the law. The contract in suit was innocent in itself, yet illegal because it was violative of the statute; but it was not void, and the trustee of the vendor was the owner of the property in controversy under it. The order of the court below, which denied his petition for a return of the property or its proceeds, must be reversed, and the case must be remanded to the court below, with instructions to take further proceedings not inconsistent with the views expressed in this opinion.

It is so ordered.

CHICAGO & A. RY. CO. v. UNITED STATES. FAITHORN v. SAME. WANN v. SAME.

(Circuit Court of Appeals, Seventh Circuit. April 16, 1907.) On Rehearing, October 9, 1907.)

Nos. 1,303–1,305.

CARRIERS—INTERSTATE COMMERCE—PAYMENT OF REBATES.

Private tracks built by the owner of a packing plant on its own property, extending from a connection with the tracks of a belt line railroad company to and around its buildings, and used in loading cars for shipment, are not a part of the railroad system, but plant facilities, and the refunding by a railroad company, which made and published a schedule of through rates, including the belt line charge, of $1 per car to such packing company on shipments made by it and paid for at the schedule rate, on the ground that it was a payment for the use of such private tracks, thus making the rate charged $1 per car less than that published and charged to shippers generally from the same point, constituted the giving of a rebate, in violation of section 1 of Elkins Act February 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1907, p. 880].

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois.

For opinion below, see 148 Fed. 646.

Ralph M. Shaw, for plaintiffs in error.

F. G. Hanchett, for the United States.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

BAKER, Circuit Judge. Plaintiffs in error were jointly convicted of violating that part of section 1 of the Elkins Act (Act Feb. 19, 1903, c. 708, 32 Stat. 847) which inhibits the giving of "any rebate * * * in respect of the transportation of any property in interstate or foreign commerce * * * whereby any such property shall by any device whatever be transported at a less rate than that published and filed." U. S. Comp. St. Supp. 1907, p. 880.

The government proved that the Chicago & Alton was an interstate common carrier, having a line extending eastward from Kansas City, Mo.; that the Kansas City Railway Company was an interstate common carrier between Kansas City, Kan., and Kansas City, Mo., having a belt line over which it hauled cars of freight from industries along its tracks to various railroads; that the Schwarzschild & Sulzberger Company, a corporation, owned and operated a meat packing plant at Kansas City, Kan., adjoining the tracks of the Belt Line; that the S. & S. Co. was not a common carrier; that within its plant, and running around and between various buildings thereof, the S. & S. Co. at a cost of $75,000 built about a mile and a half of tracks, switches, and sidings, on which the annual outlay for maintenance and taxes was $1,200; that the S. & S. tracks connected with the Belt Line tracks at the property line; that the Alton had arrangements with the Belt Line and with eastern railroads whereby the Alton undertook to transport property in interstate commerce from Kansas City, Kan., to seaboard cities; that the Alton published and filed schedules of rates for such transportation; that the Belt Line published and filed a rate of $3 a car for hauling cars of freight over its line from the S. & S. plant to the Alton; that the Alton transported various car loads of freight for the S. & S. Co. from Kansas City, Kan., to eastern points, collected from the S. & S. Co. the full amount of the published rates, and paid to the Belt Line $3 a car, which amount was included in the Alton's published rates; and that the Alton, through plaintiffs in error Faithorn as vice president, and Wann as general freight agent, paid back to the S. & S. Co., under book entries of "refund of terminal charges," $1 on each car for the use made of the S. & S. tracks in getting the S. & S. Co.'s cars of freight out upon the Belt Line's tracks.

At the conclusion of the government's evidence, plaintiffs in error moved that the jury be directed to return a verdict of not guilty. This motion was overruled. Thereupon plaintiffs in error offered to prove that the use of the S. & S. tracks was reasonably worth $1 a car. The court excluded the proffered evidence.

These adverse rulings present but a single question. If the fact that the S. & S. Co.'s charge for the use of its tracks was reasonable would take the case out from under the statute, the burden would lie upon the government, in order to bring the case within the statute, to prove that the charge was unreasonable; and this the government did not attempt to do. So the assignments of error center on the challenge of the sufficiency of the government's evidence to sustain the verdict of guilty.

Some discussion in briefs and in oral argument was had over the fact that the arrangement between the Alton and the S. & S. Co. was not published and filed with the Interstate Commerce Commission.

The S. & S. Co. was not a common carrier, and therefore had nothing in the way of rates and charges to publish and file with the commission. Shippers, of course, were interested to learn from the Alton's published schedules not only the rates between different points, but also the terminal charges, if any, that were to be exacted of them in addition to the rates. We think it is clear that the shipping public were not concerned in what part of an Alton through rate was paid by the Alton to the New York Central or to any owner of tracks that were used in making the through shipment. But if divisions of rates or track rentals were required to be published, we think it is equally clear that a failure to publish could not make a rebate of what is not a rebate, and, on the other hand, that publication could not save what is a rebate from being found to be a rebate. So the aforesaid matter of publication has nothing to do with the case.

Payment by the Alton to the S. & S. Co. was in the guise of a "refund of terminal charges," as though the Alton through oversight had collected more than the lawful charges and was rectifying the mistake. But as courts rightly are keen to penetrate an innocent appearing device to reach an illegal transaction, they should also be alert to save a lawful act though it be hid under a false cover. These plaintiffs in error should not be punished for methods of bookkeeping if the false entries represented in fact a lawful arrangement.

The real transaction was the payment by the Alton for the use of the S. & S. tracks in getting S. & S. freight out of the plant to the Belt Line. The consideration was not based on a fixed monthly or yearly rental, or on a percentage of the investment, but was determined by the amount of use measured by wheelage. But rentals on the basis of wheelage are unobjectionable if the parties have entered into a contract which in all other respects is lawful.

This contract was made on the Alton's part through its traffic department. We may know as a matter of common information that contracts respecting right of way, roadbed, and track are usually made through the engineering or maintenance of ways department, and not through freight agents. But, again, these plaintiffs in error should not be punished because the rental was measured by wheelage or because the contract was made by freight agents.

S. & S. received back a part of the money they paid the Alton for freight. That fact alone does not prove that the transaction constituted a rebate within the definition of the statute. A railroad may pay its lawful indebtedness to a shipper out of the money the shipper pays it for freight; or a shipper may pay the full freight partially in money and partially in canceled legal demands against the railroad. The statute's definition of a rebate is any device whereby any property in interstate or foreign commerce is transported at a less rate than that published and filed. So if the full rate be paid either in money or in money's worth, the parties cannot be guilty of rebating. Of course, the money's worth part of the payment might itself be used as a device whereby the property would be carried in interstate commerce at less than the published rate; but in this case the presumption must be indulged that the wheelage charge of $1 a car measured the true rental value of the S. & S. tracks.

The foregoing considerations compel us to the conclusion that the judgment cannot be sustained except by holding that the contract between S. & S. Co. and the Alton was illegal and void.

The use that the contract provided for was the use that was made in hauling S. & S. freight from inside of the S. & S. plant out to the S. & S. property line, so that there it might be put on the Belt Line's track, which in these through routings is to be taken as a part of the Alton system. Plaintiffs in error defend the arrangement on the ground that an interstate common carrier has the right to pay a shipper a just allowance for the use of any instrumentality furnished to the carrier by the shipper in connection with the transportation of the shipper's property. And attention is called to the closing paragraph of section 15 of the recent Hepburn Act (Act June 29, 1906, 34 Stat. 590) as being declaratory of the law as it stood when the contract now in question was made:

"If the owner of property transported under this act directly or indirectly renders any service connected with such transportation or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable."

It never has been unlawful for a railroad to lease cars from a shipper, like the Armour Company, any more than from a builder of cars, like the Pullman Company. But if cars are leased from a shipper, not only the Hepburn act, but also the Cullom and the Elkins acts, as we regard them, prohibit the extension of favors to the shipper in the way of freight rates under cover of the lease. So, if a railroad in discharging its undertakings as an interstate common carrier may lease tracks from another railroad, we perceive no valid reason for denying a railroad the right to lease tracks from a shipper for a like purpose, provided the rental is fair and does not include, by being excessive, a concession from the established transportation rates. The trouble in this case, however, comes from the fact that the Alton did not take a lease of the S. & S. tracks for the purpose of discharging its undertakings as an interstate common carrier. It had undertaken to carry for all the shipping public a car load of meats from Kansas City, Kan., to New York for $20, say. For that purpose it controlled, by means of its connections, a public highway. The S. & S. tracks were not a part of that highway. They were not used by the Alton in serving the shipping public generally. Their only use was in getting a particular shipper's freight from his own property out to the public highway. Suppose that the S. & S. Co., instead of ties and rails, had put down a paved roadway on its land, and that the Alton, in addition to the $20 worth of transportation it was giving to other shippers, furnished horses and wagons to haul the meats from the packing rooms to the Belt Line, would it be contended that the Alton could lawfully still further pay the S. & S. Co. for the use of the pavement? Or suppose that the S. & S. plant was all under one roof, and that the trolleys which convey carcasses and cuts of meat from one department to another were so arranged that the finished produce arrived at the property line adjoining the Belt tracks, could the Alton properly make an allowance for the use of the trolleys as instrumentalities furnished by the shipper in the transportation of property in interstate commerce? In our

judgment, the jury were warranted in finding that the tracks in question were plant facilities, as clearly as the supposititious pavement and trolleys would be plant facilities, and not instrumentalities for the Alton's use in discharging its duties to the public. Wherever the Alton needed tracks for that purpose, it could acquire the land by exercising the sovereign power of eminent domain which had been conferred upon it by the people. But manifestly the Alton could not condemn the S. & S. tracks for the sole purpose of hauling the S. & S. Co.'s product from its warehouse to the Alton's public highway, because that would be a private purpose. Whatever property the Alton could condemn it could acquire by deed or lease, but by taking a lease it could not change a private purpose or use into a public one. The lease of these plant facilities was therefore a device whereby the property of the S. & S. Co. was transported at $19 a car, while other shippers were paying $20.

This case is ruled in principle, we believe, by the decision in Wight v. United States, 167 U. S. 512, 17 Sup. Ct. 822, 42 L. Ed. 258, that an arrangement whereby a particular shipper was allowed to offset against his freight bills the true value of the use of his teams in hauling the property from the railroad to his warehouse was a discrimination against other shippers of the same class of property in the same city who were compelled to pay the freight in full. It is contended that the citation is inapplicable because the question there was of discrimination and here of rebate. Under the Cullom act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]), the standard of comparison was the treatment of other shippers. It was necessary to prove not only that the favored shipper really paid less than the published rate, but also that other shippers paid the full rate or a greater rate than that of the favored shipper. Under the Elkins act the standard of comparison is the published rate. It is only necessary to prove that the favored shipper has had his property transported at a less rate than that published and filed. Both acts were aimed to kill favoritism, and the favoritism in the Wight Case was of the same kind and effect as in this. The big manufacturer or dealer has all the advantage over his small competitor that he is legally or morally entitled to in his savings of labor cost and in buying his materials at greater discounts. The application of the maxims of merchandising to railroading was always counter to the common-law pact between the railroads and the people. But it was not until the government as parens patriæ was authorized to represent the scattered and unorganized sufferers from favoritism that any hope appeared of taking the railroad business out of the realm of private barter.

We exclude from the case, as not being within the issues, any question of the right of a railroad to render greater service or to furnish more facilities for one shipper than another for the same published charge. The issue here is the right to furnish the same or more at a less price.

GROSSCUP, Circuit Judge (concurring). I cannot bring myself to the conclusion that until the cars loaded with the products of the S.

& S. Company actually reached the rails of the Terminal Railroad Company, such products were not already in course of interstate transportation—that until the rails of the Terminal Company were reached, neither the shipper nor carrier were subject to the obligations, or entitled to the rights, that shippers and carriers are subject to, and acquire, only when the things to be shipped have reached the stage of being actually in course of interstate transportation. My personal view is that the moment the products of the S. & S. Company passed out of its hands into the cars of the Terminal Company for transportation, whether the cars thus receiving such products were at the time on the rails belonging to the S. & S. Company, or on the rails belonging to the Railroad Company, the interstate transportation of those products had already commenced; and that the published rate is a rate for the whole of that transportation, from the moment it thus begins to the moment the goods reach their destination; from which it follows, it seems to me, that as against the S. & S. Company, notwithstanding the fact that the Railroad Company receives the goods at the S. & S. Company warehouses, and on its rails (no additional terminal charges having been fixed) the Railroad Company could not lawfully exact more than the regular published rates; while in the performance of its obligations to other shippers, under the Interstate Commerce law, it could not lawfully accept less. In other words, under the facts presented, the published rate is not affected by the fact that the cars were loaded at the S. & S. Company's warehouses, and not on the Company's rails—such place of loading being, along with the Railroad Company's freight stations, "Kansas City" within the meaning of the published rates.

Now I am inclined strongly to the judgment that through contract with the parties interested, the Railroad Company could, at its own expense, lawfully have laid its own rails up to and along side of the S. & S. Company's warehouses, notwithstanding the fact that title to the land under the rails should remain in the S. & S. Company; or could have leased the rails laid by the S. & S. Company of that company; provided always that the transaction was not a subterfuge to cover up discriminations. But an arrangement of that kind between the two companies cannot, in my judgment, for reasons of public policy that the Interstate Commerce Act was intended to carry out, be lawfully based on division of rates, or in any other way be connected with, or affect, the rate making function of the Railroad Company; for to secure equality among shippers, the law commands, not only that the rates shall be equal, but that they shall be fixed and certain—subject to no addition or diminution against, or in favor of, any one—so fixed and certain that any shipper can with his head and pencil figure out from the tariff sheets just what the rate is, both for himself and for his competitors; from which it follows that, while the Railroad Company, through its appropriate department, might lawfully perhaps have leased these rails of the S. & S. Company, paying therefor a reasonable rental, it could not lawfully for the reasons of public policy named, through its tariff department, and on the basis of a division of rates (the whole arrangement secret so far as the published

tariff sheets were concerned) have made the arrangement that was offered as a defense to the offense prosecuted.

The judgment is affirmed.

On Rehearing.

PER CURIAM. The burden of the argument in support of the petition is that the opinion of the court promulgates the doctrine that it is unlawful "for a railroad company to acquire by lease or purchase or other contract the ownership or the right to use a track leading from its right of way to an industrial plant." The facts of the case do not require the affirmance of such a proposition; and we disclaim the inference which counsel draw from the language of the opinion. We do not elaborate because we believe that counsel, on reading the opinion anew, will have no difficulty in understanding that our judgment of the character of the Alton's dominion over the S. & S. tracks was founded on our view that the evidence warranted the jury in finding that "the tracks were S. & S. plant facilities, and not instrumentalities for the Alton's use in discharging its duties to the public."

The petition is overruled.

DIGGS v. LOUISVILLE & N. R. CO. (two cases).

DUNNAWAY v. SAME.

(Circuit Court of Appeals, Sixth Circuit. November 6, 1907.)

Nos. 1724–1726.

1. ACTION—TRIAL—CONSOLIDATION OF CAUSES—POWERS OF FEDERAL COURTS.

Under Rev. St. § 921 [U. S. Comp. St. 1901, p. 685], which authorizes federal courts to consolidate "causes of a like nature or relative to the same question," a Circuit Court has power in its discretion to consolidate for trial separate actions brought against a railroad company to recover for the death of persons who were killed at the same time and in the same manner.

2. CARRIERS—LIABILITY OF RAILROAD COMPANY FOR DEATH OF PASSENGERS—OPERATION OF TRAINS.

Three young men traveling together were passengers on a railroad train which approached Knoxville, Tenn., which was their destination, after dark. The trainmen had announced that the next station would be Knoxville, as required by the state statute, but had not called the station, when the train stopped on a narrow trestle in order to make use of a Y in turning before entering the city. The next morning the bodies of the young men were found near together under the trestle. Upon the trial of a consolidated action against the railroad company to recover for their deaths, there was evidence that they left the car together, while on the trestle, and tending to show that they fell over the edge as they stepped off. *Held*, that neither the announcement of the name of the next station nor the stopping of the train thereafter before it was reached was negligence, nor was either an invitation to passengers to alight before the station was called, which imposed on defendant the duty of warning them or rendered it liable for the deaths of plaintiffs' intestates.

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

G. W. Pickle, for plaintiffs in error.
J. H. Frantz, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. This was a suit to recover for the wrongful death of William Turpin through the negligence of the Louisville & Nashville Railroad Company. Against the objection of the plaintiffs in error, it was consolidated for trial with two similar cases, one brought by the administrator of James Gamble and one by the administrator of W. W. Dunnaway, who met their deaths at the same time and in the same way. At the close of the testimony for the plaintiffs, the court directed the jury to return a verdict for the defendant. It is claimed the court erred in consolidating the cases and erred in instructing for the defendant.

We are satisfied that under section 921 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 685] the court had the power to consolidate these cases for trial. They involve the same transaction, the witnesses were the same, and we can see no good reason to criticise the exercise of the court's discretion in the premises.

The evidence which the court withheld from the jury showed substantially the following facts: The three young men, Turpin, Gamble, and Dunnaway, were raised in Anderson county, Tenn., about 25 miles from Knoxville. They were not accustomed to railway travel. They left their homes on the 19th of February, 1906, to look up a brother of one of them, who they heard, was working some miles the other side of Knoxville. Apparently they did not find him, and on the 20th they started back to Knoxville. Late in the afternoon of that day they got on a passenger train of the defendant at Mentor, a station seven or eight miles from Knoxville. This train reached Knoxville about 6:30 p. m. There was but one station, Chandler, between Mentor and Knoxville. After leaving Chandler, the trainman announced that the next station would be Knoxville. The train, after leaving Chandler, ran along the Tennessee river for some distance, and then crossed over to Knoxville on a bridge and trestle. By this time it was quite dark. On the Knoxville end of this trestle a switch led off from the main track. At the end of this switch there was a narrow platform on the right as you approached Knoxville, which was used in connection with the switch. Beyond this platform, going in the direction of Knoxville, the trestle for some distance remained the width required for one track only, and then broadened as the switch left the main line. About 200 feet beyond the point of this switch, the main line divided into a Y; one track running to the right to the passenger depot, and the other to the left to the switching yards. It was customary to use this Y in order to change the direction of the train before running into the depot. When the train reached the trestle, it stopped presumably short of the switch. The three young men, one a boy of 15, got up from their seats in the smoker, which was in the forward part of the train next to the baggage car, and went out the front door. The station of Knoxville had not yet been called, nor any reason given them to

believe that they were at Knoxville, except the fact that the announcement had been made that the next station would be Knoxville. This announcement had been made a few minutes before the train stopped. Three witnesses put the time from one to one and a half or two minutes, one says before the train reached the bridge, and several testified that the custom on the road was to announce the next station shortly after leaving the last one. Such announcement was not regarded as a call of the station, which was made subsequently when the station was reached. About 6 o'clock the next morning, on the 21st of February, a witness who passed under the trestle found the dead bodies of three young men, who were subsequently identified as Turpin, Gamble, and Dunnaway. They lay close to one another, and no footprints were near them. The court below, conceding that the deceased persons were passengers, after referring to the fact that the laws of Tennessee required the railroad company to announce the next station, stated that, if the insistence of the plaintiffs was correct, "when the company does it, it would have to guard against anybody jumping off before the train reached the station, would have to put a man in each door, and keep them from jumping off, if the train should happen to stop for any purpose before it reached the station"; and directed a verdict in favor of the defendant in each case.

We think there was testimony from which the jury might have inferred that the three unfortunate young men were passengers, and that they alighted from the train on the trestle and met their deaths by falling from it to the place where they were found. They may have fallen directly from the train through the trestle, or from the trestle after alighting from the train, and they may have fallen from the trestle by missing their footing while trying to proceed in the direction of Knoxville after the train had passed, or by being pushed off by the train after it had got again in motion. There was no testimony showing precisely where the train stopped. There was a small platform on the right, located at the point of the switch, which was used by railroad men to stand on while operating the switch. If the train stopped opposite that platform, the young men had a place to stand, but after the train passed on they would have found themselves isolated, in a dangerous position, and it would naturally have seemed necessary to them to walk on in the direction of Knoxville, whose lights they could see in the distance. If they did this, after leaving the small platform, a few steps would have brought them to the narrow single track trestle above the place they were found, and from which they must have fallen. At this point the ties were 12 feet and 10 inches in length, and a passenger car is about 11 feet, 6 inches in width. An engineer who made a survey of the track testified that a "passenger alighting on this single track trestle might touch the edge of the ties, although I don't think he would. The ends of the ties were approximately practically under the outside of the steps, and the steps would put him where he would fall; he might catch two or three inches of the ties, two inches." It was necessary, in order to make a case for the jury, for the plaintiffs to present some testimony tending to show that the young men, without any fault on their part, alighted from the train and met their

death because of the negligent conduct of the railroad company or its employés. In view of the facts, the negligence must have consisted either in making the announcement that Knoxville would be the next station before it was reached, or in stopping on the trestle after the announcement was made and before the station was reached, or in so stopping without warning the passengers to keep their seats, because the station had not yet been reached.

As to the announcement, it was one required by the laws of Tennessee. Shannon's Code, § 3070. This statute came before the Supreme Court of Tennessee in the case of Payne v. Railroad Co., 106 Tenn. 167, 61 S. W. 86. There there was a call of the station and a passenger alighted before the train had stopped. The effect of the decision was to hold that the passenger was not justified in alighting while the train was in motion because of the announcement. It is to be noticed, however, in this case that the announcement, which was made as the train approached the station, almost amounted to a call which is made just as the station is reached. The difference between an announcement under the Tennessee statute and a call under ordinary railway usages must be kept in mind. An announcement under the Tennessee statute is not a notification that the station has been reached, and an invitation for passengers to alight. It serves the purpose of advising passengers in advance of what the next station will be, so that they may be ready to alight when it is reached. It is always made subject to the usages of railways. It does not commit the railway company to a verbal guaranty that the station announced will be the first stop. The railroad company retains the right to control the movement of the train, and if it is necessary to stop for any proper purpose before reaching the station, for instance, to open or close a switch, or to cross another railroad, or to use a Y, it has the right to do so, without notifying the passengers. In other words, the announcement is to be treated as a statement that the next station will be the place named, and not that the next stop will be at the station. Accordingly, in Minock v. Railway Co., 97 Mich. 425, 56 N. W. 780, it was held that a railroad company which had announced the next station was not obliged to warn passengers not to alight when it stopped at a railway crossing before the station was reached.

We have examined a number of cases where, after calling the station, the train either stopped short or overran, with the result that the passenger alighted in a dangerous place and was injured. Under such circumstances, the railway company has been almost uniformly held responsible. This is in accordance with the well-established rule that a carrier of passengers is in duty bound not only to use the strictest vigilance in receiving and conveying a passenger to his destination, but also to put him off safely at a station at the termination of the journey. As a corollary it has been held that it is likewise the duty of a carrier to announce the name of the station on the approach of the train, and to afford passengers sufficient time to alight with safety. Englehaupt v. Erie R. R. Co., 209 Pa. 182, 185, 58 Atl. 154; Weller v. London, Brighton, etc., Ry. Co., L. R. 9 C. P. 126; Van Horn v. Central R. R. Co., 38 N. J. Law, 133; P. W. & B. R.

R. Co. v. McCormick, 124 Pa. 427, 16 Atl. 848; Bridges v. North London Ry. Co., L. R. 7 H. L. 213; McNulta v. Ensch, 134 Ill. 46, 24 N. E. 631; Memphis & Little Rock Ry. Co. v. Stringfellow, 44 Ark. 322, 51 Am. Rep. 598; Ellis v. Chicago, M. & St. P. Ry. Co., 120 Wis. 645, 28 N. W. 942.

The present case, however, is not one where the station had been called and the train either stopped short or overran it, so that the passenger alighted in a dangerous place and received injuries. This case is more like that of Mitchell v. Grand Trunk Ry. Co., 51 Mich. 236, 16 N. W. 388, 47 Am. Rep. 566, where the station was announced or called before arriving at a railway crossing or junction, 300 or 400 feet from the station. The train stopped at the crossing, and the plaintiff in attempting to leave the car was hurt. The court said the real cause of the injury was the mistaken supposition of the passenger that the train had stopped for the station. There was nothing at the spot to indicate a landing place. The stoppage of cars was required by statute, as well as by usage. The judgment below was reversed on the ground that there was nothing to show any negligence on the part of the company. In the case of Ill. Central R. R. Co. v. Warren, 149 Fed. 658, 79 C. C. A. 350, it was held that the announcement of the next station, although made on near approach to the station, was not an invitation to a passenger to leave his seat and attempt to alight before the train actually stopped. Because he did this, the passenger who was injured was held guilty of contributory negligence.

We have given the present case careful consideration. The case of the plaintiffs rests upon the contention that the stoppage of the train on the trestle after the next station had been announced constituted an invitation to the young men to alight. We think that a clear distinction must be made, as we have said before, between the announcement of the next station and the call of the station at which the train is in the act of stopping. We think that in the present case no passenger of ordinary intelligence and in the exercise of ordinary care would regard the stopping of the train on the trestle as an indication that Knoxville had been reached and the time had come for him to alight, and that the idea that such a view would be taken by any passenger was not within the reasonable contemplation of either the conductor or any of the trainmen. Now, if in the actual course of events these three passengers could not be expected to alight merely because the train had stopped on the trestle, then there was no duty imposed upon the trainmen to warn them to keep their seats. Trainmen have a right to credit passengers with ordinary common sense. Passengers must exercise common sense, common care, or answer for the lack of it. In this country passenger trains are not run upon the theory that the passengers must be locked in when the train is in motion, and only released when the station is reached and the trainmen let them out. Passengers are supposed to have knowledge of common railway usages, of the way in which trains are ordinarily run and handled. While the present case excites our sympathy, we are unable to satisfy ourselves that the court below was wrong in directing a verdict for the defendant. Of course, there was

a possibility that testimony might have been presented which would have showed or at least have tended to show that the defendant was negligent, but no testimony of this sort was introduced, and it is a well-known rule that negligence can neither be presumed nor guessed at. Powers v. Marquette Ry. Co., 143 Mich. 379, 106 N. W. 1117.

The judgments of the lower court are affirmed. The joint writ of error in case No. 1,684 is dismissed for want of jurisdiction.

OSIUS v. DAVIS.

(Circuit Court of Appeals, Sixth Circuit. November 6, 1907.)

INSURANCE—RIGHT TO PROCEEDS OF LIFE POLICY—EVIDENCE CONSIDERED.

Evidence considered in a suit of interpleader between the widow and a former partner of a decedent to determine the right to the proceeds of a policy of insurance on his life, which was by its terms payable to his estate, but by an agreement between the partners was to be held for the benefit of the partnership, and *held* to sustain the claim of the widow that the partnership had been dissolved some months prior to her husband's death, and all matters between the partners settled.

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

T. B. Bradfield, for appellant.

C. W. Nichols, for appellee.

Before LURTON, SEVERNS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. This was a bill of interpleader filed by the New York Life Insurance Company against Rudolph Osius and Nellie Belle Davis, who by stipulation have become, respectively, the complainant and defendant in the litigation. The matter in dispute is the amount of a policy of $5,000, written by the New York Life Insurance Company, December 30, 1903, upon the life of William Francis Davis, husband of the defendant, who died September 25, 1904. The policy was payable "to the executors, administrators or assigns of the insured, or to such beneficiary as may have been duly designated." It also provided that the insured might change the beneficiary by written notice to the company, but that no designation or change of beneficiary should take effect until indorsed on the policy by the company at the home office. The amount due under the policy has been paid into the court below. The bill of interpleader was brought against Mrs. Davis "personally and as executrix of the last will and testament of her husband." Rudolph Osius was made a defendant "as sole surviving member of the late copartnership duly organized and doing business under the firm name of the American Dental Syndicate," which was composed of William Francis Davis and Rudolph Osius, the latter being general manager, while Davis was the business manager. Rudolph Osius claims the amount of the policy as sole surviving member of the American Dental Syndicate, claiming that this policy and one upon his own life were taken out by the syndicate, the premiums paid by the syndicate, and that there was an agreement that the policy was to be for the benefit of the syndicate and payable to the surviving

member. Nellie Belle Davis was the executrix of her husband's will and his sole legatee, and as such she claims the amount of the policy. The court below heard the testimony, and in a considered opinion held that the firm known as the American Dental Syndicate was dissolved, and its assets divided, on May 21, 1904, some four months before Davis died, and therefore the policy, according to its terms, was payable to her as executrix and sole legatee. From this decree there is an appeal to this court.

Prior to March 23, 1903, Rudolph Osius owned and operated dental establishments in the cities of Grand Rapids, Battle Creek, Flint, and Lansing, Mich., under the name of the "American Dental Syndicate." On that date William F. Davis, who was a lawyer living in Lansing, became his partner. Under the agreement Davis was to pay to Osius the sum of $5,000, $1,000 down, and $4,000 from the earnings to which Davis would be entitled less his salary; and it was expressly agreed that the title to one-half of the business was to remain in Osius until the promissory note of $4,000 was paid in accordance with its terms. Osius was to be the general manager and Davis the business manager of the firm, the former to receive $50 per week and the latter $40 per week. While the business of this copartnership was going on, two life insurance policies of $5,000 each were taken out, one by Osius and one by Davis, December 30, 1903. Frederick Cody was the agent of the life insurance company. The premiums on the two policies amounted to $269.20, being $128.75 for the Davis policy, and $140.45 for the Osius policy. Cody paid the premiums, and then settled with the policy holders. The premium on the Davis policy was partly paid by the partnership and partly by Davis himself, the last payment being $46.10, made on July 28, 1904. The receipt from Cody to Davis shows that it was in full settlement of the balance of the premium on his policy, and also in full settlement of his interest in the note given under the agreement dated December 31, 1903. On March 5, 1904, while the firm called the American Dental Syndicate was in existence, an agreement was made between Osius and Davis which provided that the policies should be paid to "the American Dental Syndicate, and not to their personal heirs or assigns," the reason as stated being "the premiums on these policies being paid out of the funds of the American Dental Syndicate, and the policies were taken out designedly for the protection of the American Dental Syndicate." While it is not disputed that this agreement was made, no indorsement was made on the policy, nor was there any notice of a change of beneficiary in accordance with its terms. The policy remained payable to the personal representatives of Davis, and was in his possession at the time of his death.

Such being the situation, the question in this case is whether, as alleged by Mrs. Davis, the partnership between her husband and Osius was dissolved on May 20 or 21, 1904. If it was, then the New York Life Insurance policy became payable, according to its terms, to her as executrix and sole legatee of her husband. We have carefully read all there is in the record upon this subject, and are clear in the opinion that the court below very properly held that Mrs. Davis had sustained the burden of proving the affirmative upon the issues of the case, namely, that the partnership had been dissolved by mutual consent and

a full settlement and adjustment of its affairs had been made The court below has referred in some detail to the facts which appear in the record and support its conclusions. It is unnecessary to go over these. The statements of Seth Davis and Carmer are quite inconsistent with the theory that the partnership continued to exist after May 21, 1904. After the agreements of May 20 and May 21, 1904, Davis withdrew from the American Dental Syndicate, ceased to be its business manager or have authority to bind it in any way, and restricted himself to the Battle Creek office which he purchased from Rudolph Osius, the other member of the defunct firm. In the agreement of May 20, 1904, made at Grand Rapids, Davis expressly relinquished all his right, title, and interest in the American Dental Syndicate, "ceased to draw salary or have anything to do with the management of the said American Dental Syndicate, the same being turned over to Dr. Rudolph Osius." On May 21, 1904, the National City Bank was notified that after that date the signature of Dr. Rudolph Osius alone would be necessary on checks of the American Dental Syndicate. On July 10, 1904, Ossius wrote a letter to Davis which practically admits the dissolution and the fact that the insurance policies had been treated as personal assets. Speaking of another agreement, Osius says, "It certainly only applied to you when a partner in this firm"; the inference being that Davis had ceased to be such partner. Then he says:

"But kindly remember that I particularly except the life insurance account which you and I have, but showed a willingness on my part to pay for half of the same."

Apparently this refers to the statement by Davis that Osius had agreed to pay all bills due from the business, and the exception made of the insurance account was made by Osius, although he says he had shown a willingness to pay for his half of that account. He also asserts that he has not only been extremely square with Davis at all times, but "particularly so at their dissolution."

These and other facts which appear on the record and have been referred to by counsel in the briefs and on the argument satisfy us that the partnership was dissolved months before Davis died, and that there was no thought at that time that the policy on Davis' life was being carried by the partnership or for its benefit. The claim now made by the surviving partner appears to be an afterthought.

The decree is affirmed.

UNITED ZINC COMPANIES v. WRIGHT.

(Circuit Court of Appeals, Eighth Circuit. October 14, 1907.)

No. 2,437.

1. MASTER AND SERVANT—FELLOW SERVANTS—FOREMAN IN MINE.

A ground foreman in mining operations conducted under a general superintendent or manager is a fellow servant with the gang of miners whose work he directs.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 491.]

2. SAME—INJURY TO SERVANT—ASSUMED RISK.

A drillman in a mine where it was the usual known custom to move the drills by hand up stopes having a practicable grade assumed the risk of injury from such manner of doing the work, and cannot recover from the owner for an injury so received, and he was not relieved from such assumption by a complaint made to the ground foreman of such method and a promise on his part to secure appliances, where he had no authority to do so, either actual or apparent, and whose only duty was to report the complaint to the superintendent, under whose direction all the work was conducted, which he failed to do.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 639, 640.

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 Southwestern Division of the District of Missouri.

Edward J. White (Arthur E. Spencer, on the brief), for plaintiff in error.

McPherson & Hilpirt and E. O. Brown, for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

ADAMS, Circuit Judge. Wright sued his employer, the zinc company, for damages alleged to have been occasioned by its failure to furnish proper appliances with which to do the work assigned him. Defendant was engaged in lead and zinc mining, and plaintiff, who was an experienced miner, familiar with the operation of the drilling machine commonly used in lead and zinc mining, was employed by defendant as head drillman to take charge of the drilling operations in its mines. He had three helpers. At the time of his injury, he was engaged in moving the drilling machine weighing about 300 pounds up an inclined stope in the defendant's mine. The stope rose at an angle of about 45 degrees. Prior to the time of his injury, when the stope was so steep that miners could not walk up conveniently, defendant had employed a pulley and rope to haul up the machine; but this appliance had been abandoned after the stope became easier. The drillman and his helpers had been for some time, two or three weeks before the time of his injury, carrying the drill up the stope by hand. The evidence tends to show that this method was commonly resorted to in that region when the stopes were not so steep that a man could not walk up and down them. It required the men to lift and move the drill by main force, and, of course, was not so easy as raising it by a pulley; but, when the distance was short and the grade practicable, it was obviously a quicker and more feasible method than stopping to adjust and operate a pulley. When the plaintiff and his three helpers were carrying up the drill on February 14, 1905, he claims that some helper slipped and allowed the weight of the machine to sag back against him, and that the sudden strain injured his back. His counsel recognize that, by entering and remaining in the service of the defendant with full knowledge of its methods of doing business, Wright assumed the usual and ordinary risks of the employment, but place their reliance for recovery of damages upon a complaint alleged to have been made by him that the method of carrying the drill up the stope by hand

was dangerous and securing from the defendant a promise of reparation. He claims that, while waiting a reasonable time for the fulfillment of that promise, he was relieved from the assumption of the risk of remaining in the obviously dangerous service. This will be conceded. Crookston Lumber Co. v. Boutin, 149 Fed. 680, 79 C. C. A. 368, and cases cited. But do the facts support the plaintiff's hypothesis? We think not. It is earnestly contended by defendant that the service in which plaintiff was engaged was simple manual labor like that involved in Gowen v. Harley, 56 Fed. 973, 6 C. C. A. 190, and that the doctrine of relief from assumption of ordinary risks of service by a complaint of danger and promise of reparation has, on the authority of that case, no application. The difference in the pleadings and conceded facts of the two cases renders the doctrine of that case of uncertain application to this, and, by reason of the view we take of another question, we find it unnecessary to attempt to distinguish or assimilate the two cases.

Defendant throughout the trial contended that Bruce, to whom plaintiff made the complaint and from whom it is claimed promise of reparation was received, was a fellow servant of plaintiff, and that, on familiar principles, his negligence, if any, in failing to secure better facilities for plaintiff to work with was imputable to plaintiff, and created no liability against the defendant. The evidence conclusively shows that Bruce was ground foreman in charge of men performing mining operations for defendant, and that there was a general superintendent who represented the master and who had general supervision over all work above and below the surface of the ground to whom the ground foreman reported and from whom he took directions. The duties and representative capacity of a ground foreman in mining operations conducted under the supervision of a general superintendent or manager have been frequently considered by the courts, and in a general sense the rule is firmly fixed that he is a fellow servant with the gang of miners whose operations he is directing. Alaska Mining Co. v. Whelan, 168 U. S. 86, 88, 18 Sup. Ct. 40, 42 L. Ed. 390, and cases cited. Weeks v. Scharer, 111 Fed. 330, 334, 49 C. C. A. 372; Id., 129 Fed. 333, 64 C. C. A. 11; Davis v. Trade Dollar Consol. Min. Co., 117 Fed. 122, 54 C. C. A. 636.

But it is contended that Bruce, the ground foreman, had exceptional powers, and so stood for the master in his relation to the miners, that complaint made to him of inadequate and dangerous working appliances was a complaint to the master, and his promise of reparation the promise of the master. In other words, that he was in this particular a vice principal. The answer to this contention requires consideration of the proof. The evidence conclusively shows that the duties of Bruce as ground foreman were to direct the miners where to set up the drill, direct the shovelers where to shovel, direct the location of the underground tracks, and look after everything underground, and that it was a common practice for him at times to help the workmen who were laboring under him in the actual drilling of holes, laying of tracks, and other such work. He was subject to the general orders of the superintendent. He hired men to work in his department and discharged them but the superintendent always paid

them their wages. It was the foreman's duty to report to the superintendent when any new or different appliances or tools were needed, and it was the duty of the superintendent to supply them. He made no report of Wright's complaint to the superintendent, and, of course, the latter took no action thereon.

From the foregoing undisputed facts or from the evidence taken as a whole, all of which has been critically examined, it cannot be claimed that the ground foreman had any right or power to supply any desired working appliance. Neither can it be claimed that Wright, the plaintiff, had any reason to believe he had such right or power. The most that can be claimed is that it was the ground foreman's duty, if Wright or any other workman under him complained about appliances, to report such complaint to the superintendent for his action, and depend upon his judgment whether any appliances should be supplied, and, if so, when and under what conditions. As the foreman had no right or ability to supply the block and tackle in question, his promise to do so, if made, afforded no protection to Wright. His failure to repeat Wright's complaint to the superintendent was the real negligence, if any in the case, and that was a failure to perform one of the duties which devolved upon him as a servant and the risk of which was assumed by all the other servants.

The case is controlled by the principles announced in the Whelan and Scharer Cases, supra. Wright assumed the obvious danger and risk incident to carrying the drill machine up the stope as it had been done before, and he is not relieved of the consequences of that assumption by any promise imputable to the master. The Circuit Court erred in not giving the instruction requested by defendant's counsel that plaintiff could not recover.

The judgment must be reversed and the cause remanded for a new trial.

ST. LOUIS STREET FLUSHING MACH. CO. et al. v. AMERICAN STREET FLUSHING MACH. CO.

(Circuit Court of Appeals, Eighth Circuit. October 22, 1907.)

No. 2,507.

1. PATENTS—INVENTION—NEW COMBINATION OF OLD ELEMENTS.

To accomplish a new and useful result within the meaning of the patent law (Rev. St. § 4886 [U. S. Comp. St. 1901, p. 3382]), it is not necessary that a result before unknown should be brought about, but it is sufficient if an old result is accomplished in a new and more effective way; and, if the value and effectiveness of a machine are substantially increased by a new combination of old elements, such combination is patentable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, §§ 27-29.]

2. SAME—EVIDENCE OF INVENTION.

That a defendant charged with infringement of a patent for a machine abandoned the machine it was previously making, and adopted that of the patent, that its engineer claimed to be the inventor thereof, and himself applied for a patent, and that the patented machine has largely superseded others previously in use for the same purposes, are all facts entitled to weight on the question of invention.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 40.]

3. SAME—SCOPE—LIMITATION BY PROCEEDINGS IN PATENT OFFICE.
Where an applicant for a patent repeatedly acquiesced in the rejection of broad claims and substituted therefor narrower ones until his application was granted, the owner of the patent cannot be heard to insist that the narrower claims allowed shall cover the same as the broader ones rejected.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 244.]

4. SAME—INFRINGEMENT—STREET FLUSHING CART.
The Ottofy patent, No. 795,059, for a street flushing cart, covers a device for scouring and flushing streets by forcing water under pressure from a tank located on a moving cart, connected by a pipe extending downward to near the surface of the street, forward of the rear wheels, to nozzles having narrow elongated delivery apertures, and so adjusted that the water is forced out of the apertures in a flat sheet nearly parallel with the surface of the street in a forward and lateral direction, so as to loosen up the dirt and force it away to the sides of the street, and into the gutters, without injury to the surface of the street. The combination of parts by which such result is effected was not anticipated, and discloses invention, but the patent is limited by the prior art to the combination and means shown for producing such flat stream nearly parallel to the street. As so construed *held* infringed.

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

James A. Carr (John D. Johnson and Charles Claflin Allen, on the brief), for appellants.

Mr. Clifton V. Edwards, for appellee.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

ADAMS, Circuit Judge. This was a suit to enjoin infringement of United States letters patent No. 795,059, granted July 18, 1905, to complainant, the American Street Flushing Machine Company, as assignee of L. F. Ottofy, the inventor. The decree below was for complainant, and defendants appeal.

The object of the invention, as stated in the specification, "is to devise a street flushing cart in which the discharge of the water is easily and accurately controlled by the driver, in which the delivery of the water shall be such as to secure the maximum washing effect without excessive use of water and without damage to the streets," etc. The narrowest claim of the patent and the one which best discloses the principle and means for producing the new result of the invention is the third, and is as follows:

"(3) In a traveling street washing machine, the combination with a tank adapted to contain water under pressure and mounted upon forward and rear supports, of a nozzle or nozzles located sufficiently near the plane of the points upon which the machine is supported to be substantially concealed from view, and having narrow elongated delivery apertures which open laterally toward the front of the machine and are substantially parallel to said plane, said nozzles being constructed and positioned to deliver water under pressure at the side or sides of the machine nearly parallel to said plane, forward and laterally of the rear support and avoiding the front support."

The other broader claims of the patent, in the view we take of the case, need not be specially referred to.

The specification describes the invention as growing out of the necessity of localizing—

"the distribution of water so as to have it strike with considerable velocity at an angle depending upon the nature of the surface so as to have first a scouring and then a flushing effect to carry off before it the loosened material. * * * The nozzles are located close to the ground within a few inches and are directed outwardly and forwardly. They are also between the forward and rear wheels and substantially underneath and concealed by the tank. In operation, therefore, the water is delivered free of the wheels under easy observation by the driver and at the same time the stream is not readily noticeable by pedestrians or passing vehicles. At the same time the water is delivered in a flat sheet nearly parallel with the street and washes the dirt forward and outward without injuring the pavement."

Taking the claims and the specification together, we find the invention is for a device for scouring and flushing streets consisting of and resulting in forcing water under pressure from a tank located on a moving cart connected by pipe to a nozzle or nozzles having narrow elongated delivery apertures, extending downward from the tank and to a position near to the surface of the street forward of the rear wheels, and so adjusted that the water is forced out of the apertures in a flat sheet nearly parallel with the surface of the street in a forward and lateral direction, so as to loosen up the dirt and simultaneously force it away to the sides of the street and into the gutters, without injury to the surface of the street.

There is no claim that any of the elements of the patent are new. The tank, the water under pressure, the nozzle, the delivery apertures, and the means of adjustment are all old, but the contention is that the particular combination of these elements in the patent produces a new and useful result, and is patentable. The new and useful result claimed is the effective loosening up of dirt and material on the street and washing them off into the gutter by one action without injury to the street. To accomplish a new and useful result within the meaning of the patent law (section 4886, Rev. St. [U. S. Comp. St. 1901, p. 3382]), it is not necessary that a result before unknown should be brought about, but it is sufficient if an old result is accomplished in a new and more effective way. If the value and effectiveness of a machine are substantially increased, the new combination of old elements, which does it, is patentable. Loom Co. v. Higgins, 105 U. S. 580, 591, 26 L. Ed. 1177; Cantrell v. Wallick, 117 U. S. 689, 694, 6 Sup. Ct. 970, 29 L. Ed. 1017; Anderson v. Collins, 58 C. C. A. 669, 122 Fed. 451, and cases cited. The proof does not permit us to doubt that the machine of the patent does the work of scouring and flushing asphalt and other smooth streets in a more effective and satisfactory way than it was ever done before. The flat sheet of water operating nearly parallel to the surface of the street works like a shovel to loosen up the material on the street, and carry it along as the cart progresses, in a forward and lateral direction, so that it finds its way into the gutter on the side of the street. The very oblique angle to the plane of the street at which the nearly parallel stream operates protects the surface of the street from injury by the impact of the water under pressure which would necessarily be occasioned by a more vertically operating stream. The nozzles from which the stream emanates, being in front of the hind wheels, makes the operation easily observed by the driver of the cart and permits of little splashing of the wheels.

But it is contended that the device of the patent is only a mechanical

shifting of existing means which does not involve invention, and that, if it did, it was anticipated by several other patents. The new and beneficial result accomplished by the device of the patent already referred to consisting of the more effective and less injurious way of scouring and flushing streets might afford a sufficient answer to this first contention; but there is more. The defendant company as found by the learned trial court and shown by abundant proof, upon being advised of the features of the Ottofy invention, abandoned its old machine made according to the Murphy patent hereafter to be considered, and adopted the device of the Ottofy patent. Murphy, defendant's patentee, upon being advised of the defects in his machine and the objections made to it which Ottofy later remedied, confessed his inability to obviate them. Pickles, the engineer of defendant company, upon hearing of Ottofy's invention, claimed to be the first and original inventor thereof, applied for a patent therefor, and assigned all rights to defendant. These are all significant admissions by experts, and that, too, against interest of patentable novelty in complainant's device. There is also evidence of more or less cogency that that device has superseded other devices in the few cities which employ scouring and flushing machines in use upon smooth or asphalt streets. These facts are entitled to weight when the question is whether the machine exhibits patentable invention. Keystone Mfg. Co. v. Adams, 151 U. S. 139, 143, 14 Sup. Ct. 295, 38 L. Ed. 103; National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co., 45 C. C. A. 544, 558, 106 Fed. 693, 707; Kinloch Tel. Co. v. Western Electric Co., 51 C. C. A. 362, 113 Fed. 652; Id., 51 C. C. A. 369, 113 Fed. 659, 665. In Krementz v. S. Cottle Co., 148 U. S. 556, 560, 13 Sup. Ct. 719, 720, 37 L. Ed. 558, Mr. Justice Shiras, in delivering the opinion of the court, after referring to the contention that the step taken by the patentee was one obvious to any skilled mechanic, says the contention is negatived by the conduct of defendant's president, which was in many respects like that of Murphy and Pickles. His language is:

"The view of the court below that Krementz's step in the art was one obvious to any skilled mechanic is negatived by the conduct of Cottle, the president of the defendant company. He was himself a patentee under letters granted April 16, 1878, for an improvement in the construction of collar and sleeve buttons, and put in evidence in this case. * * * His improvement was to form a button of two pieces, the post and base forming one piece and then soldering to the post the head of the button as the other piece. Yet skilled as he was, and with his attention specially turned to the subject, he failed to see what Krementz afterwards saw, that a button might be made of one continuous sheet of metal, wholly dispensing with solder, of an improved shape, of increased strength and requiring less material."

The chief contention of defendants is that Ottofy is anticipated by several United States patents granted before his application was filed. These will now be briefly considered.

The Van Gaasbeek patent, No. 296,488, dated April 8, 1884, is first claimed to constitute a complete anticipation. That was for an "improved street cleaning machine," and had many of the elements of the Ottofy claims, but one and the most important one it did not have, and that was "the narrow elongated delivery apertures." It delivered the water upon the street from a series of nipples or orifices, so that the

stream as it came in contact with the surface of the street was made up of a series of jets, and did not form a thin continuous sheet. Van Gaasbeek made no claim that the stream emitted from the nipples should be delivered upon the street nearly parallel to it. The device of that patent operated more like a rake to stir up and afterwards sprinkle the material on the street, than like a flat shovel inclined so as to scoop up and remove it. We do not think it discloses the combination of the patent in suit, or that a device made under it would perform the function of the device of the patent.

The McDade patent, No. 652,547, of date June 26, 1900, is also claimed to constitute a complete anticipation. That was for "new and useful improvements in street sprinkling machines." It lacks the same essential element that the Van Gaasbeek patent did, namely, "the narrow elongated delivery apertures." It could not deliver the flat continuous nearly parallel stream upon the street. It could only deliver the water in jets somewhat spaced apart, and its action while quite sufficient to sprinkle the street, as obviously contemplated by the patent, was inefficacious to serve as a scouring and flushing device.

The Murphy patents, numbered 736,134 and 736,135, are also relied upon as anticipations. The first mentioned is for an improvement in nozzles. The distinguishing feature is the globular head or hollow sphere at the lower end of a discharge pipe of a tank and a delivery aperture consisting of an elongated curved slot cut through the sphere, so as to permit the water under pressure to escape and be precipitated upon the street. The second is for an improvement in street washers. It has, according to the specification, two objects. First, "to provide means for enabling the driver or operator of the machine to ascertain the pressure within the machine while it is in motion"; and, second, "to provide in connection with the machine a sediment collecting trap for collecting and removing the sediment in a machine of this class," etc. These are totally different objects from those stated in the Ottofy specification. The drawings of the second Murphy patent show the globular nozzle and the spherically elongated slot of the first Murphy patent. The patentee doubtless intended to employ in the operation of the machine of his second patent the nozzle and slot of the first one. But he neither claims nor describes in the specification, nor shows in the drawings any device or means for delivering water from the nozzle in a flat even sheet nearly parallel to the surface of the street. Assuming that defendants are right in claiming that the Murphy device shows the location and adjustability of the nozzle so as to throw water forwardly and laterally, and that the little variances between the two devices in these respects are not functional, we think there is a truly functional difference in the arrangement of the parts by which in the Ottofy device a flat sheet of water is delivered nearly parallel to the surface of the street, whereas, in the Murphy device, the water is not delivered in a flat sheet or nearly parallel to the surface of the street at all. The spherical opening or slit in the nozzle from which the water is delivered is such as necessarily produces a spherically formed sheet of water. It is forced upon the surface of the street more like a scoop than like a flat shovel. The curvilinear flood necessarily

sprays and spatters on the sides or lateral edges of the stream, and has effective operation only for a small space at and near its middle. Moreover, the second Murphy patent discloses no means whereby the sheet of water is delivered nearly parallel with the surface of the street. The angle of inclination to the ground is usually about 40 degrees, and this produces a violent and destructive action of the stream upon the surface of the street. It may be well adapted to flush and scour granite or other streets of rough surface which are not easily injured, but it does not show the elements or disclose the means in combination of the patent in suit. Without stopping to comment upon other dissimilarities between the Murphy and Ottofy devices which may or may not be functional we content ourselves with saying that the distinctively advantageous features of the Ottofy device and the combination of means there disclosed whereby he produces the shovel-like flat stream, and applies it nearly parallel to the street, and which constitute the distinguishing principle of his invention, do not appear in the Murphy patent, and for that reason the latter or any device made pursuant to it is not an anticipation of the Ottofy patent.

The foregoing are the principal patents relied on by defendants as anticipations. The others introduced in evidence have been carefully considered, and none of them are found to so nearly approach anticipation as those already considered. Some disclose one element and some another, but none of them, including those already specifically referred to, disclose all the elements or the combination of elements of the patent in suit. For that reason, they cannot constitute anticipations. Bates v. Coe, 98 U. S. 31, 48, 25 L. Ed. 68; Emerson Electric Co. v. Van Nort Bros. Electric Co. (C. C.) 116 Fed. 974.

We are not impressed with the contention that the elements of complainant's claims constitute an aggregation, instead of a true combination. We think there is a clear correlation and coaction between the tank pressure, the location of the nozzles near the surface of the street, the narrow elongated delivery aperture, the flat sheet of water emanating from the aperture delivered nearly parallel to the street forward and in a lateral direction. The delivery of the water forwardly and laterally and in a plane nearly parallel to the surface of the street is directly related to and produced by the coaction of all the elements. The doctrine of Reckendorfer v. Faber, 92 U. S. 347, 23 L. Ed. 719, and Palmer v. Corning, 156 U. S. 342, 15 Sup. Ct. 381, 39 L. Ed. 445, relied on by defendants, has no application to facts like those disclosed in this case.

On the issue of infringement little need be said. Complainant's expert witness compared a machine shown to have been advertised and used by defendants with the device of the patent and affirmed their similarity both in function and means of performance. No contradiction of that testimony appears in the record, and no claim was made below that defendants' machine was not an infringement of complainant's patent, provided the latter was valid. Practically the only contention aside from that of want of patentable novelty, now for consideration, is that the invention of the patent is limited to a narrow compass. This is entitled to serious attention. The state of the art when

Ottofy entered the field was well advanced. The numerous patents pleaded as anticipations and given in evidence disclose that the art of street flushing and washing and the kindred art of street sprinkling had been much exploited by inventors. The field had been thoroughly worked. The mechanism employed was simple and nothing abstruse or obscure was involved. Streams operating forwardly and laterally had been produced before, but no broad flat stream operating so nearly parallel to the surface of the street as to perform the function of a shovel in scouring and flushing the street had ever been produced. In view of the prior art, the novelty and merit of the present patent rest exclusively in the employment of means and in the combination of elements to produce this flat nearly parallel stream. The patent, therefore, is not a pioneer or primary one in any sense, and the owner is not entitled to much range of equivalents. The claims must be limited in their scope to the actual combination of essential parts as shown, and cannot be construed to cover other combinations of elements or different construction and arrangement. Cimiotti Unhairing Co. v. Am. Fur. Ref. Co., 198 U. S. 399, 25 Sup. Ct. 697, 49 L. Ed. 1100; Kokomo Fence Machine Co. v. Kitselman, 189 U. S. 8, 23 Sup. Ct. 521, 47 L. Ed. 689; Greene v. Buckley, 68 C. C. A. 70, 135 Fed. 520.

That we are correct in this conclusion clearly appears from the contents of the file wrapper in evidence. Ottofy originally claimed (so far as the combination now in question requires us to consider the claims made) forwardly directed nozzles adapted to discharge water forwardly beyond the wheels. This claim, it is observed, was a broad one—to discharge a stream of water in any form and at any angle. The first application was rejected on references and amendments one after another for the period of two years or more followed. One was filed September, 1903, and this is important for our present inquiry. In it a claim was made for means generally like those described in the patent in suit "located sufficiently near the wheel base of the cart to have a forward and lateral scouring action on the street." Here is found a voluntary limitation, namely, that the stream produced should have a scouring action. This application was rejected on the Van Gaasbeek and McDade references, among others, and a new one was filed claiming means "for delivering water laterally and forwardly between the front and rear wheels close to the pavement and nearly parallel thereto." Here is found a further voluntary limitation that the stream produced should be nearly parallel to the pavement. On this application an argument was made by the attorney for Ottofy in which he says:

"The references cited not only cannot accomplish the results accomplished by applicant's cart, but they fall very far short of suggesting the above-named features. McDade and Murphy are the nearest references. If they do not anticipate, then none of the references do. McDade's apparatus is a street sprinkler. * * * If we assume that McDade could deliver the water under pressure, and assume that he changed his stream from a spray to a solid stream, and even to a flat stream, his machine would be useless as a street flusher. The water would strike the pavement at such an angle as to destroy the pavement and there would be no chiselling or scouring effect."

A reasonable and fair interpretation of this argument is that it was intended to secure the allowance of the application on the principle that

the angle of delivery of the water upon the street should, in order to accomplish the results claimed, be lower than in the McDade patent. In other words, that the angle of delivery of the Ottofy patent was so nearly parallel to the street that the pavement would not be injured, and that a chiselling and scouring effect would result from it which would not result from a delivery at an angle like that in the McDade patent. After some amendments unimportant for our present purpose, the application with the claims as they now appear was allowed and the patent in suit issued.

From this history it appears that the patentee repeatedly acquiesced in rejections of his application for a broad claim, and substituted therefor narrower claims, one after the other, upon each rejection, until his application was granted for the means whereby water is delivered under pressure forwardly and laterally nearly parallel to the surface of the street. In such circumstances the owner of the patent will not be heard to insist that the narrower claim allowed shall cover the broader rejected claims. Knapp v. Morss, 150 U. S. 221, 14 Sup. Ct. 81, 37 L. Ed. 1059; Corbin Cabinet Lock Co. v. Eagle Lock Co., 150 U. S. 38, 40, 14 Sup. Ct. 28, 37 L. Ed. 989; Hubbell v. United States, 179 U. S. 77, 80, 21 Sup. Ct. 24, 45 L. Ed. 95; Computing Scale Co. of America v. Automatic Scale Co., 204 U. S. 609, 27 Sup. Ct. 307, 51 L. Ed. 645; Greene v. Buckley, supra.

The contention that Ottofy's combination of means for producing the flat nearly parallel stream is only a change in location, degree, or shape from the Van Gaasbeek or McDade angle of delivery cannot be sustained. The consideration already given to those patents discloses a difference in the means, a difference in the operation of the means, and a difference in the result between his and their inventions. With such differences his would not constitute an infringement of theirs and of necessity theirs do not constitute anticipations of his. Kokomo Fence Machine Co. v. Kitselman; Greene v. Buckley, supra. The practical difficulty in this case is to definitely declare the extent of complainant's monopoly under its patent. It is easy to say that it shall enjoy a monopoly of the means and the operation of the means found in the combination in question, but this is so general a statement as to be likely to produce misunderstanding in practice. For that reason, we emphasize the fact that the production of the flat stream delivered and operating nearly parallel to the surface of the street is an indispensable element of the invention of the patent. It alone expresses the principle of the invention. The claims, when read in the light of the prior art and the history of the patent in suit as disclosed by the file wrapper, clearly establish that principle; not only so, but the patentee himself so regarded it as appears by the argument of his counsel before the commissioner of patents on the McDade reference. He represented that the angle of the McDade patent say of 20 to 30 degrees to the surface would not give the scouring effect of his nearly parallel stream, but would injure the surface of the street. This representation is not referred to as constituting an estoppel like the abandonment of claims once made and acceptance of others in lieu of them, but as an expression by the patentee, who naturally would best know what the principle of his invention was, concerning that principle.

Some other propositions were ably discussed by counsel and have all been carefully considered by us, but from what has already been said it follows that the decree below was for the right party, and should be affirmed; and it is so ordered.

WESTINGHOUSE ELECTRIC & MFG. CO. v. MONTGOMERY ELECTRIC LIGHT & POWER CO.

(Circuit Court of Appeals, Second Circuit. June 27, 1907.)

No. 268.

PATENTS—ANTICIPATION—ELECTRICAL DISTRIBUTION.

The Stanley patent, No. 469,809, for a system of electrical distribution, was not anticipated by the Zipernowski and Deri article published in London in 1885.

On petition for rehearing.

For former opinion, see 153 Fed. 890.

Before WARD, Circuit Judge, and HOLT, District Judge.

PER CURIAM. This is an application by the defendant-appellant for a rehearing. The complainant-appellee is the owner of patent No. 469,809, granted to it as assignee of William Stanley, Jr., March 1, 1892. This court has found, as Coxe, Circuit Judge, did in the Saranac Case (C. C.) 108 Fed. 221, that Stanley made his invention in November, 1885.

The specifications of the patent, between lines 15 and 37 of the second page, provide as follows:

"In the construction of the coils, P and S, the following principles are to be observed: the first thing to be determined is the length of primary wire. This should be of such length that reacting self-inductively upon its own magnetic circuit the average counterpotential so produced approximately equals the potential applied to the primary circuit. When so constructed an ammeter will practically show no current when the secondary circuit is open.

"To obtain these results in practice I use the following method: I first choose the percentage of efficiency to be obtained. Then having selected a type of magnetic circuit affording as great magnetic conductivity as possible, I apply such a length of primary conductor that acting self-inductively upon its core the difference of the counterpotential and the applied potential multiplied by the current in the converter shall equal the pre-determined loss of energy inevitable in conversion and vary the length of primary wire until the desired results are attained."

This quotation is paragraphed for the purpose of making more clear the statement that this court has determined that Stanley's invention was in discovering that the generator and transformer could be so co-ordinated as to give a self-regulating secondary system by winding the primary wire, when the secondary circuit was open, to the point where there was practically no current through the primary. The statement of his practice which follows, represented by the formula C2R referred to throughout the case, this court has held to be no part of the invention.

The above findings dispose of substantially all the grounds suggested for a rehearing, except the ground principally relied on, viz., the defense

of anticipation in certain articles known as the "Zipernowski and Deri articles," published abroad in 1885, before Stanley's invention. This defense was fully considered in the Saranac Case (C. C.) 108 Fed. 221, and 113 Fed. 884, 51 C. C. A. 514, in which, after very careful consideration and an abundance of expert testimony, this court held that these Zipernowski and Deri articles were not an anticipation.

The defendant in this case, not being a party or privy in the Saranac Case, raised the question of anticipation again, but the court followed the finding in that case, saying:

"But this court has already considered and disposed of these alleged anticipations, and has held that they failed to disclose the invention in suit."

If those skilled in the art could have learned from these articles in question, published in August, 1885, that the generator and transformer could be so co-ordinated as to give a self-regulating secondary system by using a primary wire of a certain length when the secondary circuit was open, then the Stanley invention was anticipated and the decision in this case should have been in favor of the defendant.

The subject is complicated and obscure, and has received most careful consideration by this court both in the Saranac Case and in this case. The Zipernowski and Deri articles did not contain, to the mind of the court, any statement that the desired end could be obtained by the use of the primary wire in the manner plainly described in Stanley's specifications. Admitting that Zipernowski and Deri did invent a self-regulating secondary system, and that their system involved the same length of primary wire pointed out by Stanley, still we do not think that the articles in question disclosed even to those skilled in the art the fact that the regulation of the length of this wire was the simple method of obtaining the result.

All the other grounds suggested in the petition for rehearing have been carefully considered, and the petition is denied.

In re BEVIER WOOD PAVEMENT CO.

(District Court, S. D. New York. October 29, 1907.)

1. BANKRUPTCY—PROVABLE CLAIMS—ROYALTY FOR USE OF PATENT.
   Where a claim against a bankrupt for a minimum annual royalty under a license contract for the use of a patent was rejected by the special master as being in the nature of a penalty and unenforceable, he was not authorized to allow any sum to the claimant, except on proof that the patent was actually used by the bankrupt and of the reasonable value of such use.

2. SAME.
   Disallowance of claim for minimum amount of royalty during life of patent, on ground of illegality, as being in reality a penalty, approved.

In Bankruptcy. On review of decision of special master.

Abbott & Coyne, for claimants.
Pease & McLaughlin, for trustee.

CHATFIELD, District Judge. Upon November 3, 1905, an agreement was entered into with the bankrupt corporation, by which agree-

ment the corporation was to have the right to use a certain patented process, and to pay a certain amount for its use, to the extent of a minimum for each successive year, and at a certain rate per square foot for any amount used in excess of the quantity upon which the minimum rate of payment was estimated. Upon October 27, 1906, a petition in bankruptcy was filed, subsequently a receiver was appointed, and in the month of February, 1907, the receiver was notified by the owners of the patent that they rescinded the contract with the bankrupt company. The first payment of royalty or of compensation for the use of the patent was to be made upon January 1, 1907, a date subsequent to the filing of the petition in bankruptcy. The owners of the patent claim the minimum amount of compensation for the entire life of the patent; that is, some 17 years from the making of the original contract. On reference to a special master, it was determined that this agreed compensation was in the nature of a penalty, and therefore illegal. No testimony was taken as to whether the company actually made use of the patent, or incurred any liability for compensation because of that use. It was conceded that a deposit for $3,000, dependent upon certain tests, had been paid over to the licensors, and no question about that deposit can be raised. The special master, upon the contract which was introduced in evidence, found, in addition to denying the claim for the minimum amount for the entire period, that the licensors should be paid as compensation during the time preceding the filing of the petition in bankruptcy the proportionate part of the royalty for the first year which the term between November 3, 1905, and October 27, 1906, bore to the period of one year, for which the first amount of royalty was estimated. If testimony had been taken, and it had been determined as a matter of fact that this amount of compensation was reasonable, the finding might have been sustained. But to hold that the amount of royalty is void, as being in the nature of a penalty, and then to use that royalty as a basis of computation, without taking any evidence as to whether the bankrupt corporation had made use of the patent, or derived any benefit from which a quantum meruit amount or reasonable compensation could be estimated, seems to the court to be unfounded in law.

The owners of the patent contend that they should be allowed royalty at any rate to the 1st of January, 1907, when the first payment would have been due, or to the date in February, when the contract was rescinded. But, in the view which the court takes of the transaction, this contention would make no difference in the result. The special master should have taken testimony to find out what actual use was made by the bankrupt corporation of the rights under the patent, and, if any use was made of those rights, or any enjoyment had, between the appointment of a receiver and the time of the rescission, that also could have been shown. In so far as the various parties seem to have agreed that the amount found by the special master could properly be considered as a fair compensation, it does not seem necessary to disturb the award; and, if the various parties to this motion will stipulate (without prejudice to the claim of the licensors for the minimum amount of royalty throughout the life of the patent) that the amount found by the special master, upon the basis of quantum meruit or com-

pensation, is a fair award, an order may be entered rejecting the creditors claim for royalty in toto, but allowing him the amount found by the special master for the actual use of the patent, it having been stated orally in the argument herein that such use was made, and to that extent confirming the special master's report. If such a stipulation cannot be agreed upon, the special master's report will be confirmed, in so far as he rejected the royalty, and the matter will be sent back to him to determine what was the fair compensation, if any, for the use of the patented article while such use was had, in the same manner in which the liability of a bankrupt corporation is computed upon a claim under a lease, for a period that has not terminated at the time of the institution of the bankruptcy proceedings.

RUDOLPH WURLITZER CO. v. SHEPPY.

(Circuit Court, N. D. Illinois, E. D. October 24, 1907.)

No. 28,428.

PATENTS—INFRINGEMENT—PHONOGRAPH TONE-REGULATOR.

The Robinson patent, No. 831,188, for a phonograph tone-regulator, which consists of an independent device adapted to be inserted between the parts of a phonograph sound-conveyer, discloses invention, and is valid. Also, *held*, infringed.

In Equity. On final hearing.

Cheever & Cox, for complainant.

Frederick Benjamin, for defendant.

KOHLSAAT, Circuit Judge. This suit is brought to restrain defendant from infringing patent No. 831,188, granted to Eugene M. Robinson, September 18, 1906, for phonograph tone-regulator, upon an application filed December 30, 1905. This application is a division of an application for a patent for an improvement in phonographs, being a device for reducing the volume of sound waves passing through the horn of a phonograph, which patent was issued to complainant's assignor February 27, 1906, and numbered 813,670. This latter patent expressly provides that the device of the patent in suit is reserved for the application and patent in suit. The claims read as follows, viz.:

"1. In a phonograph in combination with a record, a reproducer in operative connection therewith and a sound-conveyer attached to said reproducer, a valve-plate mounted adjacent to said sound-conveyer in a plane substantially at right angles thereto adapted to be moved into and out of the path of sound waves within the sound-conveyer to open and close said passageway, a rack upon the plate a pinion meshing with said rack and means for rotating said pinion, whereby said plate may be given a gradual motion in either direction between its two adjustable positions.

"2. A sound-modifier, consisting of a supplemental plate adapted to be secured between two parts of a phonograph sound-conveyer, there being a hole in said supplemental plate adapted to register with the sound wave passageway through the sound-conveyer and a valve-plate mounted in a recess in said supplemental plate adapted to be moved edgewise in the plane of the supplemental plate between two different positions to open and close said hole in the supplemental plate.

"3. A sound-modifier, consisting of a supplemental plate, adapted to be secured between two portions of a phonograph sound-conveyer, there being a hole in said plate adapted to register with the passageway for sound waves through the sound-conveyer and a valve-plate slidably mounted in a recess in said supplemental plate adapted to be moved edgewise in the plane of the supplemental plate backward and forward between two different positions to open and close said hole in the supplemental plate.

"4. A sound-modifier consisting of a supplemental plate, adapted to be secured between two portions of a phonograph sound-conveyer, there being a hole in said plate adapted to register with the passageway for sound waves through the sound-conveyer and a valve-plate slidably mounted in a recess in said supplemental plate adapted to be moved backward and forward in the plane of said plate between two different positions to open and close said hole in the supplemental plate, and a slow-motion device for moving said valve-plate backward and forward between its two positions.

"5. A sound-modifying device comprising a relatively fixed base-plate provided with a sound-conveying opening and provided with means for securing the said plate within a sound-conveyer, a valve-plate adjustably mounted upon said fixed plate and means operable from without said conveyer for adjusting the position of said valve-plate relatively to the opening in said fixed plate."

Manifestly, the device of the patent in suit is covered in general terms by the specifications of the former patent, as well as by the drawings thereof, and might, seemingly, have been made the subject of a claim under that patent. Had it not been reserved as above set out, nor claimed in the former patent, it would fairly have been abandoned to the public. Defendant applied for a patent on December 11, 1905, 19 days prior to the filing of the application for the patent in suit, for improvements in sound-boxes for talking machines, and an interference was declared. Defendant, among other things, insisted that complainant's patent covered only a sound-limiting device located in or close to the horn of the phonograph, while his invention related to means for controlling the volume of sound produced in the sound-box. The examiner rightly held that, while Robinson's claims, as originally presented, in patent No. 831,188, did not in terms cover a sound-regulator, located in the sound-box, yet his drawings did include such a device, and his claims should properly be made to meet the drawings. The drawings of patent No. 813,670 clearly disclose both the horn and the sound-box locations. Defendant acquiesced in the decision of the Patent Office, and limits his defense to invalidity and noninfringement.

Regulation of sound in phonographs is not new in the art. As early as August 12, 1892, Worthington took out patent No. 706,627, for enlarging, diminishing, or entirely cutting out the chamber between the speaking attachment and the horn. The purpose of his invention, it is stated, "is to provide an exceedingly simple and cheap attachment for phonographs by means of which the character of musical or articulated tones may be reproduced substantially as in the original." The tone-regulator is adjacent to, if not in, the sound-box. It differs in form and method of adjustment from that of the patent in suit. Much more in point is the French patent to the Perret & Lenglet Company on July 29, 1902, "for the reproducing diaphragm with regulated tonality for phonographs." It calls for a tone-regulating disc, in conjunction with a sound slot, so arranged as to permit the full volume of sound to pass into the horn when their openings coincide, and

to be diminished as the coincidence grows less and less, up to a total closing of the sound slot. The disc is operated by a thumb screw. A cylindrical revolving regulator is shown as a modification. This device seems to be the equivalent of the swinging shutter of Fig. 7 of the patent in suit, so far as its operation is concerned. Complainant's alleged invention consists of a tone-modifier, which is "adapted to be secured between two parts of a phonograph"; that is, it is a separate article of commerce, sold separately from other elements of the phonograph, and so made as to be adjusted to phonographs not already provided with a tone-modifying arrangement.

Following the interference proceedings, defendant was granted a patent, numbered 843,042, the claims of which are narrow and set out the sound-modifying device as a part of the sound-box or of the phonograph, and not as an independent and adjustable article. A wider construction of its claims would bring it into infringement of the patent in suit. Complainant concedes that it does not conflict with its patent. The distinctions seem to be very nice, however. Be that as it may, defendant is before the court as an infringer, if complainant's patent is valid. He, too, manufactures the very article which the examiner gave to complainant, in which decision he acquiesced, i. e., an independent device, adapted to be inserted between the parts of a phonograph sound-conveyer. He defines the difference between his device as originally claimed, to consist in the fact that:

"In the French patent, the tone-regulating device would have to be sold with the reproducer, whereas, in my invention, it could be applied as a separate portion."

In view of both the patents cited from the prior art, I am of the opinion that the same would be true with regard to the patent in suit. Unless patentable novelty can be found in complainant's device as a separate article of commerce, and its adaptability to phonographs removably, it falls short of invention. It is significant that more than three years were allowed to elapse after the Worthington and the French patents were granted before complainant's device was conceived. Undoubtedly, it was a desirable article, and this delay is very persuasive evidence of invention. Furthermore, the phonograph is a very mysterious and delicate instrument, so that every advance in its efficiency must of necessity be slight, physically. Every improvement which serves to make it more available to the public should be given grave consideration by the courts. The degree of invention involved in constructing the device of the patent in suit is, in itself, slight, but in its effect on the art it is very considerable. I am of the opinion that it has patentable merit.

The prayer of the bill is granted.

UNDERWOOD TYPEWRITER CO. v. ELLIOTT-FISHER CO.

(Circuit Court, S. D. New York. September 13, 1907.)

1. PATENTS—INFRINGEMENT—TABULATING ATTACHMENT FOR TYPEWRITERS.
The Gathwright patent, No. 436,916, for a tabulating attachment for typewriters, construed, and *held* infringed on a motion to punish a defendant for contempt in violating a preliminary injunction restraining it from infringement of such patent.

2. SAME—SUIT FOR INFRINGEMENT—IMPOUNDING OF INFRINGING ARTICLES.
A court of equity has power on a preliminary motion in a suit for infringement of a patent, when a prima facie case is made, to order the marshal or a receiver to take possession of infringing articles in the possession of defendant, and to hold them until a final decree.

3. SAME—INFRINGEMENT—SALE AFTER EXPIRATION OF INFRINGING ARTICLE MADE BEFORE.
The making of articles which infringe a patent during the existence of the monopoly which is created by that patent is in violation of the patent law, and infringing articles so made during the life of a patent cannot lawfully be sold after its expiration.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 360.]

In Equity. On motion to punish for contempt for violation of injunction.

Briesen & Knauth (Arthur v. Briesen and Eugene Eble, of counsel), for the motion.

Robert Fletcher Rogers (William A. Redding, Alfred W. Kiddle, and Philip T. Dodge, of counsel), opposed.

HOLT, District Judge. This is a motion to punish the defendant for contempt of court for violating a preliminary injunction in a patent suit, and for an order requiring the defendant to deliver up to the marshal certain machines alleged to have been made in violation of the injunction. The suit was a suit in equity, in the usual form, to restrain the alleged infringement of United States patent No. 436,916, issued September 23, 1890, to Josiah B. Gathwright. An order for a preliminary injunction was consented to by the defendant. The injunction as issued restrained the defendant, among other things, from making, using, vending, or delivering typewriting machines such as had theretofore been made by the defendant, and from imitating the invention of claims 4 and 5 of said Gathwright patent. The defendant thereupon made a certain change in its machines, and has been selling the changed machines. By consenting to the preliminary injunction, it admitted that the machines which originally made infringed. It claims that the machines which it now makes, with the changes which it introduced, do not infringe, and the sole question upon the motion is whether the changes which have been made have converted the machine from one which infringed into one which does not infringe.

Gathwright's invention relates to an improvement in a tabulating attachment for a typewriting machine. The Circuit Court of Appeals in its opinion describes the principal features of Gathwright's invention as being, "first, a supplemental spacing key which is exclusively devoted to the tabulating attachment, and performs no function except in connection therewith." This key performs two functions, one to dis-

engage an ordinary detent or feed dog from the rack, which permits the carriage of the typewriter to pass to a desired point, where it is stopped by an arm of the feed bar coming into contact with adjustable lugs affixed to the stop rod. The second function is to raise the stop rod, so that the adjustable lugs shall stop the movement of the carriage. When the pressure on the key is released, the rod returns to its former position, the lugs are removed out of the path of the carriage, and the machine is free to resume the ordinary action in typewriting, proceeding step to step. The use of a key moving a lever to disengage the detent, thus leaving the carriage of the typewriter free to pass over any desired space, is old, but the use of a spacing key fitted to a tabulating attachment, which is entirely distinct from the apparatus of the machine, by which the exact space at which the tabulation should begin can be fixed in advance, and the machine moved over to the precise point, and there stopped mechanically, was novel with Gathwright. As the Circuit Court of Appeals says (Wagner Typewriter Co. v. Wyckoff, 151 Fed. 587, 81 C. C. A. 129):

"Generally speaking, the patentee's contribution to the art consists in providing an independent mechanism operated by a separate spacing key by which adjustable stop lugs can be brought into contact with a portion of the feed carriage, thus dispensing with the use of the small and comparatively delicate feed dog, or detent, to bear the greatly increased strain when the carriage is released from the step by step movement."

In Gathwright's patent the lever moved by the supplemental spacing key both moves the rack, so as to disengage it from the detent, and moves the stop rod so as to bring the adjustable lug in the way of the carriage. In order to accomplish this, the lever is connected both with the rack bar and the stop rod. The defendant's original machine was so constructed, but the machine which it is now selling has been changed by taking out a connecting piece of iron, described as "T1" on the drawing of defendant's typewriter. This leaves the machine with the supplemental spacing key moving the stop rod into position, and another spacing key near it disengaging the rack from the detent. These two spacing keys can be reached by one finger, and moved by one movement of the finger, the finger performing the same function that was formerly performed by the connecting piece of iron. The defendant claims that the essence of Gathwright's invention was that the supplemental spacing key operated both levers. This claim is substantially based on the statement, at line 50 of the second page of the patent, that the "supplemental spacing key has only one service to perform. When it is pressed down in operation, it releases the carriage-detent, and places an adjusted stop in the path of the carriage to arrest it at the desired point." It is claimed that the patent shows that this is the substance of the invention, not only in the language of the specification, in which it is stated that the supplemental spacing key has only one service to perform, but in the language of both the fourth and fifth claims relied on, one of which claims a connection between the stop rod and the rack bar, and the other of which claims a spacing key provided with a mechanism for releasing the carriage from the detent and for simultaneously interposing an adjustable stop. It is clear that, in the particular arrangement of the machine as described

in the patent, one key performs two functions, releasing the detent and moving the lug into position, and such an arrangement is obviously more simple and desirable than to use two keys, one releasing the detent, and one moving the lug; but in my opinion the essence of Gathwright's invention was not the release of the detent and the movement of the stop rod by the use of one key, but was the independent tabulating apparatus, by the use of the stop rod and adjustable lug in connection with the supplemental spacing key. The use of a key to release the detent was old. It was a clever idea to connect that lever with the lever moving the stop rod, but the use of the stop rod with the adjustable lugs independently moved by the supplemental key was substantially an improvement, and was so held to be by the Circuit Court of Appeals. The defendant admittedly at present uses that improvement, and the fact that it has removed a piece of iron which connected the lever which released the detent and the lever which moved the stop rod in my opinion does not make its present machine any less an infringement of the Gathwright patent than the machine which the defendant admitted was an infringement by its consent to the granting of the preliminary injunction. My conclusion is therefore that the defendant, by making and selling such machines as the one purchased by Merrikan, was guilty of a violation of the preliminary injunction.

Part of the motion is for an order requiring the defendant to deliver up to the marshal the typewriting machines referred to in the moving papers; that is, those substantially similar to those purchased by Merrikan. I do not think that the court would have the power, on a preliminary motion, to order infringing articles to be delivered up and destroyed before a final decree in the case, but it seems to me that it has power, when a prima facie case is made, to order the marshal or a receiver to take possession of infringing articles, and to hold them until a final decree. The papers show that it was the purpose of the defendant, upon the expiration of the complainant's patent, on September 27th of this year, to replace the part which has been removed. The inevitable inference is that it intends to thereupon sell machines manufactured during the life of the patent which infringed the patent. The weight of authority seems to me to hold that goods manufactured during the life of a patent which infringed it cannot be sold or used after the expiration of the patent. The making of such goods during the existence of the monopoly which is created by that patent is in violation of the patent law, and, in my opinion, it is not until after the expiration of the patent that business rivals are at liberty to manufacture articles in conformity with the invention described in the patent for the purpose of selling them. Root v. Railway Co., 105 U. S. 189, 26 L. Ed. 975; Toledo Co. v. Johnston Co. (C. C.) 24 Fed. 739, 741; N. Y. Belting & Packing Co. v. Magowan (C. C.) 27 Fed. 111; American Diamond Rock Boring Co. v. Rutland Marble Co. (C. C.) 2 Fed. 356; Crossley v. Gas Light Co., 4 Law J. Ch. (N. S.) 25; Curtis on Patents, § 436; 3 Robinson on Patents, § 908.

My conclusion is that the defendant should be adjudged guilty of contempt. As a punishment therefor, the defendant is hereby fined $1,000. An order will also be entered directing the marshal to take into his possession and keep until the final determination of this suit

all machines in the possession of the defendant, or its agents, substantially similar to those purchased by Merrikan. If the complainant desires, a master will be appointed to superintend the taking and delivery of said infringing machines, and to take testimony and pass upon any controverted question arising in the proceeding. The order should be settled upon notice.

AJAX FORGE CO. v. MORDEN FROG & CROSSING WORKS.

(Circuit Court, N. D. Illinois, E. D. October 24, 1907.)

No. 27,751.

1. PATENTS—INFRINGEMENT—COMBINATION PATENT.
   A patent for a combination is not infringed by using one element of such combination as an element of a different combination.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 387.]

2. SAME—SWITCH-ROD.
   The Elfborg patent, No. 640,456, for an adjustable switch-rod in which an eccentric is used as means for adjusting the length of the rod in a split switch, is not a pioneer patent, but the device shown differs from prior devices only in the specific locking means employed, and, in view of the narrow construction required by the prior art, the patent is not infringed by the device of the Lee & Moore patent, No. 679,153.

3. SAME—CHANGE OF COMBINATION.
   A patent for a four-part structure operating in a certain way cannot be construed to cover a three-part structure in which one of said three parts is a combination of two of the parts of the patented structure, where an entirely different mode of operation is required, and where, when it is attempted to operate the patented device in the same way, it is wholly inoperative.

In Equity. On final hearing.

Thomas F. Sheridan (Walter A. Scott and George L. Wilkinson, of counsel), for complainant.

Cheever & Cox, for defendant.

KOHLSAAT, Circuit Judge. This is a suit to restrain alleged infringement of claims 1, 3, and 6, of letters patent No. 640,456, for adjustable switch-rod, granted January 2, 1900, to Henry G. Elfborg. The claims in suit are as follows:

"1. The combination, with two parts to be joined, of an eccentric pivoted to one of them and fitting rotatively in an eye or socket in the other, a locking-block seated upon the part to which the eccentric is pivoted, means for nonrotatively connecting the eccentric and locking-block, and means for preventing the locking-block from moving about the pivotal axis of the eccentric, substantially as set forth."

"3. The combination, with two parts to be joined, of an eccentric fitting rotatively in an eye or socket in one of the parts, a shaft carrying the eccentric and having pivotal bearing in the other of the parts, a locking-block having nonrotative engagement with the shaft, and means carried by the part in which the shaft has its pivotal bearing for preventing the locking-block from moving about the axis of the shaft, substantially as set forth."

"6. The combination, with two parts to be joined, of an eccentric fitting rotatively in an eye or socket so formed in one of them, a shaft carrying the eccentric and having pivotal bearing in the other of said parts, a locking-block having nonrotative engagement with the shaft, means carried by the part in which the shaft has its pivotal bearing for preventing the locking-block from

moving about the axis of the shaft, and a handle carried by the locking-block for manipulating it, substantially as set forth."

A switch-rod is a member connecting and holding in alignment the movable opposite rails of a railroad switch, and the patent in suit relates to what is known, by reason of the pointed ends of its movable rails, as a "point rail," or "split switch." Obviously, the simplest form of a switch-rod would be a plain rod or bar having holes for bolts or other means at each of its ends for fastening to the rails. This simple means of holding the rails in proper position is not, however, practicable, for the reason that, where the pointed rails contact with the continuous rails they gradually become worn and loose, thus necessitating frequent readjustment of the length of the switch-rod. Means for adjusting the rod to take up this wear has been the subject of many patents. Some have used the screw as a means of adjustment; others have used plates bolted to each end of the rod with a number of holes, each giving a new adjustment when used with the connecting bolt; while the later devices, of which the patent in suit is an example, used the eccentric as an adjusting means.

The class of devices using the eccentric have these features in common: (1) Two principal parts of the rod to be joined; (2) a bolt, shaft, or pin passing through holes in each of the parts; (3) a disk fitted rotatively into one of the principal parts, through which passes, at some point other than its center, the axis of the coupling pin or bolt; (4) some means for locking this eccentric against rotation.

The patents of this class differ from each other somewhat in the assembling of these parts, and this seems to be principally on account of their different means of locking the eccentric. The patent therefore cannot be called a pioneer patent. It follows closely the methods of the prior art in principle, differing only in the specific locking means employed.

Defendant admits the manufacture and sale of two kinds of switch-rods which are charged to infringe the claims in suit. The first of these devices is substantially identical with that illustrated in Figs. 7, 8, and 9 of patent No. 679,153, granted to W. C. Lee and W. F. Moore on July 23, 1901, which patent is owned by defendant company; the second is a slight modification of the Lee & Moore patent, No. 679,153. The difference between the two devices of defendants is admitted by both parties to be immaterial. The device of the patent in suit undoubtedly discloses peculiarities of construction not found in the prior art. Elfborg seems to have been the first, who, by making the eccentric integral with the shaft, gave to that member the new functions of forming part of the means for adjusting the eccentric and for locking the eccentric when adjusted.

Defendant's structure embodies these features of novelty, but goes a step further. While the shaft-head of complainant forms but a part of the means for locking the eccentric against rotation (the other part being a detachable locking-block), defendant's shaft-head is so made as to dispense entirely with the separate locking-block. Defendant has made in one part what complainant made in two, but in doing so has also changed the mode of operation. In adjusting complainant's device, the nut on the shaft-head is removed, the locking-block lifted out, the shaft with its eccentric turned to the desired position, and the lock-

ing-block then replaced. In defendant's device, the lower nut is removed (the upper one being integral with the shaft), the shaft must then be raised to admit of turning, and then lowered to lock the eccentric. While it may be, as seems to be the case, that Elfborg was the first to use the eccentric integral with the shaft, yet, considered separately, this was no part of his invention. What he did invent was a combination, and there is no rule of law prohibiting defendant's use of any element of Elfborg's combination, provided it is used in a different combination.

To find infringement, the court must find that the enlarged octagonal shaft-head of defendant's device is the equivalent of the "locking-block" of complainant's claims, and that the integral connection between the shaft and its head is the equivalent of the "means for nonrotatively connecting the eccentric and locking-block" of claim 1 and the "nonrotative engagement with the shaft" of claims 3 and 6. Under the language of claim 6, this bolt-head must also be construed as "a handle carried by the locking-block for manipulating it."

The defendant's bolt-head corresponds to the upper octagonal part of the shaft of complainant's patents. It is simply an enlargement of this part, and the "locking-block" shown and described by complainant, and plainly meant by him when he uses the term, is a separate locking-block. There is no such part in defendant's device. While the integral connection between the bolt-head and its shaft of defendant's structure might be construed to be equivalent to "means for nonrotatively connecting the eccentric and locking-block," this could not be done without manifest abuse of the language used in claims 3 and 6, where "nonrotative engagement with the shaft" is called for. Engagement with the shaft implies clearly the want of integrality. It would seem a forced construction to hold that the bolt-head of defendant's device is the "handle" described and claimed by complainant. There is no such handle in defendant's device.

Complainant contends that it does not involve invention to simply make the locking-block of its patent integral with the shaft, and complainant's expert has gone into this question fully in his testimony, and has offered in evidence an exhibit model showing the integral connection of a bolt-head made circular and locked by a narrow lateral projection which is adapted to fit into any one of a series of notches formed around the hole in which the bolt-head rests. Leaving out of consideration the handle, which is integrally connected with the bolt-head, this construction is substantially that of defendant. The mode of operation is that of defendant. The lower nut must be loosened, and the whole shaft raised, before it can be adjusted. This exhibit model seems to beg the question. If integral connection is made between complainant's removable locking-block and its octagonal shaft-head, without other change, the device becomes inoperative and incapable of adjustment.

Keeping in view the state of the prior art, and giving to the claims as broad a construction as the terms used will reasonably warrant, it does not appear that defendant has infringed, and the bill will therefore be dismissed for want of equity.

AJAX FORGE CO. v. MORDEN FROG & CROSSING WORKS.

(Circuit Court, N. D. Illinois, E. D. October 24, 1907.)

No. 27,598.

1. PATENTS—INFRINGEMENT—SWITCH-ROD.
The Elfborg patents, No. 768,591 and No. 768,592, for switch-rod mechanism, construed, and, as limited by the language of their claims and by the prior art, *held* not infringed.

2. SAME—CONSTRUCTION OF CLAIMS.
Where a patentee limited his claims, by the use of the word "corrugated," to describe the form of a part, he cannot be heard to say that it should be given a broader construction, as "polygonal" or "noncircular," when there was pending in the Patent Office at the same time another application, with which he would have been thrown into interference if he had used the broader term.

Thomas F. Sheridan (Walter A. Scott and George L. Wilkinson, of counsel), for complainant.

Cheever & Cox, for defendant.

KOHLSAAT, Circuit Judge. This suit is brought to restrain infringement of claims 1 and 2 of letters patent No. 768,591 and all of the claims of letters patent No. 768,592; both patents being for switch-rod mechanism, granted to Henry G. Elfborg, August 30, 1904. Claims 1 and 2 of patent No. 768,591 are as follows:

"1. In an apparatus of the class described, the combination of a bracket and a switch-rod, one of such members having a perforation with corrugated walls, and a bolt extending through such bracket and switch-rod and provided with a neck portion in engagement with one of such members and having an eccentric portion in engagement with the other of such members one of such portions of the bolt having a corrugated periphery in engagement with the member having the corrugated perforation, substantially as described.

"2. In an apparatus of the class described, the combination of a bracket secured to a switch-rail, a switch-rod adapted to be secured to the other switch-rail, one of such members having a corrugated perforation, and a bolt extending through such bracket and switch-rod and provided with concentric and eccentric portions, one of which is corrugated and in engagement with the member having the corrugated perforation, substantially as described."

Claims 1 to 7, inclusive, of patent No. 768,592, are as follows:

"1. In an apparatus of the class described, the combination of a bracket and a switch-rod, one of such members having a perforation with corrugated walls, and a bolt extending through such bracket and switch-rod and provided with a corrugated neck portion in engagement with the member having the corrugated perforation, and an eccentric portion in engagement with the other member, substantially as described.

"2. In an apparatus of the class described, the combination of a bracket and a switch-rod, one of such members having a perforation with corrugated walls, and a bolt extending through such bracket and switch-rod and provided with a corrugated neck portion in engagement with the member having the corrugated perforation, such bolt having a substantially cylindrical eccentric portion in engagement with the other member, substantially as described.

"3. In an apparatus of the class described, the combination of a bracket secured to a switch-rail, a switch-rod adapted to be secured to the other switch-rail, one of such members having a perforation with corrugated walls, and a bolt extending through such bracket and switch-rod and provided with a corrugated neck portion and depending portion in engagement with the member having the corrugated perforation, such bolt having a substantially cylin-

drical eccentric portion in engagement with the other member, substantially as described.

"4. In an apparatus of the class described, the combination of a bracket secured to a switch-rail, a switch-rod adapted to be secured to the other switch-rail, one of such members having a perforation provided with corrugated walls, a bolt extending through such bracket and switch-rod and provided with a corrugated neck portion and a substantially cylindrical depending portion in alinement with the axial center of such neck portion both in engagement with the member having the corrugated perforations, such bolt having a substantially cylindrical eccentric portion in engagement with the other member, and means for holding such bolt in position, substantially as described.

"5. In an apparatus of the class described, the combination of a bracket secured to a switch-rail, a switch-rod adapted to be secured to the other switch-rail one of such members being provided with a substantially cylindrical perforation therethrough, and the other of such members being provided with an upper jaw having a perforation with corrugated walls and a lower jaw having a substantially cylindrical perforation in alinement with the axial center of the perforation in the upper jaw, and a bolt provided with a corrugated upper neck portion and a substantially cylindrical depending portion in engagement with such jaws and having a substantially cylindrical eccentric portion in engagement with the member which extends between the jaws, substantially as described.

"6. In an apparatus of the class described, the combination of a bracket secured to a switch-rail and having one and provided with an upper jaw having a perforation with corrugated walls and a lower jaw having a perforation in alinement with the axial center of the perforation in the upper jaw, a switch-rod adapted to be secured to the other switch-rail slidably mounted between the jaws of the bracket member and provided with a substantially cylindrical perforation, and a bolt provided with an upper corrugated neck portion and a substantially cylindrical depending portion in engagement with the jaws of the bracket, and having a substantially cylindrical eccentric portion in engagement with the switch-rod, substantially as described.

"7. In an apparatus of the class described, the combination of a bracket secured to a switch-rail, a switch-rod adapted to be secured to the other switch-rail, one of such members having a substantially cylindrical perforation, and the other of such members being provided with an upper jaw having a perforation with corrugated walls and a lower jaw having a substantially cylindrical perforation in alinement with the axial center of the perforation in the upper jaw, a bolt provided with a corrugated upper neck portion in engagement with the corrugations of the upper jaw and having a substantially cylindrical depending portion in engagement with the lower jaw and having a substantially cylindrical eccentric portion in engagement with the member which extends between the jaws, and means for holding such bolt in position, substantially as described."

Defendant admits the manufacture and sale, subsequent to the issuance of complainant's patents in suit, of certain adjustable switch-rods, which are charged by complainant to infringe, but contends: (1) That Elfborg was not the first inventor of the subject-matter of the claims above quoted; and (2) that it has not infringed those claims.

The mechanism of the patents in suit relates to what are known as "point rails," or "split switches," which are the very common form of railroad track construction used wherever it is desirable to form a branch or switch, or to run two tracks into one. The two rails forming the switch terminate in points, and each point is adapted to fit closely against the rail on one side, while leaving a space for the passage of the wheel-flanges on the other. The rod connecting these two rails of the switch is called the switch-rod. It is found that the vibration caused by the passage of trains over the switch causes the switch-rails, by the constant rattling and rubbing, to lose their close contact with the rails, and frequent readjustment of the switch-rod is neces-

sary, so that the rails may fit snugly together. The purpose of the patented device in suit is to provide a safe and convenient means for relatively readjusting the position of these rails by lengthening and shortening the switch-rod. The necessity for some means of readjustment, of course, very early became apparent, and many methods have been suggested and used for this purpose. Screw adjustments of different kinds seems to have been first thought of, but these were soon found open to the objection that constant exposure to moisture corroded, rusted, and wore away the threads of the screws, weakening the rod, and thereby making this mode of adjustment very insecure and dangerous. A stronger and more durable switch-rod is disclosed in some of the later devices which use the principle of connecting the two principal parts of the switch-rod by passing through them a coupling-pin or bolt, having an eccentric portion (as a separate part or integral with the bolt) so arranged as to engage with one or the other of the members of the switch-rod, so that turning the bolt (or the eccentric portion, where that is separate) will cause the members of the adjusting device to slide upon each other, thus lengthening or shortening the rod. When the proper adjustment is obtained by this means, it is necessary that the eccentric be held firmly against rotation, and to accomplish this result by a device simple, strong, cheaply made, and easily manipulated, seems to have been the goal towards which inventors directed their efforts.

The adoption of the eccentric as a means for accomplishing this adjustment is old. The patent relates, specifically, to the means adopted to hold the parts in adjustment. This is accomplished by complainant's assignor by the sinuous or corrugated form of the periphery of the eccentric portion in one patent, and of the shaft or bolt head in the other. In the defendant's device, it is accomplished by the octagonal shape of the bolt or shaft head, which is sunk in the same manner as in complainant's device into the upper part of the switch-rod. The only material difference between the device of patent No. 768,592 of complainant and defendant's device is in the shape of the shaft-head, and complainant contends that, as the bolt-heads of both devices, although a little different in shape, perform exactly the same functions in the same manner, they are mechanical equivalents of each other. An examination of the claims charged to be infringed shows that the patentee has limited himself to the corrugated form of the periphery of the eccentric portion of the bolt in one patent, and in the bolt-head in the other. He has been careful to use the word "corrugated" in all of the claims in suit, and has made no attempt to claim any other form, though the record discloses that in his first model the form used was polygonal. Either the word "polygonal" or the word "noncircular" might have been used in the claims and specifications. As the patentee and his attorney had before them the polygonal form of this member, and yet did not claim it, the conclusion would seem irresistible that they did not desire to claim it, but wished to confine themselves exclusively to the corrugated form. At the time of the pendency of the applications of complainant's assignor, patent No. 679,153 had been granted to Lee & Moore, and there was in the Patent Office an application of Elliott, upon which patent No. 755,471 was afterwards granted. Both of these showed a polygonal form of bolt-head; that of Elliott being sunk into

one of the switch-rod members, being thus supported against rotation on all of its faces, while that of Lee & Moore patent shows only one face of the octagonal bolt-head resting against the luglike portion of the upper member. To make this member of the Lee & Moore patent so that the bolt-head would be partially or wholly sunk into it, or to adapt the lug to engage with more than one of the faces of the bolt-head, would not seem to constitute invention. With this application and prior patent before the examiner, both disclosing the polygonal form of bolt-head, performing the same functions as the sinusoidal or corrugated form of complainant's patent, it would seem clear that, unless complainant's patents had been limited to the corrugated form, an interference would have been declared. This was not done, and the only plausible inference is that the Patent Office granted the patents to Elfborg solely because they were so limited.

Complainant's attempt to anticipate the Elliott and Lee & Moore patents by the 1899 model of Elfborg and the evidence of invention at that time cannot affect the case, because that construction was abandoned. No application was made for a patent on that specific form of switch-rod mechanism. Indeed, Elfborg declined, upon being informed by his counsel that his prior patent No. 640,456 did not cover the device of his 1899 model, to make application for a patent therefor, but decided to apply for a patent on "a somewhat similar structure, but corrugated; that is, so as to remove the objections which are found in the hexagonal head and hole." If the patent can be sustained at all in view of the prior art, it must be by reason of the specific form claimed, and, this being so, it clearly follows that defendant does not infringe.

The bill is dismissed for want of equity.

In re MORRIS.

(District Court, M. D. Pennsylvania. July 8, 1907.)

No. 985, in Bankruptcy.

1. SALES—CONDITIONAL SALES DISTINGUISHED FROM BAILMENT.

Where a contract, evidenced by a writing purporting to be a lease or bailment of the furniture of a hotel, provided for a delivery of the goods to the bailee on the payment of a certain sum, and for progressively increasing monthly installments extending over a period of five years, with interest, which the bailee undertook to pay, on completion of which payments he was to become the owner, without more, there being no term for which the goods were leased, nor any stipulation for their return at the end, and the amount to be paid for their use being the full value of the goods, the bailor, upon a default, being given the right to retain all payments made, this, under the law of Pennsylvania, was a conditional sale, notwithstanding the fact that no title, as it is declared, was to pass, but was to be retained by the bailor until the end.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 1324, 1325.]

2. SAME—BANKRUPTCY—RIGHTS OF TRUSTEE REPRESENTING CREDITORS.

Whatever it may be called, and however hedged about with conditions, where there is a positive engagement on the part of the so-called bailee or lessee to pay a stipulated sum, upon which payment, without more, the goods are to be his, and a bill of sale to be executed therefor, this is nothing but a sale, and not a bailment, which the trustee in bankruptcy, representing creditors, may assert.

3. FRAUD—UNUSUAL LITTLE THINGS AS BADGES OF.

Semble, that the character of a transaction is often betrayed by the unusual little things which creep in, "the clausulæ inconsuetæ pointed to in Twyne's Case as the sure badges of that which they are intended to hide."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 1324, 1325.]

In Bankruptcy. Petition of Barbara Boyle for the reclamation of certain property.

C. A. Van Wormer, for petitioner.
J. C. Ingham, for trustee.

ARCHBALD, District Judge. It is difficult to give to a written instrument a character which the transaction, which it purports to represent, does not inherently bear. While, therefore, it is easy enough to make an agreement speak as a lease or a bailment, where that was what was actually in the mind of the parties, where the fact is that the one desires to sell and the other to buy, the attempt to have the arrangement masquerade in writing as something else is very likely to fail. There are apt terms and provisions for the one, which are inapt and unadaptable for the other, and the result is a nondescript, the different parts of which defeat each other and make manifest the real purpose in view. And this is also often betrayed by the unusual little things which creep in, "the clausulæ inconsuetæ pointed to in Twyne's Case, 3 Rep. 80, as the sure badges of that which they are intended to hide." Taylor v. Taylor, 8 How. 183, 205, 12 L. Ed. 1040; In re Baxter (C. C. A.) 152 Fed. 137, 141. As experience teaches, such instruments are prompted by the desire on the part of the owner of the goods to have the benefit of a sale while escaping its responsibilities, retaining a hold on them so as to be secure of the price, without subjecting them to the claims of creditors by reason of having parted with the possession, although giving credit to the one obtaining them, in their eyes, as the apparent owner thereby. This is not the policy of the law, and there is no occasion for the courts to be astute in helping to get around it. On the contrary, the result cannot but be healthful where attempted evasions of it are brought to nought. This subject has been so often considered in this court that there is very little left to be said. In re Butterwick (D. C.) 12 Am. Bankr. Rep. 536, 131 Fed. 371; In re Tice (D. C.) 15 Am. Bankr. Rep. 97, 139 Fed. 52; In re Poore (D. C.) Id. 174, 139 Fed. 862; In re Wells (D. C.) Id. 419, 140 Fed. 752; In re Heckathorn (D. C.) 16 Am. Bankr. Rep. 467, 144 Fed. 499. The question is one of local law in which the decisions of the state courts control. Those in Pennsylvania are not all so clear or consistent as they might be. In re Tice (D. C.) 15 Am. Bankr. Rep. 97, 139 Fed. 52. And there are some no doubt in which the writing has been held to constitute a lease or bailment, which approach somewhat closely to the case in hand. Stiles v. Seaton, 200 Pa. 114, 49 Atl. 774; Miller v. Douglas, 32 Pa. Sup. Ct. 158. But as was observed in one of the latest, and as is applicable here, there is nothing about the agreement relied upon that suggests a bailment, except the use of certain terms and expressions which are evidently

employed to give another name to that which was meant to be a conditional sale. Kelly Roller Co. v. Spyker, 215 Pa. 332, 64 Atl. 546. There is no evidence in the present instance, outside of the writing, as to the nature of the transaction out of which it grew, and it is therefore to be judged solely by the terms of that instrument. But, regardless of some of these, if the effect was to give title to the bankrupt upon payment of a stipulated sum, it was a sale, whatever else it may have been denominated at the time. In re Tice (D. C.) 15 Am. Bankr. Rep. 97, 139 Fed. 52.

The agreement is a somewhat verbose affair, and starts out with styling one party the bailor and the other the bailee, reciting that the one delivers to the other, "on hire and on the terms and conditions" thereinafter named, the goods and chattels enumerated in the schedules attached. These goods constituted the furniture in a certain hotel, known as the "Sinclair House," at Pittston, Pa., of which the bankrupt took a five-year lease on the same day. And "for the use and hire" of them he agreed to pay the sum of $5,500, of which $1,500 was to be paid down on the execution of the agreement, June 20, 1905; $50 on April 1, 1906, and the same amount monthly thereafter until $600 had been paid; $75 on April 1, 1907, and the same amount monthly until $900 had been paid; and $104.16 on April 1, 1908, and the same amount monthly until $2,500 had been paid, together with interest, at the rate of 6 per cent. per annum, payable month by month, to be computed on the balance due on the date of the agreement up to April 1, 1906, and thereafter from April 1st to April 1st, on the unpaid balance, on each of such successive dates, no allowance or deductions to be made therefrom on account of the monthly installments of principal provided for meanwhile. In case of default in any such payments, the so-called bailor was to have the right to repossess herself of the goods and chattels without notice or other proceeding, except that she might sue out a writ of replevin; the so-called bailee agreeing to peaceably and promptly deliver them up to the bailor, who was to retain all money that had been paid. It was also expressly stipulated that, until the payments provided for had been made and a bill of sale given, the right of property should remain in the bailor, the bailee to pay the insurance thereon. The bailee further agreed to protect the goods from needless use and injury, and not to remove them from the hotel nor part with their custody in any way without the written consent of the bailor, any attempt of the bailee to remove them working an immediate forfeiture thereof. Judgment was also confessed by the bailee for $4,000 (the balance due after making the down payment) with interest and costs, and a 5 per cent. attorney's commission, waiving inquisition and exemption. And, upon the failure of the bailee to comply with the terms and conditions of the agreement, the entire balance unpaid was to become immediately due and payable, on affidavit of which judgment might be entered therefor. Finally, upon the faithful performance of all the covenants of the agreement, the bailor undertook to execute a bill of sale transferring to the bailee the ownership of the goods involved.

Notwithstanding the apparent stringency of this instrument, and the multitude of provisions by which its real purpose is overlaid, if not

obscured, it will be found upon examination to be subject to all the infirmities to which reference has been made. Like so many others, the attempt is to have it pose as a bailment, while getting the benefit of a sale, which is only thinly disguised. As a lease, if that be claimed for it, there is no term; or, as a letting for hire, if there be any distinction, there is no provision for a return at the end. These may not be essential. Stiles v. Seaton, 200 Pa. 114, 49 Atl. 774. But they certainly have weight. Kelly Roller Co. v. Spyker, 215 Pa. 333, 64 Atl. 546. The amount to be paid also is the full value of the goods, which is out of all character, if for their mere use. And what explanation is there of the progressively increasing installments provided for, and the peculiar, not to say excessive, computation of interest, upon any such idea? But the determinative thing, from which there is no escape, is that, not only is there a positive engagement on the part of the so-called bailee to pay the sum stipulated, with interest, but upon such payment, without more, the goods without qualification are to be his. Call it what you will, and hedge it about with conditions as you may, this is nothing but an agreement of sale. In re Tice (D. C.) 15 Am. Bankr. Rep. 97, 139 Fed. 52. From the moment the writing was executed, the one party was obligated for the price, and the other upon its payment was bound to transfer the title. There was to be a bill of sale, it is true, but that was a mere form, the bailor having agreed to give it and possession having been parted with at the time. Bearing this character from the start, it does not matter where we break in. Nor is it of any consequence that title was not to pass, as it is declared, but was to be retained by the bailor until all payments had been made. A condition of that kind may be good between the parties, but as to creditors it is of no avail. And why was it necessary to so stipulate, if there was a bailment beyond doubt? Or why, it may be added, was there occasion to provide, as is done, that all money should be retained by the bailor upon the termination of the agreement by default, if it was really for the hire of the goods? But without stopping over this, taking the writing as it stands, there is nothing to be made out of it but a conditional sale, vesting title in the bankrupt, which the trustee representing creditors has the right to assert.

The petition is dismissed.

PHILADELPHIA WAREHOUSE CO. v. WINCHESTER et al.

(Circuit Court, D. Delaware. September 5, 1907.)

No. 262.

1. PLEDGES—VALIDITY.

The Philadelphia Warehouse Company, being engaged in the business of advancing cash or giving credit to manufacturing and other establishments on the security of a pledge of merchantable commodities, loaned $150,000 to the Diamond State Steel Company on collateral notes of the latter company, taking from it leases of portions of its premises on which personal property intended as security for such notes and their renewals was situated, and pursuant to contract with the steel company appointed a custodian of the leased premises and of the personal property deposited or thereafter to be deposited thereon; the custodian being an employé of the steel company. The custodian duly took possession of the leased

premises and placed and continuously maintained thereon in a number of conspicuous positions signs and placards plainly indicating that the warehouse company was the owner of or specially interested in the personal property thereon. *Held*, that a valid pledge of such personal property was created in favor of the warehouse company which should be enforced against receivers of the steel company.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Pledges, §§ 34, 35.]

2. SAME—NOTICE.

Due and reasonable care should be observed by a pledgee to negative the existence of ostensible ownership in the pledgor, and to this end such means should be resorted to as fairly to inform or put third persons on inquiry; but the common-law doctrine of pledge does not require the adoption of such means of giving notice to the public as absolutely to insure to all persons dealing with the pledgor knowledge of the existence of the pledge, nor should it be so strained as to shock reason and negative in large measure the validity of pledges fairly made for the accomplishment of useful ends in extensive industrial operations.

3. SAME.

The signs and placards placed by the warehouse company on the leased premises being of such character as to attract the attention of persons of ordinary intelligence and capable of reading and understanding the English language, and being plainly visible to those visiting the premises and using reasonable care and circumspection, the warehouse company fully discharged its duty to negative ostensible ownership in the steel company.

4. SAME.

The fact that the steel company had some of its own unpledged property on the leased premises could not, as against reasonable notice to the public afforded by signs and placards, establish ostensible ownership in that company of the pledged property; for, while it might have a tendency to create belief on the part of third persons that the unpledged property on the leased premises was in fact pledged, the effect of such belief, far from causing false credit to be given to the steel company, would tend to deter third persons from extending to that company credit which otherwise it might receive.

(Syllabus by the Court.)

In Equity.

John Douglass Brown, for complainant.
H. H. Ward and A. C. Gray, for defendants.

BRADFORD, District Judge. The Philadelphia Warehouse Company filed a bill in this court March 1, 1905, against James P. Winchester and Howard T. Wallace, receivers of the Diamond State Steel Company and also the Diamond State Steel Company, alleging that certain personal property of the latter company had been pledged to the complainant to secure the repayment of moneys loaned or advanced or to be loaned or advanced by it to the Diamond State Steel Company, and praying, among other things, as follows:

"3. That defendants pay to complainant the moneys due upon complainant's advances to the Diamond State Steel Company, including principal, interest, costs, charges, commissions, fees and expenses, to which complainant is entitled under its several pledge contracts, leases or other agreements with the Diamond State Steel Company, and thereby redeem the property in complainant's possession, pledged to it by the Diamond State Steel Company; or in default of such payment that complainant be permitted to pursue its remedies under its several pledge contracts or agreements without interference or hindrance on the part of defendants or of any other persons; accounting to the receivers of the Diamond State Steel Company or to such other party or

parties as may be entitled to receive the same, for the surplus of material, or of cash, or of both, remaining in its hands after the liquidation of its claims as aforesaid."

Answer and replication having been put in, the case was at issue April 8, 1905. Subsequently, June 5, 1905, all the parties entered into a stipulation for a surrender by the complainant to the receivers of certain premises leased to the former by the Diamond State Steel Company on which the property alleged by the former to be subject to a lien in its favor by reason of a pledge was situated, and for the sale of such property by the receivers and the deposit and retention of the proceeds of sale, within certain limits and subject to modification by the court as to amount, as a special fund to abide the determination of this case. The stipulation contained the following provision:

"It is understood and agreed that nothing herein contained shall affect or impair the rights of any party hereto and that in surrendering possession of the merchandise covered by this agreement to Messrs. James P. Winchester and Howard T. Wallace as receivers, the Philadelphia Warehouse Company is surrendering the same to be held by the said receivers as under a special trust or appointment and is not, as pledgee of the said merchandise, redelivering it, or surrendering it, to the pledgor thereof, or the legal representatives of the pledgor thereof, and is not surrendering or relinquishing any of the rights secured to it under its general contract, under its several pledge contracts, under its several leases, or under any of the other contracts or agreements or writings which it holds and to which the Diamond State Steel Company is a party."

The court by a decretal order June 10, 1905, approved the above mentioned stipulation, directed it to be filed, and declared:

"That the Philadelphia Warehouse Company is authorized to surrender the leased premises and to deliver the merchandise referred to in the said stipulation; and that James P. Winchester and Howard T. Wallace, receivers of the Diamond State Steel Company are authorized to receive the same, as a special trust, to be administered in accordance with the agreement set forth in the said stipulation; and that the effect of the said stipulation and of this decree confirming the same and of proceedings by any of the parties hereafter taken in accordance with the said stipulation shall not affect or impair the rights of any of the parties to this present cause, but that the proceeds of sales made under the said stipulation shall be held to await the determination of this cause, and the later order of the court."

The property on which a lien was claimed by the complainant has since been sold, the proceeds of sale are within the control and subject to the disposition of the court, the evidence has been taken and returned by the examiner, and the case is ripe for final adjudication. The complainant is a corporation of Pennsylvania and its business is to advance cash or give credit to manufacturing and other establishments on the security of a pledge of merchantable commodities. It has no public warehouse; and when it is impracticable to store the merchandise, intended to be pledged, in such a warehouse and receive warehouse receipts, the complainant is in the habit of securing storage room for such merchandise at the plant or establishment of the borrower, taking and retaining possession of such merchandise by means of a lease of the buildings or premises containing it, placing and retaining in charge thereof a custodian in the employ of the com-

plainant, and marking the leased premises in order that the public may not be misled or deceived, with respect to the property thereon. The warehouse company and the steel company entered into a contract under seal February 13, 1903, in and by which the former agreed to make advances to the latter on the security of merchandise manufactured by the latter and of raw material or other personal property used in the manufacture of the finished product at its plant in Wilmington in this district. The contract, among other things, provided as follows:

"The advances will be made and will be payable at the office of the warehouse company in the city of Philadelphia. The steel company will lease to the warehouse company several buildings, suitable for storage of the commodities upon which the advances are to be made, also portions of the land belonging to the steel company suitable for storage yards for the same purpose. The warehouse company will employ and place in charge of these leased premises a custodian who shall furnish bond in the amount of one hundred thousand ($100,000) dollars, with security satisfactory to the warehouse company, conditioned for the faithful discharge of the duties of his appointment, and he shall at all times maintain exclusive possession of the leased premises, and their contents, for the warehouse company. Contracts of pledge will from time to time be executed as advances are made, but the execution of such contracts shall not abrogate or impair the legal effect of the pledging of the entire contents of the leased premises, or of the entire stock of merchandise or goods delivered to the custodian of the warehouse company, or affect the right of the warehouse company to maintain and uphold its legal possession of all goods on the leased premises by its duly appointed custodian."

Pursuant to this contract and on the same date the steel company executed under seal four leases to the warehouse company for as many portions of the premises occupied by the steel company, and a fifth lease February 20, 1903, for another portion of said premises, each of the leases, aside from the description of the land demised and the conclusion and subject to variations in the amount of storage charges, and the difference in the date of the last lease, being as follows:

"This agreement, made the 13th day of February, 1903, between the Diamond State Steel Company, a corporation existing under the laws of the state of Delaware, of the first part, and the Philadelphia Warehouse Company, a corporation existing under the laws of the commonwealth of Pennsylvania, of the second part, witnesseth:

"Whereas, it has been agreed between the parties hereto that the premises hereinafter described shall be leased by the party of the first part to the party of the second part for storage of property consigned to the party of the second part as security for advances, the said premises being maintained at the expense of the party of the first part: Now, therefore, this agreement witnesseth, that for the term of one year from the date hereof, and for so long thereafter as any property shall remain thereon which has not been released on repayment to the party of the second part of all advances and charges upon the same, the party of the first part, in consideration of the benefits to accrue, and of the yearly rent or sum of one dollar, receipt whereof in advance is hereby acknowledged, hath leased and demised, and by these presents doth lease and demise, unto the party of the second part premises at works of the party of the first part at Wilmington, Delaware, particularly described as follows, viz.: * * * To have and to hold said premises, with the appurtenances, unto the party of the second part; together with the right in the party of the second part to have at all times by their agents, servants, or employees, free ingress and egress to and from the same, through or over any other premises of the party of the first part; and the right to place and maintain such signs or marks thereon, or on the property stored thereon, as may be neces-

sary to indicate the proprietorship of said party of the second part; and the paramount right at all times during the continuance of this lease to employ any facilities of the party of the first part for receiving, handling, weighing, storing, caring for, packing, shipping, or delivering property.

"It is further agreed that:

"1. The party of the first part shall furnish all material and labor and bear all expenses for keeping and maintaining said premises in good order and repair, and for the employment of a custodian by the party of the second part, and for receiving, handling, weighing, storing, caring for, packing, shipping, or delivery, property taken into, or delivered from, said premises, in such manner as the party of the second part shall direct; and in consideration thereof charge for storage by the party of the second part prior to the maturity of advances made on merchandise stored shall be waived, and thereafter shall be ten (10) dollars per day or fraction thereof.

"2. The party of the second part shall not, without consent of the party of the first part, for all or any part of the term hereby granted, sub-let the said premises, or occupy or use the same in any other manner than for storage purposes, and for the transaction of such business as may be connected therewith, or incident thereto.

"3. Should the party of the first part violate any of the terms or conditions of this lease; or in any manner interfere with, or make difficult, the duties of the agents, servants, or employees of the party of the second part; or become insolvent; or should the premises hereby leased become involved in any manner in litigation; or should the party of the first part, or the party of the second part, be ejected or ousted therefrom or proceedings be begun for that purpose; or should the party of the second part at any time deem it necessary for the protection of their interests or of the property stored; then the party of the second part shall have the right to remove all property from the premises herein described to such other place or places as the party of the second part may deem proper or expedient; and in case of any such removal the party of the first part undertakes and agrees to pay to the party of the second part all expenses of such removal, and of storing said property elsewhere, until the property so stored shall be released on repayment to the party of the second part of all advances and charges upon the same.

"4. The party of the first part agrees to execute or cause to be executed any further agreement or agreements that may be necessary to secure the convenient use and enjoyment of the premises hereby leased by the party of the second part."

In conformity with the contract of February 13, 1903, and the leases of the same date, the warehouse company on the same day appointed in writing a custodian of the portions of the premises of the steel company then, and thereafter to be, leased to the former, and of the personal property deposited or stored, or thereafter to be deposited or stored, thereon, the appointment being as follows:

"This agreement, made the 13th day of February, 1903, between the Philadelphia Warehouse Company, a corporation existing under the laws of the commonwealth of Pennsylvania, of the first part, and Frank W. Todd, of Wilmington, Delaware, of the second part, witnesseth:

"The party of the first part hereby constitutes and appoints the party of the second part custodian in charge of their premises at the works of the Diamond State Steel Company, at Wilmington, Delaware, now or hereafter held or which may hereafter be held under lease from the Diamond State Steel Company, and of the property deposited or stored on said premises, or which may hereafter be deposited or stored thereon. The party of the second part shall maintain at all times exclusive possession of said premises, and see that the proprietorship of the party of the first part therein is continuously made known by the maintenance of conspicuous signs thereon or on the property stored thereon, to give notice to parties visiting the premises of the possession thereof of the party of the first part. He shall be responsible for the safe keeping of the property of the party of the first part while on storage on said premises, making delivery thereof only upon presentation of the written order

of an authorized officer of the party of the first part; he shall keep accurate account thereof and of receipts and deliveries thereof, reporting to the party of the first part weekly or oftener if required; under general instructions of the party of the first part he may deliver from time to time to the Diamond State Steel Company for their own use pledged merchandise in excess of the aggregate gross value deemed necessary for the protection of the loans which at the time of such delivery are outstanding. Party of the second part agrees to calculate value of pledged merchandise at schedule valuations to be fixed by the party of the first part. And upon the termination of his employment he shall account for all property which has been placed in his custody and shall deliver the same to his successor as custodian, or to such other person or persons as the party of the first part may direct. The party of the second part shall furnish to the party of the first part bond in the sum of one hundred thousand (100,000) dollars, with sureties satisfactory to the party of the first part, conditioned for the faithful custody and proper delivery of the premises and property committed to his care, and the faithful discharge of the duties assumed by him under this agreement. As compensation for his services the party of the second part shall be paid by the party of the first part twenty five (25) dollars per annum.

"This agreement shall continue in force for one year from its date, and thereafter from year to year unless terminated by the party of the first part, or by the party of the second part on thirty days' notice to the party of the first part; provided, however, that upon the termination of the lease, or leases, of the premises herein described the employment hereunder shall cease.

"In Witness Whereof the parties hereto have subscribed these premises the day and year first above written.

"Philadelphia Warehouse Company,
"By Wm. A. Powell, Secy.
"Frank W. Todd."

The warehouse company having received on or about February 13, 1903, a schedule of the personal property of the steel company situated on the premises leased to the former company on that day, afterwards, February 16, 1903, gave its promissory note at four months for $50,000, to the steel company, and the latter company in consideration thereof at the same time and as part of the transaction entered into a contract which, aside from an enumeration of the property intended to be pledged, was as follows:

"Philadelphia, February 16, 1903.

"Invoice of collateral consigned to the Philadelphia Warehouse Company by the Diamond State Steel Company.

* * * * * * * * * * * * *

"Having deposited with, and confided to the management, custody, and charge of, the Philadelphia Warehouse Company the property belonging to us described in the foregoing invoice, and that company having advanced to us upon security of said property their promissory note for fifty thousand dollars, dated February 16, 1903, payable June 16, 1903, receiving five hundred dollars as commission for their responsibility and services as above, and loan of their credit, now, in consideration of said loan, we do hereby promise and agree to and with the said company that we will pay to them, at their office in the city of Philadelphia, at or before the maturity of their said promissory note, fifty thousand dollars together with all charges for storage, insurance, and other necessary expenses on account of the said property.

"And we, the undersigned, do also agree with the said company to the following terms and conditions as part of this contract:

"1. The Philadelphia Warehouse Company shall not be liable for any shortage, loss, or injury of, or to, the property in their custody, resulting from water, fire, theft, decay, leakage, wastage, accident, or any other cause than the gross negligence of the said company or of their agents; nor for any loss from failure to insure it, unless such insurance be specially directed in writing.

"2. It is hereby warranted that title to the property described in the fore-

going invoice is in the undersigned, that the said property is free from liens or claims of third parties, and that the description thereof is accurate as to quantity, quality, kind, and value; and it is hereby agreed that a margin of at least as stipulated above per cent. upon the invoice value thereof shall be maintained, and that, in case the market value thereof shall fall, such margin shall be made good upon demand.

"3. The property pledged hereunder, together with any heretofore or hereafter pledged by the undersigned to the said company, to secure this or any other liability, general or special, shall constitute a general continuing collateral security for all liabilities of the undersigned to the said company, and the said company's right, title, and interest therein, shall be prior to all liens or claims thereon, or on the proceeds thereof. And if any property be consigned or delivered to the said company by the undersigned, either in substitution for property withdrawn or as additional security, such substituted or added collateral shall be subject to all the terms and conditions of this contract, including the maintenance of whatever margin may be stipulated for in case of such property.

"4. Either (a) assertion by legal proceedings in any form, of an adverse claim by any third party to the property described in the foregoing invoice, or to any hereafter consigned or delivered to the said company; or (b) fraud, misrepresentation, or concealment, intentional or unintentional, in the description thereof; or (c) failure for twenty-four hours to comply with a demand to make good the stipulated margin; or (d) failure to pay and discharge whatever may be due at the maturity of this or of any other obligation, or of any extension of any obligation, of the undersigned to the said company; or (e) the undersigned's default in meeting other business obligations, and the beginning of legal proceedings by any creditor or creditors to enforce the same; or (f) transfer of the undersigned's business by voluntary act or by operation of law to an assignee, trustee, or receiver; shall render all the undersigned's obligations to the said company immediately due and payable notwithstanding the time limit in any or all of the instruments evidencing the same may not then be elapsed; and the said company may charge and collect as part of the undersigned's liabilities, in addition to legal interest and their usual commission at the rate of three per cent. per annum, all expenditures of every nature, including attorney's fees, which they may find necessary for the protection of their interests and for the collection of whatever may be due them by the undersigned, and costs of any litigation in which they may become involved.

"5. In case of the maturing of the obligations of the undersigned under any provision of the preceding paragraph, the said company may at any time thereafter, in the discretion of their president or vice-president, sell, or cause to be sold, at the undersigned's expense and risk, any or all property held as collateral security, for liabilities of the undersigned, at public or private sale or sales, for cash or on credit, and without notice to the undersigned; and after deducting five per cent. of the net proceeds as commissions of the said company upon such sale or sales, shall apply the balance to the payment of whatever sum or sums may then be owing by the undersigned to the said company, accounting to the undersigned or to the undersigned's legal representative, for the surplus, if any; and the undersigned will be liable for any deficiency. If the sale of the collateral be a public sale by auction of which due notice has been given, the said company may become the purchaser of the same or of any part thereof, and shall in such case hold what is thus purchased as absolute owner thereof, freed and discharged from any right or equity of redemption of the undersigned, such right or equity being hereby expressly waived and released.

"The Diamond State Steel Co.,
"By H. T. Wallace, President.
"The Diamond State Steel Co.,
"By J. A. McKee, Jr., Treas."

Frank W. Todd having, in conformity with the contract of February 13, 1903, and the leases of that date, been appointed custodian of the leased premises and the personal property thereon, took pos-

session of the same as custodian and placed in a number of conspicuous positions on such premises signs which, while differing somewhat in phraseology plainly indicated that the warehouse company was the owner of or specially interested in the personal property thereon. The same statement is applicable, mutatis mutandis, to the premises leased February 20, 1903, and the personal property thereon. The signs placed on the premises leased February 13, 1903, were affixed to the buildings or warehouses thereon, and read "Special Warehouse, Philadelphia Warehouse Company, Philadelphia, Pennsylvania," or "Special Warehouse, Philadelphia Warehouse Company, Philadelphia, Pennsylvania, Frank W. Todd, Custodian, Wilmington, Delaware." The signs placed on the premises leased February 20, 1903, were about 19 in number, distributed about the leased yard and reading as follows: "Storage Yard, Philadelphia Warehouse Company, Philadelphia, Pennsylvania," or "Storage Yard, Philadelphia Warehouse Company, Philadelphia, Pennsylvania, Frank W. Todd, Custodian, Wilmington, Delaware." Two of the 19 signs on the leased yard in conspicuous positions contained a plan or outline of the leased premises. Subsequently the warehouse company loaned or advanced to the steel company, February 20, 1903, and March 13, 1903, respectively, two other sums of $50,000 each on the same or similar terms and conditions as to security by way of pledge as those contained in the contracts and instruments above referred to.

The contracts and negotiations between the steel company and the warehouse company relating to the personal property, on the proceeds of which the latter company claims a lien for advances, clearly did not operate as a sale nor were they violative of the statute of frauds of Delaware, as contended by counsel for the receivers. And it is equally clear that they did not create a chattel mortgage. It is unnecessary to enlarge on these points. These contracts manifestly contemplated a pledge of the personal property then and thereafter to be placed by the steel company on the leased premises. That a contract of pledge may validly cover and operate upon future as well as present deliveries of personal property and may effectually secure future as well as present advances or loans of money is well settled. To constitute a valid pledge there must be actual, or symbolical or constructive, delivery to the pledgee of the property intended to be pledged. It is true that by agreement on sufficient consideration and without delivery a lien on real or personal property may be created which will be enforceable in equity as between the parties and against volunteers or purchasers with notice. Walker v. Brown, 165 U. S. 654, 664, 17 Sup. Ct. 453, 41 L. Ed. 865; Booz v. Phila. & Lewes Transp. Co. (C. C.) 124 Fed. 430. But such an agreement is in no sense a pledge. The creation and continuance of a pledge require delivery of possession and retention of possession by the pledgee, or his agent, subject to the qualification that, under certain circumstances not material to be discussed in this connection, a return of possession to the pledgor, for a merely temporary purpose, will not defeat the pledge. It has been urged on the part of the receivers that whatever may have been the rights of the warehouse company as against the steel company with respect to a

lien on the property intended to be pledged, the former company had no lien or preference valid as against the creditors of the steel company, for want of delivery of possession to and retention of possession by the warehouse company; the receivers representing not only the stockholders, but also the creditors of the steel company. The steel company and the warehouse company unquestionably contemplated and in good faith intended that the latter company should have a lien on all personal property then or thereafter to be placed on the leased premises to secure the repayment of advances made by the latter company to the former company, and that such lien should continue to operate as such security, except in so far as portions of the personal property on the leased premises, not deemed necessary by the warehouse company to the sufficiency of the pledge, should by permission of that company be sold or otherwise disposed of by the steel company, and thereby discharged of the lien. Nor can there be any doubt that delivery of the property intended to be pledged was made by the steel company to the warehouse company. With respect to personal property not originally on the leased premises, but subsequently placed thereon by the steel company, no question can arise as to an actual physical delivery to the warehouse company. And it is equally clear that there was, if not an actual physical delivery, what was equally efficacious, by the steel company to the warehouse company with respect to the personal property situate on the leased premises at the time of the contract of pledge. Such personal property, it is true, was not raised from the surface on which it rested and physically delivered to the warehouse company, but what transpired in connection with the contracts of pledge necessarily involved a delivery in legal contemplation and a change of possession as between the two companies. No other conclusion is admissible in the light of what occurred. In the contract of February 13, 1903, it was stipulated that the "Steel Company will lease to the Warehouse Company several buildings, suitable for storage of the commodities upon which the advances are to be made, also portions of the land belonging to the Steel Company suitable for storage yards for the same purpose." It was further stipulated that the "Warehouse Company will employ and place in charge of these leased premises a custodian * * * and he shall at all times maintain exclusive possession of the leased premises, and their contents, for the Warehouse Company." Pursuant to the contract of February 13, 1903, leases were duly executed by the steel company to the warehouse company, the leased premises having personal property situate thereon intended to be pledged. Each of the leases provided, among other things, that the warehouse company should have the "right to place and maintain such signs or marks" on the leased premises "or on the property stored thereon, as may be necessary to indicate the proprietorship" of that company, and that a custodian of the leased premises and personal property thereon should be employed by the warehouse company at the expense of the steel company for and on behalf of the former company. Pursuant to the contract and the leases the warehouse company duly appointed a custodian to "maintain at all times exclusive possession of said premises, and

see that the proprietorship" of the warehouse company was "continuously made known by the maintenance of conspicuous signs thereon, or on the property stored thereon, to give notice to parties visiting the premises of the possession thereof" by the warehouse company; to be responsible for the safe keeping of the personal property while on storage on the demised premises, "making delivery thereof only upon presentation of the written order of an authorized officer" of the warehouse company; and upon the termination of his employment as custodian to account for all property placed in his custody and "deliver the same to his successor as custodian, or to such other person or persons" as the warehouse company should direct. The right to the possession of the leased premises and of the property thereon intended to be pledged having thus been conferred upon the warehouse company, Todd as custodian, appointed by and for it, entered into possession and placed or caused to be placed and maintained signs thereon as before stated. Under these circumstances it is idle to contend that no delivery was made by the steel company to the warehouse company of the property constituting the subject of the pledge. Not only did the former company contract for a pledge and lease the premises on which the personal property was located, but affirmatively participated in the delivery by authorizing the custodian, to be paid by it for the purpose, to take and retain possession thereof. And the warehouse company, having received possession of the property intended to be pledged, retained possession of it, on the leased premises, except such portions as, being unnecessary for securing repayment of the money loaned or advanced, were disposed of pursuant to the contracts of pledge. Of course, with respect to such portions the lien terminated, and no question is presented on this point. But aside from the portions so disposed of, the steel company made no use of the leased premises or the property thereon in the least inconsistent with the existence and maintenance of the pledge as claimed by the warehouse company. There was no commingling of the pledged with unpledged property on the leased premises in such manner as to render the former indistinguishable from the latter. Both companies understood what was pledged and what was unpledged. In fact, all of the property of the steel company, real and personal, having been sold under a decretal order of this court, it does not appear that the receivers of the steel company and the warehouse company have had the slightest difficulty in ascertaining and separating the funds arising from the sale of the pledged and unpledged property. This, therefore, is not a case in which confusion of property operates to defeat a pledge by reason of uncertainty as to the identity of its subject.

The real and only crucial question on this branch of the case relates to the sufficiency of possession by the warehouse company as against third persons. Did the steel company have the ostensible ownership of the pledged property? Was that property so intermingled with or indistinguishable from its own unpledged property as to mislead and prejudice third persons and obtain for the steel company credit to which it was not entitled? It is not charged on the part of the receivers that anyone mistook or confounded the pledged

property on the leased premises with the unpledged property of the steel company, nor is there any evidence to support such a charge. If reasonable precautions were adopted by the warehouse company to secure third persons from deception or mistake as to what property was pledged and to prevent an extension of credit to the steel company on account of such pledged property, the receivers have no just cause to question the existence of a lien in favor of the warehouse company. The system of "field storage" under which the warehouse company largely, if not wholly, conducts its business, has much to commend it, if care be taken not to mislead the public. It is both convenient and economical. It is promotive of the welfare of manufacturing and commercial industries. It avoids all necessity for unreasonably moving from place to place heavy and bulky material. Sound industrial policy requires that when conducted with reasonable safeguards for the public, it should be encouraged, and not discountenanced. Judge Clark in a carefully considered opinion in Bush v. Export Storage Co. (C. C.) 136 Fed. 918, 927, 933, well says:

"It is not to be disputed that the earlier cases on the subject declare a very strict doctrine in regard to the questions of actual delivery, segregation, and exclusive possession, as necessary conditions in constituting a valid pledge, but a study of more recent cases discloses what is always recognized that the law itself, in order to meet the requirements of commerce and our constantly changing industrial and commercial conditions, is progressive and expansive, and constantly, by slow changes, adapting itself to the changed conditions due to progress, and in this way the earlier and more stringent rules are constantly being liberalized and somewhat relaxed. It is now well established, for example, that, in determining the sufficiency of delivery in a pledge, it is necessary to consider the nature of the property, the surrounding circumstances, and the objects of the pledge, and the reasonable convenience of the pledgor and pledgee, and the apparent demands of larger aggregations of capital and large operations in business. It is settled that there need not in all cases be an actual moving of property, but only such a delivery as the property is reasonably capable of, and as is reasonably suitable under the circumstances. In the case of property of much weight or bulk, moved or transferred with difficulty, a symbolical or constructive delivery has become the rule in almost all cases, instead of an actual delivery; and for much the same reasons the strict necessity of segregation is slowly disappearing and the validity of substitution is very well settled. * * * In regard to such heavy and bulky material as iron and other similar products used in a manufacturing establishment like the one in question, it would seem to be quite unreasonable to require that it should be stored or kept in any particular kind of building or warehouse, such as would be necessary for the storage of grain, meats, and the like. Such a requirement would render a warehousing a stem for such material and articles extremely difficult and expensive. In the absence of statutory regulation, I conclude that leased premises like these in question, sufficiently marked off, by placards, stakes or otherwise, to indicate possession, is valid, in law, as a warehouse lot or storage place, and that such a place is suitable and appropriate to heavy and bulky material of the kind in question, and that the premises were sufficiently marked so far as the issues now to be decided are concerned."

The application of the common-law doctrine of pledge does not necessitate the adoption of such means of giving notice to the public as absolutely to insure to all persons dealing with the pledgor knowledge of the existence of the pledge. Such a stringent requirement would be wholly unreasonable and impracticable. Certainly it is not

the duty of a manufacturing pledgor, as a preliminary step to buying material on credit or receiving loans or advances from persons at a distance, to inform such persons of the existence of a pledge, what property is covered by it, and what amount of money secured by it. It would hardly be more unreasonable to require a pledging corporation to furnish to purchasers or lenders a complete financial statement of its assets, liabilities and business, showing inventories, trial balances, and all other matters relating to its solvency or financial standing. There is a prima facie presumption of fair and honest conduct on the part of men in their business dealings, and upon this presumption necessarily large reliance must be placed in civilized and enlightened communities. Confidence in business is a necessity. Risks of financial loss are incurred, it is true, but the law cannot, however desirable it might be, abolish all such risks in the transactions of society. It cannot afford full protection to the public against all imposition, negative as well as affirmative, on the part of pledgor or pledgee, or save third persons from the injurious consequences of lack of circumspection and inquiry on their own part. Is a man, who knows of the existence of the steel company and sees its extensive plant at a distance of a quarter or half a mile, justified by the law and to be protected against loss in assuming that all of the property on the premises belongs to that company? Or is he to be saved by the law from harm if he assumes that the company is a prosperous concern and worthy of credit, because the real estate and personal property there situate may be worth a million or a couple of million dollars, when in fact its liabilities may be such as to render it insolvent? He should guard himself against risks involved in such assumptions by reasonable inquiry and precaution. But it is unnecessary to multiply such suggestions. The extent to which the doctrine of pledge can go is that the ostensible ownership of the pledged property shall not be in the pledgor. Even this rule is subject to the qualification that pledged property may, without a surrender of the pledge, be delivered by the pledgee to the pledgor for certain special and temporary purposes not necessary to be discussed here. Due and reasonable care should be observed by the pledgee to negative the existence of ostensible ownership in the pledgor, and to this end such means should be resorted to as fairly to inform or put third persons on inquiry. The law does not require more than this. The warehouse company, as before stated, took leases from the steel company of the premises on which the pledged property was situated and appointed a custodian thereof. It is immaterial, under the circumstances of this case, that the custodian was also an official of the steel company. The law does not render an officer or agent of the pledgor and pledgee incompetent to be the custodian of the pledged property, where the parties so agree. Dunn v. Train, 125 Fed. 221, 60 C. C. A. 113; Fidelity Insurance, Trust & S. D. Co. v. Roanoke Iron Co. (C. C.) 81 Fed. 439; Bush v. Export Storage Co. (C. C.) 136 Fed. 918. The application of this proposition to this case is the more apparent in view of the fact that Todd, the custodian, was the assistant treasurer of the steel company, and the character of that office, held by him before and after the execu-

tion of the pledge contracts, did not include the custody of the personal property on the premises. These facts alone, however, might not be sufficient to negative ostensible ownership in the steel company; for a person intending to deal with that company might not and probably would not have known of the existence of the leases, which, in fact, were not recorded, and, aside from the placards and signs, he might not have recognized Todd, even if he knew him, as custodian for the warehouse company. But the warehouse company in placing the signs and placards on the buildings and portions of the premises containing the pledged property did all that could reasonably be expected or required of it to notify the public that it had a claim to or interest in or owned such pledged property. It is true that an illiterate or blind person or a foreigner not understanding the English language would have received no information from these notices. But the law does not test discharge of duty by the warehouse company by such exceptional circumstances. If the signs and placards were of such a character as to attract the attention of persons of ordinary intelligence and capable of reading and understanding the English language, and were properly placed and visible to those using reasonable care and circumspection, such persons visiting the premises were chargeable with knowledge of the notices on the signs and placards. That they were of such a character, and so placed and visible, is clear from the evidence. Indeed, in the brief of argument for the receivers their counsel stated:

"It is further admitted that numerous signs were, at the instance of the Philadelphia Warehouse Company, placed upon various buildings and distributed in prominent places around the yards covered by the leases aforesaid, from the Diamond State Steel Company to said Philadelphia Warehuse Company, and that the notice of any person actually visiting the leased yard or the leased buildings would have very likely been attracted by said signs and by the notices intended to be covered by them."

They were sufficient even if their full import should not be gathered by persons visiting the premises, to put them upon inquiry, and inquiry of the steel company or the warehouse company would have fully informed them; for it is not to be assumed that either company would have perpetrated a fraud upon them. But the counsel for the receivers contend that on the leased premises there was not only the property intended to be pledged to the warehouse company, but also certain property of the steel company not included in the contracts of pledge. Stress is laid upon the fact that it appears from the evidence that, included in such property, were sundry manufacturing appliances, implements, apparatus and conveniences operated and used by the steel company so long as it continued in business. The materiality of this circumstance is not perceived. The fact that the steel company had some of its own unpledged property on the leased premises could not, as against notice to the public afforded by the signs and placards, establish ostensible ownership in that company of the pledged property. It might have a tendency to produce belief on the part of third persons that the unpledged property on the leased premises was in fact pledged. But the effect of such belief far from causing false credit to be given to the steel company would

tend to deter third persons from extending to that company the credit to which it might otherwise have been entitled. They could in nowise be injured by the presence of unpledged property on the leased and placarded premises. The evidence does not disclose any management of or operations on the leased premises inconsistent with the continuance in force of the pledge or with good faith toward the public. The proof is to the contrary. Todd testified to the effect that he was in charge of the leased premises and of the property thereon under the terms of his appointment as custodian, and held such property for the warehouse company, and that such use as was made of the leased premises or any part thereof by employés of the steel company was consistent with the instructions received by him from the warehouse company. There can be no reasonable doubt that the receivers of the steel company recognized, adopted and became bound by the provisions of the pledge contracts. From the time of the original erection by the warehouse company of the signs and placards on the leased premises, such notices remained undisturbed, in their original form and position, and continuously, until June 10, 1905, subject to renewal in some instances. After the appointment of the receivers special watchmen were placed by the warehouse company in charge of the leased premises and their contents, who discharged their duties without protest or molestation on the part of the receivers. After their appointment none of the pledged property was disposed of without the consent and express authority of the warehouse company. That possession by the latter company in pledge of the property on the leased premises continued until after the decretal order of June 10, 1905, appears from the receipt given on that day by the receivers to the warehouse company which, inter alia, contained the following:

"Whereas, under a stipulation in the above cause, confirmed by decree of the court entered the tenth day of June, A. D. 1905, property pledged to the Philadelphia Warehouse Company by the Diamond State Steel Company is agreed to be delivered to Messrs. James P. Winchester and Howard T. Wallace, receivers, under the terms set forth in the stipulation by the said decree confirmed:

Now, therefore, * * * William A. Powell, Secretary of the said Philadelphia Warehouse Company, has made delivery on behalf of the said company, turning over to the undersigned the key to the Bolt and Nut Warehouse and delivering possession of all the other warehouses and of the storage yards, and will forthwith direct the watchmen or care takers of the warehouse company to withdraw from the said premises and deliver peacable possession thereof to the undersigned."

And it was provided in the decretal order:

"That the Philadelphia Warehouse Company is authorized to surrender the leased premises and deliver the merchandise referred to in the said stipulation; and that James P. Winchester and Howard T. Wallace, receivers of the Diamond State Steel Company are authorized to receive the same as a special trust," etc.

There is no evidence, and it has not been suggested, that the warehouse company until after the above decretal order ever surrendered its pledge except as to such portions of the property as were in excess of the value agreed to be retained.

On the evidence the warehouse company fully discharged its duty to negative ostensible ownership in the steel company. The doctrine of ostensible ownership should not be extended so far as to shock reason or destroy in large measure the validity of pledges fairly made for the accomplishment of useful ends in large industrial operations. If reasonable notice to the public was not given in this case, where can the line be drawn? Of course, if courts are prepared to denounce as illegal the whole system of "field storage" that is decisive. But, if not, what more could have been expected or required to be done by the warehouse company to maintain and preserve its pledge than it did do? That it has a valid pledge to secure the amount due to it from the steel company is clear not only on reason but on the cases, which I shall not undertake to discuss. Among them are: First Nat. Bank v. Pennsylvania Trust Co., 124 Fed. 968, 60 C. C. A. 100; Dunn v. Train, 125 Fed. 221, 60 C. C. A. 113; Bush v. Export Storage Co. (C. C.) 136 Fed. 918; Fidelity Trust Co. v. Roanoke Iron Co. (C. C.) 81 Fed. 439. The cases cited by the receivers in their contention against the existence of the lien claimed are without exception readily distinguishable from that in hand. The lien having been transferred, as before stated, to the fund in court, the remaining question relates to the amount of money secured by it.

It is admitted that of the principal sum of $150,000 advanced by the warehouse company to the steel company, $47,748.16 remains unpaid, and is now due to the former company with interest; and further, that, on the assumption of the validity of the lien claimed by the warehouse company it is entitled to receive $6,000 to cover legal expenses; and further, that, on the same assumption, the item of $596.60 claimed in the statement of the warehouse company is correct. On the same assumption, there is a dispute between counsel as to the amount which should be allowed to the warehouse company for the storage of the pledged material. Under the pledge contracts the warehouse company was to receive $55 for each day's storage. Up to June 10, 1905, when the leased premises with the property thereon were surrendered to the receivers, a period of 306 days, a claim for storage had accrued amounting to $16,830. As a general rule, subject to sundry exceptions in cases of illegality or other special circumstances of avoidance, it is not the province of the court to undo contracts deliberately entered into with full understanding of the parties. But the counsel for the warehouse company, in view of the facts of this case, waiving any assertion of a contractual right to the whole amount of the storage charge, has stated the readiness of that company to receive 50 per cent. thereof as a reasonable and proper charge. By reason of this waiver, the sum of $8,415, without interest, only will be allowed instead of $16,830. The item in the statement of claim of a commission of 5 per cent. on sales of pledged property prior to June 10, 1905, amounting to $1,666.92 is allowed. No question has been raised as to the correctness of the amount of the sales prior to this last named day and it seems clear that under the pledge contracts the warehouse company was entitled to commissions on sales made by it or through the receivers as its agents until, by the stipulation of the parties, the pledge lien was taken

from the property on the leased premises in order to attach to the funds thereafter to arise from a sale of the remainder of the property by the receivers. The item of $111.38 in the statement of the warehouse company for brokerage due L. & R. Wister & Co. on sales is disallowed. On the evidence the item of $1,583.07 claimed by the warehouse company as "interest balance" appears to be correct and is allowed. The same is to be said about the item of $896.84, claimed as "commission balance." The item of $3,771.65, claimed as "selling commission" on sufficient quantity of material to liquidate the balance due the warehouse company is disallowed for the reason that the pledge contracts in connection with the stipulation of June 5, 1905, on which the decretal order of June 10, 1905, was based, are wholly inconsistent with the maintenance of such a claim. The warehouse company is entitled to a decree in its favor for the aggregate amount of the demands hereinabove allowed, together with interest, on such as bear interest, and costs, to be paid out of the fund in court retained to answer the purposes of this suit, and is also entitled to receive out of said fund $5,000, or so much thereof as the warehouse company shall deem necessary, to be retained by said company to abide the determination of the attachment suit in Philadelphia, mentioned in the bill of complaint; the receivers of the steel company to have a right to ask leave to intervene in that suit to secure the dissolution of the attachment, and the warehouse company to account to the receivers for any surplus of the said sum of $5,000 remaining after the attachment has been disposed of. Let a decree for the complainant be prepared in accordance with this opinion and be submitted.

ALLEN v. McMANNES.

(District Court, W. D. Wisconsin. October 29, 1907.)

No. 186.

1. FRAUDULENT CONVEYANCES—TRANSFER IN FRAUD OF CREDITORS—KNOWLEDGE OF PURCHASER.

The sale by a retail merchant of his entire stock of goods puts the purchaser on inquiry to learn whether the seller is not in financial difficulty, and casts upon him the burden of proving that he used such means of knowledge as were at hand to ascertain the facts, in order to sustain his title as against creditors of the seller.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Fraudulent Conveyances, §§ 500, 501.]

2. BANKRUPTCY—VOIDABLE PREFERENCE—RECOVERY BY TRUSTEE.

A bankrupt within four months prior to his bankruptcy transferred his stock of goods to a creditor who held a mortgage thereon, which was void as to the bankrupt's creditors, in satisfaction of the debt. The transfer was made in good faith, both parties supposing the mortgage to be valid, but the bankrupt was insolvent at the time, which fact the creditor could have ascertained by reasonable inquiry. *Held*, that the transfer constituted a voidable preference, and the trustee in bankruptcy was entitled to recover the property or its proceeds.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, §§ 250-257.]

3. SAME—SUIT BY TRUSTEE TO AVOID PREFERENCE—AMOUNT RECOVERABLE.
In a suit by a trustee in bankruptcy to avoid a preferential transfer of property, where the transferee has sold the property to as good advantage as the trustee could probably have done, he should not be held to account for more than the amount received therefor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 466.]

4. SAME—EQUITABLE POWERS OF COURT—PROTECTING EQUITIES OF DEFENDANT.
In a suit by a trustee in a court of bankruptcy to set aside a voidable preference 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. 1907, p. 1031], the court has the full powers of a court of equity, and may enforce equities of the defendant as against any other creditor who would otherwise be entitled to share in the recovery, but such creditors are not represented by the trustee in such sense that they can be excluded from participating in the fund or property recovered equally with other creditors without being given notice and an opportunity to be heard.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 467.]

5. SAME.
A bankrupt had made a preferential transfer of his stock of merchandise to his largest creditor in payment of his debt and the creditor had sold the same. Such stock comprised all of his property, except certain real estate for which he was largely indebted, and which his wife claimed as a homestead and refused to surrender. She also filed a claim against the estate. The creditors to whom the bankrupt owed the purchase price of such homestead had reserved no lien thereon. The bankrupt also owed a note given in part payment for a worthless patent right. *Held*, in a suit brought by the trustee to set aside the transfer, that the equities of the defendant were superior to those of such creditors; that, on accounting for the proceeds of the property received by him after paying the costs and expenses of the bankruptcy proceedings, his own claim was entitled to participate pro rata with those of the remaining creditors in the remainder of the fund.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 531.]

In Equity.

Richmond, Jackman & Swansen and Orton & Osborn, for complainant.

H. C. Martin and Bashford, Aylward & Spensley, for defendant.

SANBORN, District Judge. This is a bill in equity, brought by complainant as trustee in bankruptcy of Lorenzo Clark, to avoid an alleged preference made by the bankrupt on July 31, 1906. On that day the bankrupt and his wife, Bessie Clark, joined in a bill of sale to the defendant, covering a stock of boots and shoes and store fixtures. The bill of sale recited that defendant had and claimed a chattel mortgage on the property, and should take such property in full payment for the debts secured by the chattel mortgage; that the sale was in full for the amount due from Clark to the defendant. It was agreed that the property should be sold by defendant as soon as possible, that he should have private occupancy of the lower part of the building in which the goods were situated, until they were sold, upon payment of a stipulated rent. If the property should bring more than the amount of the debt, the surplus was to belong to the bankrupt. Defendant was to conduct the sale and account for the proceeds. It was further recited that the book accounts belonged to the

bankrupt, but might be paid either to said Clark or defendant, either being authorized to collect and give receipts, but, when collected, to belong to said Clark, so far as necessary to pay any of Clark's merchandise debts. The consideration of the sale was recited to be the sum owed by said Clark to defendant on certain notes secured by the chattel mortgage, amounting to $8,089.56, and that such indebtedness was paid by the sale and transfer. It was alleged in the bill of complaint that at the time of making said bill of sale Clark was insolvent, and made the sale with intent to prefer the defendant and to defraud his other creditors in violation of the bankrupt act, and that the value of the property transferred was $8,000, and that defendant at that time had reason to believe and to know, and did know, that said Clark was insolvent, and that said payment to him was for the purpose of preferring him as a creditor of said Clark. The bill does not contain any general prayer for relief, but only for the issue of a subpœna and to have the defendant answer but not under oath, but it was assumed on hearing that the suit was brought for the purpose of compelling defendant to account for the value of the property sold and to have sale declared invalid as a fraud on the bankrupt act. The answer denies that Clark was insolvent at the time of making the bill of sale, that the defendant knew, or had reason to believe, that Clark was insolvent; denies that he made the transfer with intent to prefer defendant or to defraud other creditors; further denies that defendant had reason to believe or to know, or did know, that said Clark was insolvent and that said payment was for the purpose of preferring him as a creditor; further denies that defendant had reason to believe that Clark was insolvent. The answer admits that the property transferred was worth $8,000 at the cost price, but denies that it was worth that sum for immediate conversion at quick or forced sale. It appears in evidence that in the year 1895 the bankrupt was working for the defendant in his boot and shoe store, and in January of that year defendant sold out the stock of boots and shoes to the bankrupt for $8,966.14, $1,216.14 of which was paid in cash and the balance in notes secured by chattel mortgage. The mortgage was renewed several times; the last renewal being made in January, 1905. There was an understanding between the parties that the mortgagor might sell the property in the ordinary course of business and apply the proceeds to his own use. This understanding rendered the mortgage void as to the creditors of the bankrupt. Other questions are raised as to the validity of the mortgage, but they seem to be immaterial in view of the effect of this understanding. In March, 1901, the bankrupt purchased the store building from the defendant for $4,000. In order to raise the money to pay for the building, the bankrupt was obliged to borrow it, or the greater part of it. The person who lent this money did not take any security upon the store building, but some part of the debt has been paid by the bankrupt. In the latter part of July, 1906, an offer was made by one Gordon to purchase the store building for $4,500 and a portion of the stock of boots and shoes for $3,500. It was contemplated that the $3,500 was to be paid to the defendant on his chattel mortgage debt. This offer was accepted by the bank-

rupt, but he was unable to carry it through, because his wife refused to sign the deed of the store property, on the ground that it was her homestead. When the defendant learned that the sale had fallen through, he immediately demanded that his debt be paid, and it was then proposed by the bankrupt to turn over the stock to him in full payment of his debt. At this time both of the parties supposed that the chattel mortgage was valid, and that the defendant had the right to take the stock and apply it in payment of such indebtedness. Defendant knew that the bankrupt was indebted to other creditors for merchandise covered by the bill of sale, but it appears in evidence that Clark told defendant, and later repeated the same statement in the presence of Mr. H. C. Martin, his attorney, that the indebtedness to other creditors was $1,500, and that he had sufficient book accounts to pay such indebtedness. Defendant took no steps to satisfy himself in respect to the book accounts or the amount of the indebtedness. He was well acquainted with the situation; knew the value of the store property, and the value of the merchandise which he took in satisfaction of his debt. Had he supposed that the transfer was subject to be disputed or set aside by creditors, he would undoubtedly have taken further precautions. By mistake of law, he supposed that his chattel mortgage was valid, and this led him to be less vigilant than he otherwise would have been, but it is entirely clear that he knew practically the whole situation. He knew that Clark had been unable to sell the real estate and merchandise, and he understood that there were merchandise debts, and that Clark was closing out all of his property with which he was doing business. As a matter of fact, Clark was insolvent at the time. The sale was not in the ordinary course of business, and the defendant knew that the property was a homestead; that Clark had borrowed the money to pay for it; that the debt to defendant had been increasing; that Clark had obligated himself to pay for a patent right; that he was indebted to merchandise creditors in the sum of at least $1,500. In fact, the defendant knew pretty much everything that Clark knew about the situation, except the amount of the book accounts, which Clark told the defendant were sufficient to pay his merchandise debts. These book accounts were of very little value, probably not to exceed $200 at that time.

The sale of an entire stock of goods of a retail merchant is a suspicious circumstance per se, naturally calculated to put the purchaser on inquiry. Walbrun v. Babbitt, 16 Wall. 577, 21 L. Ed. 489; In re Knopf (D. C.) 146 Fed. 109; Dokken v. Page, 147 Fed. 438, 77 C. C. A. 674. Such a purchase is presumptively questionable, and casts the burden of proof on the purchaser to show that he had no notice of facts or circumstances sufficient to arrest his attention, puts him on inquiry, and requires him to use such means of knowledge as were at hand in order to learn whether the seller is not in financial difficulty, and whether a general statement, such as that the book accounts are sufficient to pay the mercantile creditors, was true. Thomas v. Adelman (D. C.) 136 Fed. 973; English v. Ross (D. C.) 140 Fed. 631; In re Hines (D. C.) 144 Fed. 544; Jackman v. Eau Claire National Bank, 125 Wis. 485, 104 N. W. 98; In re Pease (D. C.) 129 Fed. 448; Roberts v. Johnson, 151 Fed. 567, 81 C. C. A. 47.

Counsel for defendant recognize that the rules just stated are salutary and well settled; but urge that a full inquiry would have disclosed neither the insolvency of the bankrupt nor his intent to prefer. I find from the evidence, however, that investigation would have disclosed Clark's insolvency. Defendant could have found in the store that the mercantile debts were $1,540, and by inquiry could have learned that the note to Mrs. Tyson was $410, the debt for the store building $3,295, and to the bank $300. His own claim was $8,089.56. The total is $13,634.46. Taking the value of the stock at $8,000, the store building at $4,500, the household goods at $200, the amount is $12,700. Defendant could have ascertained by looking at the list of accounts that they were not worth more than $300 or $400 at the outside figure. It may also be said that the stock was hardly worth $8,000 or the store building $4,500. Defendant had recently sold the latter for $4,000. The stock realized only $5,500 at a forced sale; but, taking the property at the extreme highest limit, and also excluding the note given for the patent right, the result is the same, and shows insolvency. The whole situation shows that Clark was in financial difficulty. His wife was claiming a homestead exemption, and refusing to join in a sale of the homestead property for a good price. Defendant took a bill of sale of the stock as a whole, knowing that the homestead creditors were not paid, and not intended to be, also without verifying Clark's statement that the accounts would pay the mercantile creditors. In view of the whole situation, I feel quite clear that the defendant had notice of facts and circumstances disclosing Clark's insolvency and his intent to prefer. From this conclusion a decree setting aside the sale as an unlawful preference should be entered; but the extraordinary circumstances of the case require consideration, so as to determine whether the usual relief following the avoidance of the sale should be administered, or whether the complainant, as trustee representing all the creditors of the bankrupt, including defendant among their number, should be compelled to submit to certain equitable conditions of the relief to which he is entitled, on account of the nature and peculiar circumstances attending some of the claims so represented by him.

Mrs. Clark, the bankrupt's wife, has taken a technical advantage of a liberal exemption law to save a homestead at the expense of her husband's creditors, and at the same time has filed her own claim for $1,158, for money lent her husband from year to year for some 11 years. She claims, and is entitled, to a homestead in the store building purchased by her husband from defendant with borrowed money, $3,295 of which is still unpaid. By virtue of the liberal construction given by the courts of Wisconsin to the homestead exemption law, a business block, part of which is used as the debtor's home, is exempt from process on his debts, and is recognized by the bankrupt law. Clark and his wife, therefore, have saved this building for their homestead out of the wreck of his failure, thus casting the debt contracted to pay for the building upon the personal property of the bankrupt. Thus Mrs. Clark first lessens the assets and increases the claims against the personal property by asserting the homestead right, and then further swells the claims by filing her own; and through the trustee in

this suit asks a decree against defendant for the full amount of his liability. It will be noticed also that it was the act of Mrs. Clark, in refusing to join with the bankrupt in a deed of the homestead which brought on the preferential sale of the stock to defendant, and thus precipitated the bankruptcy. By this act, technically lawful though it was, the sum of $4,500 was prevented from reaching the creditors, and was retained for the benefit of the debtor and his wife. Mrs. Clark is thus permitted to pervert a liberal exemption law by refusing to devote the property to her husband's just debts, allowed to retain a remunerative property in which she is now living and carrying on business, and, in addition, asks the right to prove her claim for $1,158 against the money which defendant is compelled to restore on account of the avoidance of the very sale induced by her act in claiming the homestead, and refusing to devote it to the payment of the debts. Should a court of equity, in setting aside the sale to defendant, compel him to pay back any money for the benefit of Mrs. Clark, or should she be entirely excluded from all right to claim any part of the fund in question?

A similar question arises as to the Huntington and White claims. The Huntington claims amount to $3,295, and are for money lent the bankrupt to pay for the homestead at the time of its purchase from defendant. These claims might have been either secured by mortgage on the property, or by the assertion of vendors' liens within a reasonable time. By neglecting to so secure them their burden is thrown upon the personal property, all of which is now held by defendant as the proceeds of his sale under his preference. By their negligence the Huntingtons have lost their claims on the property which equitably ought to bear the burden. Having two funds applicable to the payment of their claims, the real property and the personal, while other creditors have only one, the Huntingtons negligently permit one fund to escape them, and become absolutely vested in the bankrupt and his wife as a homestead. The Huntington claims, therefore, have no equitable right to compete with other creditors whose claims relate only to the personalty; and defendant as a creditor with a claim for $8,089.56 ought not to be compelled to pay anything toward the liquidation of these claims. The White claim, for $614.63, is part of the consideration for the sale of a worthless patent right or license to the bankrupt by the claimant, who was paid $500 in money in addition to this claim. The proof shows this right to be of no value whatever, and defendant should not be compelled to pay anything towards this claim unless such a result necessarily follows the setting aside of the preference.

The important question, then, is whether the court, as a court of equity, whose power is invoked to set aside a sale invalid both at law and in equity, having found the sale preferential and void, may nevertheless enforce equitable conditions of the relief sought, by permitting defendant to retain such part of the value of the property conveyed to him by the void sale as represents the percentage which the claimants Clark, White, and the Huntingtons would be entitled to. Should the maxim that he who seeks equity must do equity, or submit to have equity done, be held to apply to a case arising under the

bankrupt law in enforcing the special jurisdiction vested in the District Court by the amended act? The provisions of the bankrupt act would not permit any such result as that here suggested. All allowed claims must be paid pro rata, unless made privileged by the act itself. But this, instead of preventing the application of equitable conditions to the relief sought, is the very situation which usually calls for such an application. It is the ordinary case of a legal rule, adopted as properly applicable to the great majority of cases but which sometimes operates inequitably, like the common-law rule vesting the wife's personalty in the husband, but protecting it from the claims of his creditors, except on condition of making a suitable provision for the wife. By amendment to the bankrupt law, the District Court is given jurisdiction to set aside preferences at the suit of the trustee, and it is urged that the power of the court is limited by this provision to the mere avoidance of the preference, and decreeing that the trustee recover the property or its value. No such limitation is expressly imposed by the law, and the question whether any such would be valid was the subject of thorough and prolonged discussion in the Senate of the United States in 1906, in connection with a proposed provision of the railway rate bill, attempting to limit the federal courts in the matter of granting injunctions in respect to rates and other matters. That discussion resulted in the defeat of the amendment, and tended strongly to the conclusion that, while the Congress may define the subjects which shall come within the jurisdiction of the lower federal courts, yet, having once given the jurisdiction, it cannot withhold any part of the judicial power pertaining to the court to which such jurisdiction is given. 40 Cong. Rec. pt. 5, pp. 4115–4122, 4156–4164. The equitable rule as to imposing conditions of relief is thus stated by Mr. Pomeroy:

"It may be regarded as a universal rule governing the court of equity in the administration of its remedies that, whatever may be the nature of the relief sought by the plaintiff, the equitable rights of the defendant growing out of, or intimately connected with, the subject of the controversy in question, will be protected; and for this purpose the plaintiff will be required, as a condition to his obtaining the relief which he asks, to acknowledge, admit, provide for, secure, or allow whatever equitable rights (if any) the defendant may have, and to that end the court will, by its affirmative decree, award to the defendant whatever reliefs may be necessary in order to protect and enforce those rights. This principle is not confined to any particular kind of equitable rights and remedies, but pervades the entire equity jurisprudence, so far as it is concerned with the administration of equitable remedies." 1 Pom. Eq. § 388.

The principle has been applied in a great variety of cases. It is applicable, whenever necessary, in order to promote justice. Mutual Life Insurance Co. v. Brown, 30 N. J. Eq. 193. Perhaps the most striking example was the protection of the wife's equity against her husband's creditors. At law the personal property of a married woman vested in her husband, but courts of equity would not permit the husband's creditors to take it for his debts, except on condition of making adequate provision for the wife. 1 Pom. Eq. § 389. Another illustration is found in Willard v. Tayloe, 8 Wall. 557, 19 L. Ed. 501, where a vendee in a land contract made when the price was

payable in gold sought specific performance upon a tender of depreciated legal tender notes. He was allowed relief only on the payment of the purchase money in gold. Many statutes are merely expressions of the rule, like those in Wisconsin, compelling landowners to pay taxes as a condition of setting aside void tax deeds. In Walling v. Aiken, 1 McMul. Eq. (S. C.) 1, a mortgagor was compelled, as a condition of redeeming from a mortgage, to pay other unsecured debts owing to the mortgagee. This was undoubtedly an extreme application of the rule. It seems to me that this is a proper case for the application of the equitable rule in question. The trustee represents all the creditors, including defendant in his capacity as a creditor. He brings suit in their right, and theirs alone, although the right is wholly statutory. He is here in court as a complainant, seeking to enforce their equitable right to have a preference which injured them avoided, and the proceeds restored to a fund against which they may claim. He represents Mrs. Clark, the Huntingtons, and White, as well as all other creditors, and seeks to enforce their rights, in addition to those of officers of the court, himself, and his attorneys, for commissions, fees, and expenses. Mrs. Clark, through the trustee, is here asking the court to enable her to force defendant to restore money to or for her when, but for her act in seizing the opportunity to gain a homestead without paying for it defendant would not have taken the transfer, or become involved in the liability, vexation, and expense of this litigation. If Mrs. Clark were herself a complainant in person, is it conceivable that a court of equity would give her any such relief? And, if not, it should equally be withheld in a case brought to enforce her rights. Though the case is not as strong in respect to the White and Huntington claims, yet I think like conditions should be imposed in respect to them also. While the trustee represents all the creditors, they are not parties to this suit, and will only be conditionally bound by the decree, as hereafter stated.

As to the measure of damages: Defendant closed out a large part of the property by a quick sale and the balance in bulk. He is an experienced boot and shoe dealer. The expenses of the sale were exceedingly low. The evidence shows that he got as much or more than the trustee could have realized from the same property. Under the rule laid down in Clements v. Moore, 6 Wall. 299, 18 L. Ed. 786, and Wall v. Cox, 101 Fed. 403, 41 C. C. A. 408, the liability of defendant should not exceed the net proceeds he received, or $5,551.31, with the costs of this suit. It appears by the proof that there are no other assets besides this liability. If the sale is set aside, the defendant would then be entitled to file his claim for $8,089.56. Excluding the Huntington, Clark, and White claims, aggregating $5,067.63, the total claims filed are $2,245.63. Not including defendant's debt, the expenses of the bankruptcy proceedings, including fees of the clerk, referee, trustee, and stenographer, and the compensation of the trustee's attorneys, should be made payable out of the amount due from defendant, including all other assets of the estate, which the proof shows to be merely nominal in amount. Defendant should be decreed to pay these expenses, less the amount realized from other

assets, and, in addition, such proportion of the balance as the claims other than the Clark, Huntington, and White claims bear to the total claims, excluding those aforesaid, and including that of defendant.

For the purpose of having a final decree drawn the expenses aforesaid have been ascertained, so that the trustee will have no duty except to disburse the money. Such expenses are as follows:

Disbursements of attorneys in the bankruptcy, and in this action	$ 119 34
Commissions of the trustee	151 02
Fees of the referee	80 01
Fees of attorneys for trustee in this action and the bankruptcy	1,000 00
Stenographer's per diem and fees for transcript under order to preserve testimony, and for copy to complainant's solicitors	111 63
	$1,472 00

The expenses and fees will be fixed accordingly in the final decree.

In order to ascertain the amount to be paid to the trustee by the defendant, the total amount of claims is to be ascertained, excluding the Clark, Huntington, and White claims. Such amount is $10,334.59. The amount for which defendant is liable is $5,551.31. Out of this he should first pay the expenses, $1,472, leaving the sum of $4,078.31. This should be divided by the trustee ratably between defendant, considered as a creditor, and all other creditors who have filed claims, except Mrs. Clark, the Huntingtons, and White. In other words, the sum of $4,078.31 is to be ratably divided between creditors representing claims for $10,334.59, giving a dividend to each of 39.46 per cent. Defendant, having a claim of $8,089.56, will retain $3,192.16, and the other creditors, with claims for $2,245.63, will receive $886.15. Defendant will also be liable for costs which will be taxed by the clerk without including any solicitors' fees.

A further question remains to be considered, of the effect of a decree entered in conformity with this opinion upon those creditors who are denied the right to share in the fund. Mrs. Clark, White, and the Huntingtons are to be excluded from participation in the fund realized from the suit, and which constitutes all the assets of the bankrupt estate. Can they be so excluded without some additional hearing? No one can be bound by a decree without his consent without his day in court. There must be a hearing, in which he may take part, or else an opportunity to be heard, of which he does not avail himself. This is one of the fundamentals, and no other rule could be tolerated for a moment. He need not be a party on the record, but at some point in the proceedings he must have notice, and the means to appear and submit his right or interest. "The decree must be without prejudice to the right of those who are not made parties, and who do not come in before the decree." Gray, J., McArthur v. Scott, 113 U. S. 395, 5 Sup. Ct. 670, 28 L. Ed. 1015. "It is an elementary principle that a court cannot adjudicate directly upon a person's right without having him either entirely or constructively before it." Lamar, J., Gregory v. Stetson, 133 U. S. 586, 10 Sup. Ct. 424, 33 L. Ed. 792. In this case that point has not yet been reached. Those four creditors are, indeed, parties in some sense represented by the trustee. He brings suit for them, to avoid a preference which

stands in the way of their claims. For this purpose, beneficial to them, he is their representative; but his agency goes no further. He is in court for the sole purpose of having a preference avoided, not to have decided the question whether their claims are to be allowed participation. They are represented parties, but have no power to control the proceedings or appear by their own attorney. They are not liable for costs, and have no right of appeal; that being vested solely in the trustee. A represented party is not bound by a hostile proceeding, unless he has had an opportunity to be heard, and neglects to accept it. Pomeroy, Code Rem. § 296. The term "party" in the sense of one who is concluded by a judgment includes all those directly interested in the subject-matter, and who had the right to control or defend the proceedings, examine and cross-examine witnesses, and appeal from the judgment. This was the case of an injury on a highway, where the person responsible for the defect and liable over to the city, and who had actual but not express notice of the suit, was held concluded by the judgment. Robbins v. Chicago, 4 Wall. 657, 672, 18 L. Ed. 427. He need not be named on the record. Strayer v. Johnson, 110 Pa. 21, 1 Atl. 222; Theller v. Hershey (C. C.) 89 Fed. 575; Bachelder v. Brown, 47 Mich. 366, 11 N. W. 200; U. S. v. Beebe, 127 U. S. 344, 8 Sup. Ct. 1083, 32 L. Ed. 121. The trustee being expressly authorized to bring suit to set aside preferences, the creditors, whose right the trustee represents, are thus made parties, so far as they are parties, against their will, by force of the statute. McCann v. Louisville (Ky.) 63 S. W. 446; Tobin v. Portland Mills Co., 41 Or. 269, 68 Pac. 743, 1108.

The decree should therefore provide that the four creditors be given a reasonable time to intervene, become full parties, and show cause why they should not be excluded from any share in the fund; and, in default of such intervention within a time to be fixed, the decree to become absolute.

MISSOURI & K. I. RY. CO. v. CITY OF OLATHE.

(Circuit Court, D. Kansas, First Division. October 26, 1907.)

No. 8,605.

1. STREET RAILROADS—ORDINANCE GRANTING FRANCHISE—POWER TO REPEAL.
A reservation in an ordinance granting a franchise to a street railroad company, which by its acceptance by the company created a contract, of the power to repeal said ordinance in case of a breach of its conditions by the company, does not authorize the city to repeal the ordinances at its pleasure without assigning any breach, and when there has, in fact, been none.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, § 50.]

2. COURTS—JURISDICTION OF FEDERAL COURTS—FEDERAL QUESTION.
A suit to restrain the passage of a municipal ordinance repealing a prior ordinance granting a franchise to a street railroad company, which had been accepted by the company, is one involving the question of the impairment of the obligation of a contract in violation of the constitu-

tional rights of the company, and is within the jurisdiction of a federal court, regardless of the citizenship of the parties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 821.

Jurisdiction in cases involving federal question, see notes to 11 C. C. A. 308; 35 C. C. A. 7.]

8. CONSTITUTIONAL LAW—JUDICIAL POWERS—CONTROLLING LEGISLATIVE ACTION OF MUNICIPALITY.

While a court of equity of the United States may properly enjoin the enforcement of a municipal ordinance which impairs the obligation of a contract in violation of the federal constitution, it has no power to enjoin the passage of such an ordinance, which involves the exercise of legislative discretion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 129.]

In Equity. On demurrer to bill.

Frank Doster, S. D. Scott, and S. T. Seaton, for complainant.

C. L. Randall, J. P. Hindman, and J. W. Parker, for defendant.

POLLOCK, District Judge. The facts material to a ruling on the demurrer lodged against the bill of complaint in this case are, as shown by the record, as follows:

By an ordinance of defendant city, duly passed and published on the 1st day of February, 1907, complainant was granted the right and authority to construct and operate along and over certain streets and avenues of defendant city a standard-gauge electric interurban railway for a period of 20 years, under certain terms, conditions, and restrictions set forth in said ordinance. A copy of said ordinance reads as follows:

"An ordinance granting to the Missouri-Kansas Interurban Railway Company the right to construct, maintain and operate a railway, to be operated by electricity or any other suitable motor power except steam, over and along certain streets within the city of Olathe.

"Be it ordained by the mayor and councilmen of the city of Olathe, Kansas:

"Section 1. The right, privilege, and authority is hereby granted to the Missouri and Kansas Interurban Railway Company, a railroad corporation duly organized under the laws of the state of Kansas, hereinafter called the grantee, its successors and assigns, to construct, maintain and operate for a term of twenty years from and after the publication of this ordinance, a standard-gauge interurban railroad to be operated by electricity or other motor power except steam in, over and along certain streets and avenues of the city of Olathe, Kansas, to wit: Beginning at or near the point where the center line of the track of the Missouri and Kansas Interurban Railway Company is now located and constructed, would if extended intersect the center line of Park street in the city of Olathe, thence extending in a westerly direction over and along said Park street to the westerly side of the public square, thence in a northerly direction over and along Kansas avenue to Santa Fé avenue, thence over and along Santa Fé avenue in an easterly and westerly direction from the center line of said Kansas avenue such distance, which shall not exceed three hundred and fifty (350) feet or thereabout, as may be necessary for the proper construction and operation of a Y track which may be installed and constructed at the corner of said Kansas avenue and Santa Fé avenue.

"Said railroad to consist of a single track laid as nearly as may be in the center of the street occupied by it with necessary turnouts, Ys, passing tracks, fixtures and appurtenances needful in the construction and operation of said railway, and the grantee shall have the right to construct for the purpose of transmitting power to the propulsion of its cars, overhead trolley systems,

suspended on posts placed along the curb line of such streets in said city, provided that this grant shall be subject to all the restrictions and regulations hereinafter contained.

"Sec. 2. The rights herein granted shall relate to a railroad to be operated by electricity or other motive power except steam; steam as a motive power being hereby expressly prohibited under the terms of this ordinance.

"Sec. 3. Said grantee by its acceptance of this ordinance agrees to construct, operate and maintain an interurban railway system upon and along the streets and avenues of said city of Olathe designated in section 1, of this ordinance, and to some point connecting with the street railway system of Kansas City, Missouri, and to provide the necessary cars for carrying passengers and freight and shall maintain in continuous service a schedule for the passage of cars in each direction between points within said city of Olathe at least every two hours for not less than twelve hours in each day, and at least every hour for not less than twelve hours in each day thereafter, and such additional cars for such additional hours as the public service may at any time reasonably demand. It is expressly stipulated, agreed and understood that the grantee shall not haul live stock on its railroad within the city limits and that the carriage of all freight or express within or into said city shall be subject to such regulations as the mayor and council may by ordinance prescribe.

"Sec. 4. The grantee shall bring the streets on which their tracks are laid to the grade as now or hereafter established by said city at their own expense, and for the whole width thereof, and shall also grade all intersecting streets and alleys the whole width thereof and to such distance and in such manner as will permit easy and convenient approach to the street occupied by the grantee's tracks, and the surface of said railway company's tracks shall conform to the grades now, or hereafter established.

"Sec. 5. Whenever the line of said railway company's tracks traverse any street upon which pavement is constructed it shall be the duty of said company after laying its tracks to restore such pavement wherever injured or destroyed, taken up or removed to its previous condition, and whenever the said city of Olathe shall hereafter pave, repave or repair any street upon which said line of railway is constructed it shall be the duty of such railway company to construct or pay the cost of construction of such paving, repaving or repairing to a total width in area along the street so occupied of eight feet for each track occupying each street, according to specifications adopted by said city council and to maintain such paving in good condition during the time such track may remain on such street, except when the duty of maintenance of such pavement may rest upon any contractor contracting such pavement; provided that the said railway company may construct along its tracks detachable curbs or blocks or bricks of sufficient width to enable said company to take up or repair its tracks or rails without disturbing pavement of cement or asphaltic character used in any such streets.

"Sec. 6. Upon the final determination of the city council to pave any street occupied by the track or tracks of the grantee, it shall cause the city clerk to give a written notice of such determination to said railway company and said railway company shall, if it desires to construct so much of said pavement as it is required to do under the provisions of its ordinance so notify the city clerk in writing before the contract for the construction of such pavement is awarded, and it shall thereupon be the duty of said railway company upon making such election to execute its part of such paving in conjunction with the progress of same work under the direction of the city. In the event of said railway company failing to proceed with the work if such notice is given, the said work shall be executed by the city and be charged to said railway company, and a measure of the liability of said railway company shall be the cost and expense of construction of that portion of the paving hereby made the duty of said company to construct.

"Sec. 7. It shall be the duty of the grantee at its own expense to lower, relay and reconstruct all water and gas mains, sewer man-holes and all pipes, wires and cables laid in any street when such lowering, relaying or reconstruction is made necessary by the grading of any street in the construction, operation or maintenance of said railway.

"Sec. 8. The mayor and councilmen of said city shall at all times have the power to pass ordinances regulating the use of headlights and gongs and make all other needful rules and regulations for the protection of the inhabitants of said city in connection with the operation of said railway. Fire engines or other fire fighting apparatus of the city of Olathe shall at all times have the right of way over, across and along the tracks of said railway and the cars of such railway company shall be stopped after the sounding of the fire alarm and on the approach of a fire engine, hose cart or other fire apparatus, which stoppage shall be made when such apparatus is within a distance of three hundred feet of such cars, and shall remain standing until the same have passed. All cars shall be equipped with gongs or whistles, which shall be sounded for a warning upon the approach of a street crossing and whenever necessary to warn any person of danger. All motor cars shall be provided with headlights when run after night. The grantee shall operate its cars at a speed not greater than ten miles an hour in the business portion of the city, and at a speed not to exceed fifteen miles per hour in the residence portion thereof except in front of the property of the deaf and dumb institute where the speed shall not exceed six miles per hour. All passenger cars or trains shall stop at or near all street intersections, but not on the same for the purpose of taking on or letting off passengers, and at such other places as the mayor and council may from time to time designate. The said grantee shall erect, keep and maintain at its own expense suitable and proper electric or natural gas lights at the street intersections along the line of its road within said city of Olathe and at such points within said city as may be necessary to keep its tracks lighted during the hours of the night when its cars are being operated. The entire system of tracks, trolleys, wires and equipment of said railway system shall be modern, first class and suitable for the purpose for which it is intended and shall be so kept and maintained during the existence of this franchise.

"Sec. 9. The location of the tracks, turnouts, Ys, passing tracks and power house and all poles and wires shall be subject to the approval of the city council. All wires suspended from trolley poles shall be not less than eighteen feet above the surface of the street and all the work and improvements of the said railway company of said city shall be constructed under the supervision of the mayor and in city council, so as to avoid the interference both in construction and maintenance with a free and unrestricted use of the streets by the public consistent with the construction and maintenance of said railway. Before doing any work of construction in said city of Olathe, the grantee shall file with the city clerk plans and specifications of said work to be approved by the city council.

"Sec. 10. The grantee shall construct and maintain its own bridge or viaduct across Mill creek in such manner as not to interfere with unobstructed use by the public of the wagon bridge across said creek.

"Sec. 11. The charge for transporting passengers by said railway company shall not exceed the sum of five cents for one continuous passage over said company's line from points within the city limits to any other point in such city. Tickets for the use of school children shall be furnished good for one continuous passage in quantities not less than twenty rides at the rate of two and one-half cents each, good during the school months. United States mail carriers, policemen and members of the fire department when uniformed shall be carried free within the city limits. Children under seven years of age when accompanied by any person paying full fare shall be carried free within the city limits.

"Sec. 12. The city of Olathe or any corporation or person duly authorized by it shall have the right to construct, repair, or replace water, gas and sewer mains and laterals, gas and water service pipes, conduits, to lay wires and cables or any other service utility over or under the tracks of the grantee.

"Sec. 13. The grantee shall within thirty days after the passage of this ordinance file its acceptance of the same in the form of a resolution of its board of directors, attested by the corporate seal and before entering upon any of the work hereby authorized, the said grantee shall execute to the city of Olathe, Kansas, a bond for ten thousand dollars with good and sufficient sureties to be approved by the city council conditioned that the said

grantee in the construction or repair of said road will fill all openings and excavations made by it and will replace or repair all pavings, sidewalks, curbing, streets, which may be disturbed by them in the construction of any work under this ordinance, and that they will pay all damages to persons or property for which the city may in any way become liable resulting from or growing out of any negligence or want of care on the part of said grantee in the construction or operation of its road or cars, and will pay the city the cost of and construction, repair, or other thing which is required of grantee by the terms of this ordinance and in the performance of which said grantee shall fail.

"Sec. 14. The rights and privileges granted by this ordinance shall be enjoyed and possessed by said grantee, its successors or assigns for the period of twenty years from and after the publication of this ordinance.

"Sec. 15. Whenever the city council shall deem the bond provided for in section 13 of this ordinance to be inadequate or insufficient, either in security or amount, it may require the grantee to give an additional undertaking of like tenor and effect to be approved by the city council. Before any successor or assignee or the grantee shall acquire any rights under this ordinance the bond required by section thirteen of this ordinance, shall be given or renewed by such successor or assign. This ordinance shall not be construed as granting the said grantee any exclusive right or privilege or as preventing the granting of a similar privilege to any other person, company or corporation, which shall include the right of crossing the tracks of any subsequent grantee.

"Sec. 16. All rights and privileges herein granted, and all the conditions, forfeitures and prohibitions herein contained shall be binding upon said grantee in any and all extensions of said railway in the city of Olathe, and, provided: that no extension of said railway shall be made except as provided by ordinance.

"Sec. 17. All the privileges granted by this ordinance to said grantee shall be held to inure to the benefit of their successors and assigns, and said successors and assigns shall be subject to all the conditions, forfeitures, prohibitions and requirements imposed by this ordinance upon the original grantee.

"Sec. 18. If the said grantee shall fail to construct, operate, and maintain the railway provided for in this ordinance within six months from the date of its publication, and if it shall fail, neglect or refuse at any time during the life of this franchise to do and perform all the matters and things required of it by this ordinance, or shall at any time do any of the things prohibited by the terms of this ordinance, then all the privileges herein granted shall terminate, and this ordinance may be repealed by the mayor and city council and the grantee, its successors and assigns ousted of all right and privilege hereunder.

"But it is expressly provided that if the work or construction or the operation of said road be delayed by bona fide strikes, injunctions or legal proceedings such delay shall not work a forfeiture nor be deducted from the time above specified for the completion of said road.

"Sec. 19. No assignment or transfer of the right and privileges granted by this ordinance shall be valid unless made in writing and filed with the city clerk of the city of Olathe, Kansas, together with the written acceptance thereof in due form by the assignee and thereupon all the rights and privileges granted by this ordinance shall vest in such assignee, provided the same shall not already be forfeited and the said assignee shall at once be charged with all duties, liabilities and obligations imposed upon the original grantee.

"Sec. 20. In consideration of the granting of the aforesaid franchise the grantee agrees to pay to the city of Olathe upon the completion of the work to Water street to be done hereunder, the sum of five thousand dollars ($5,000) said sum to be applied by the mayor and the city council to such one of the two following purposes as shall seem most desirable to wit:

"(1) To the payment of the cost of widening Park street three feet on each side thereof from Church street to Water street.

"(2) To distribute said sum to the property owners on Park street, between Church street and Water street, aforesaid in the same proportion as they

would be compelled to contribute to the cost of widening said Park street between the points aforesaid if said improvement was done in the manner provided by law.

"Sec. 21. The grantee shall pay into the city treasury upon the completion of said work the sum of four thousand dollars ($4,000) in cash.

"Sec. 22. To secure the payment to the city of Olathe of the sum of nine thousand dollars ($9,000) as provided in sections 20 and 21 of this ordinance the grantee shall execute to the said city of Olathe an undertaking in the said sum of nine thousand dollars ($9,000) with sufficient sureties to be approved by the council conditioned for the payment of the said sum to the said city as provided in said sections 20 and 21, which said bond or undertaking shall be executed before the grantee begins any work of construction of its said railroad provided for in this ordinance.

"Sec. 23. By the acceptance of this ordinance and franchise the grantee agrees to dismiss its suit in equity against the city of Olathe now pending in the United States Circuit Court for the District of Kansas and waives all right and claim to any former franchise or right heretofore granted to it by the said city.

"Sec. 24. The grantee shall within one year after the publication of this ordinance establish and maintain a passenger depot and waiting room within one block of the public square adequate for the accommodation of the public traffic.

"Sec. 25. This ordinance shall take effect and be in force from and after its passage, acceptance and publication in the official paper of the city of Olathe.

"Passed and approved this 28th day of January, 1907.

"F. R. Ogg, Mayor."

Thereafter, and on the 19th day of March, 1907, said ordinance was amended by Ordinance No. 971 of defendant city in certain unimportant details. The terms and conditions of this grant as made by the city were accepted by complainant in writing on February 1, 1907. The statutory authority of defendant city to make this grant is found in section 668, Gen. St. 1905, which reads as follows:

"Before any person, firm or corporation shall have the right to enter upon the streets, alleys, public parks and grounds of any city of the second or third class in the state of Kansas for the purpose of piping the same for gas, heat, light, water, or for the construction of any railways, street railways, sewerage system, telephones, or for any other purpose whatsoever, such person, firm or corporation must first procure the passage of an ordinance by the mayor and councilmen of such city granting unto such person, firm or corporation such right or rights, and in which said ordinance shall be defined fully and at length the terms upon which said right is conceded."

Thereafter, and before August 1, 1907, complainant, in pursuance of the authority so conferred upon it by the city, proceeded to and did substantially complete its proposed line of railroad in and into the city at a cost of about $75,000, and did, as is averred in its bill of complaint, do and perform all the terms and conditions required by it to be performed under the terms of said ordinance. The defendant city, however, contending complainant had not kept and performed the obligations imposed upon it by the terms of said ordinance and its acceptance, on or about the 5th day of August, 1907, were threatening to and about to pass an ordinance repealing said former ordinance, when complainant applied to and secured a restraining order from this court enjoining defendant city from so doing. That the precise cause of complaint may be made to appear, that portion of complainant's bill of complaint is here set forth at length as follows:

"Your orator avers that, notwithstanding all the premises aforesaid, the said defendant, unmindful of your orator's vested rights under the aforesaid ordinances, but contriving and designing to wrong your orator and deprive it of the benefits and advantages belonging to it under said ordinances, did, by and through its mayor and council, on the 5th day of August, 1907, consider a resolution or ordinance or other like proceeding, the precise nature of which your orator is unadvised, repealing and abrogating the aforementioned ordinances of January 28 and March 19, 1907, and, as said defendant through its mayor and city clerk have advised your orator, said resolution or ordinance or other proceeding has been by an affirmative vote passed through two successive readings with a view to its final enactment or adoption at some succeeding meeting of said mayor and council which your orator is advised and understands will be held on the 14th day of August, 1907, and will after said final passage or adoption be immediately published in some newspaper, as required by law, and will, so far as lies in the power of said defendant city, become effective on said publication.

"Your orator avers that said action and threatened action of said mayor and council are wholly without justification, and that your orator has strictly and literally complied with all the terms and conditions necessary to the exercise of its franchise rights to enter and operate its line of railway in said city. And said defendant, so far as your orator is advised, has not made any claim to or filed with any court of law or equity any suit or proceeding to annul or abrogate your orator's franchise rights secured to it by said ordinance, but pretends to have the right in and of itself to abrogate and repeal said ordinances without any submission of its claim of right in the premises to any court of law or equity.

"Your orator says that the action and threatened action of said mayor and council repealing and abrogating the aforesaid ordinances, and terminating your orator's franchise rights thereunder, has caused it and will further cause it to be understood and believed that its said franchise rights have been justly abrogated and revoked, and that said franchise ordinances have been legally and justly repealed, and it further says that said repeal or annulment of said ordinances has and will continue to constitute a cloud on its title to the franchises, rights, and privileges theretofore conferred by said defendant, and said repealing ordinances, resolutions, or proceedings will impair the obligations of the contract entered into between said defendant and your orator by and through said ordinances and the acceptances thereof, in and by the terms of which your orator acquired and enjoys the right to operate its line of railway into said defendant city and through the corporate limits thereof. Said repeal or abrogation of said ordinances will be to the irreparable damages of your orator, and will cause it to wholly lose the large sum of money expended by it in the construction of its line into said city, as hereinbefore stated, and will cause it to lose the tolls, revenues, and profits that it otherwise would enjoy by the operation of its line into said city. Wherefore your orator charges that the said action and threatened action of said defendant is and will be in violation of section 10 of article 1 of the Constitution of the United States which ordains that no state shall pass any law impairing the obligation of contracts."

The repealing ordinance so threatened and about to be passed by the defendant city reads as follows:

"An ordinance repealing ordinance No. 962 entitled 'An Ordinance granting to the Missouri and Kansas Interurban Railway Company the right to construct, maintain and operate a railway, to be operated by electricity or any other suitable motive power except steam over and along certain streets within the city of Olathe.' And all ordinances amending said Ordinance No. 962, and to rescind, annul and set aside the franchise and all rights, privileges and powers, heretofore granted by the city of Olathe to said Missouri and Kansas Interurban Railway Company.

"Be it ordained by the mayor and councilmen of the city of Olathe, Kansas.

"Section 1. That ordinance No. 962, passed and approved by the mayor and councilmen of the city of Olathe on the 28th day of January, 1907, and

entitled 'An Ordinance granting to the Missouri and Kansas Interurban Railway Company the right to construct, maintain and operate a railway, to be operated by electricity or any other motive power except steam over and along certain streets within the city of Olathe' and all ordinances amending the same, be and are hereby repealed.

"Sec. 2. That the franchise, and that all the rights, powers and privileges, heretofore granted by the city of Olathe, to said Missouri and Kansas Interurban Railway Company are hereby rescinded, annulled and set aside.

"Sec. 3. This ordinance shall take effect and be in force from and after its publication in the official paper of the city of Olathe."

To this bill of complaint defendant demurs.

The propositions contended for by the respective parties to this litigation, as gathered from their briefs and oral arguments, are these: It is contended by the city: (1) That provision of the ordinance permitting the city to repeal it is a part of the contract between the parties, and may be exercised by the city without any impairment of the obligation of the contract, or without depriving complainant of its property rights without due process of law. Therefore it is contended no federal question is raised for decision, and this court is without jurisdiction of this controversy between citizens of this state. (2) That the consideration and passage of said proposed repealing ordinance is an act involving a legislative discretion on the part of the mayor and council of the defendant city, with which act the courts will not interfere to prevent by injunction. Complainant contends: (1) That the passage of the repealing ordinance in and of itself, unaccompanied by any other or further act on the part of the city or its officers, will operate to impair the obligation of its contract with the city, and will deprive it of its property rights granted by the ordinance without due process of law. Therefore this court has jurisdiction and power to and should enjoin the passage of the repealing ordinance. (2) Complainant further contends while the city has the power under the statute above quoted to grant to it the authority to occupy the streets and avenues of the city with its line of electric railroad, and to prescribe the terms and conditions of such grant, yet it has no power to withdraw a grant once made, and hence the provision contained in the ordinance for its repeal by the city is nugatory and void.

Conceding, for the purpose of this decision, the contention of the city as to its right to repeal the ordinance for the reason stated in section 18 thereof, above quoted, yet, as it is averred in the bill of complaint, as follows:

"Thereafter (the date of the passage of the ordinance) and up to the present time, your orator has duly performed all the terms and conditions of said ordinances of January 28 and March 19, 1907, required to be performed on its part, and within the time required for performance, and in particular your orator avers that it did during the time intervening between March 21, 1907, and the 1st day of August, 1907, substantially complete its line of railway into said defendant city and over and along the aforesaid streets granted to it for right of way purposes, and on said last-mentioned date had said line in full operation according to the terms and requirements of said ordinances, and was in the full possession and enjoyment of all the rights, privileges, and franchises conferred on it by said ordinances"

—and as the demurrer interposed admits the truth of these averments, it must be held on this branch of the case, as complainant was not

in default and had not breached its contract with the city, the attempt made by the city to repeal the ordinance and revoke the franchise granted, when the bill was filed, was an unauthorized exercise of the power of repeal reserved to the city by the terms of the ordinance. Therefore, as the repealing ordinance in express terms renounces all obligation on the part of the city to complainant and revokes all powers, privileges, franchises, and rights theretofore granted by the city to complainant, I have no doubt, as it stands admitted by the record, complainant had fully performed and had not breached its contract with the city; that such repealing ordinance, if passed, would impair the obligation of the contract between complainant and the city, and would deprive the complainant of its property rights therein without due process of law, in violation of the provisions of the federal Constitution, and that this court has the power and jurisdiction to restrain the doing of the threatened act, unless, as further contended by the city, the act threatened is in its very nature such that courts of equity will not restrain. Walla Walla v. Walla Walla Water Co., 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341; Vicksburg Waterworks Co. v. Vicksburg, 185 U. S. 65, 22 Sup. Ct. 585, 46 L. Ed. 808; Vicksburg v. Waterworks Co., 202 U. S. 453, 26 Sup. Ct. 660, 50 L. Ed. 1102; City Railway Co. v. Citizens' Railroad Co., 166 U. S. 563, 17 Sup. Ct. 653, 41 L. Ed. 1114; Iron Mountain R. Co. v. City of Memphis, 96 Fed. 124, 31 C. C. A. 410; Pikes Peak Power Co. v. City of Colorado Springs, 105 Fed. 1, 44 C. C. A. 333.

Is the threatened act here sought to be enjoined in its very nature and character such as to protect it from interference by the courts? That is to say, is the threatened act one involving legislative discretion within the sovereign power and protection of the legislative branch of the government, and for this reason beyond the power of the judicial branch of the government to prohibit? The defendant city is denominated in the bill a city of the second class. As such municipal body corporate, it must be conceded its mayor and council, under the act above quoted, section 35, c. 19, Gen. St. 1901, has the same full and complete power to legislate concerning the subject-matter of this controversy as would the Legislature of the state itself in the absence of such grant of power to the city. And the city, in the exercise of this legislative power committed to it by the state, exercised that same high degree of sovereign legislative power possessed by the state itself. Its ordinances become a portion of the law of the state within the jurisdiction of the city. Yount v. Denning, 52 Kan. 629, 35 Pac. 207; Johnson v. Simonton, 43 Cal. 242; 1 Dill. on Municipal Corporations (4th Ed.) § 308. It is a general rule that a municipal corporation can no more be enjoined from the exercise of its legislative power over matters within its jurisdiction and control than can the exercise of legislative power by a state be enjoined. In New Orleans Waterworks v. New Orleans, 164 U. S. 481, 17 Sup. Ct. 165, 41 L. Ed. 518, Mr. Justice Harlan, delivering the opinion of the court, said:

"If it be said that a final decree against the city, enjoining it from making such grants in the future, will control the future action of the city council of New Orleans, and will therefore tend to protect the plaintiff in its rights, our answer is that a court of equity cannot properly interfere with, or in advance

restrain, the discretion of a municipal body while it is in the exercise of powers that are legislative in their character. It ought not to attempt to do indirectly what it could not do directly. In view of the adjudged cases, it cannot be doubted that the Legislature may delegate to municipal assemblies the power of enacting ordinances that relate to local matters, and that such ordinances, if legally enacted, have the force of laws passed by the Legislature of the state, and are to be respected by all. But the courts will pass the line that separates judicial from legislative authority if by any order or in any mode they assume to control the discretion with which municipal assemblies are invested when deliberating upon the adoption or rejection of ordinances proposed for their adoption. The passage of ordinances by such bodies are legislative acts which a court of equity will not enjoin. Chicago v. Evans, 24 Ill. 52, 57; Des Moines Gas Co. v. Des Moines, 44 Iowa, 505, 24 Am. Rep. 756; 1 Dillon on Mun. Corp. § 308, and notes; 2 High on Injunctions, § 1246. If an ordinance be passed and is invalid, the jurisdiction of the courts may then be invoked for the protection of private rights that may be violated by its enforcement. Page's Case, 84 Md. 558, 564; Baltimore v. Radecke, 49 Md. 217, 231, 33 Am. Rep. 239.

"As no decree can be properly rendered that will affect the rights of the beneficiaries named in the ordinances enacted before this suit was commenced —such beneficiaries not being before the court—a court of equity ought not, by any form of proceeding, to interfere with the course of proceedings in the city council of New Orleans, and enjoin that branch of its municipal government from hereafter passing ordinances similar to those heretofore enacted and which are alleged to be obnoxious to the plaintiff's rights. The mischievous consequences that may result from the attempt of courts of equity to control the proceedings of municipal bodies when engaged in the consideration of matters entirely legislative in their character are too apparent to permit such judicial action as this suit contemplates. We repeat that when the city council shall pass an ordinance that infringes the rights of the plaintiff, and is unconstitutional and void as impairing the obligation of its contract with the state, it will be time enough for equity to interfere, and by injunction prevent the execution of such ordinance. If the ordinances already passed are in derogation of the plaintiff's contract rights, their enforcement can be prevented by appropriate proceedings instituted directly against the parties who seek to have the benefit of them. This may involve the plaintiff in a multiplicity of actions. But that circumstance cannot justify any such decree as it asks."

Or, as said by Mr. Chief Justice Fuller delivering the opinion of the court in McChord v. Louisville & Nashville R. Co., 183 U. S. 483, 22 Sup. Ct. 165, 46 L. Ed. 289:

"The rule was also applied by Mr. Justice Field in Alpers v. San Francisco (C. C.) 32 Fed. 503, where complainant sought an injunction to restrain the passage of an ordinance which he alleged would impair the obligation of a contract he had with the city. Mr. Justice Field said: 'This no one will question as applied to the power of the Legislature of the state. The suggestion of any such jurisdiction of the court over that body would not be entertained for a moment. The same exemption from judicial interference applies to all legislative bodies, so far as their legislative discretion extends. * * * The courts cannot in the one case forbid the passage of a law nor in the other the passage of a resolution, order or ordinance. If by either body, the Legislature or the board of supervisors, an unconstitutional act be passed, its enforcement may be arrested. The parties seeking to execute the invalid act can be reached by the courts, while the legislative body of the state or of the municipality, in the exercise of its legislative discretion, is beyond their jurisdiction. The fact that in either case the legislative action threatened may be in disregard of constitutional restraints, and impair the obligation of a contract, as alleged in this case, does not affect the question. It is legislative discretion which is exercised, and that discretion, whether rightfully or wrongfully exercised, is not subject to interference by the judiciary."

While decisions to the contrary may be found, I do not find the Supreme Court has ever departed from the general rule so forcibly and clearly stated in the above opinions. True, there are cases holding an injunction may issue to restrain the passage of a municipal ordinance void for want of power, where the very fact of its passage, unaccompanied by any other act done or threatened by the city, would work to the complainant immediate and irreparable injury, notably the cases of Spring Valley Waterworks Co. v. Bartlett (C. C.) 16 Fed. 615, and Leverich et al. v. Mayor, etc., of Mobile et al. (C. C.) 110 Fed. 170. However, I do not find the doctrine there announced sanctioned by any decision of the Supreme Court. Its soundness is open to much doubt, and, even if such rule of decision may, from stress of extraordinary circumstances, obtain in any case, I am convinced such case is not made out by the bill filed in the case at bar. The act of the mayor and council of defendant city in considering and adopting or rejecting the repealing ordinance in question is clearly one involving the exercise of legislative discretion on the part of the lawmaking body of the city. The exercise of such legislative power under our form of government must be and ever remain free and untrammeled beyond the power of the judiciary to prevent or the executive to punish. Such legislative act must reflect the judgment and conscience of the appropriate lawmaking power as to what the law shall or shall not be, and when the legislative will has spoken and the exercise of legislative power has spent its force, and the new law thus brought into existence as a result of such legislative action stands complete, and some attempt is made or threatened to put such completed effort of the legislative branch of the government into effect to the irreparable injury and damage of any person affected thereby, then, in my judgment, and not until then, may he be heard by the judicial branch of the government to assert the invalidity of such action because repugnant to some provision of the organic law. A contrary holding would, to my mind, tend to make the sovereign legislative branch of our government subservient to the judicial branch, to impose the judgment of our courts in the place of the will of our lawfully constituted legislators, a result dangerous in its tendency, desired by none.

It follows from what has been said, the full scope, object, and purpose of the bill in this case being to secure injunctive relief against the exercise of a legislative function—the consideration and passage of the repealing ordinance in question—such relief cannot be afforded complainant in this suit.

The demurrer will be sustained.

In re TULLY.

(District Court, E. D. New York. November 2, 1907.)

BANKRUPTCY—DISMISSAL OF PROCEEDINGS—JURISDICTIONAL DEFECTS.

Bankr. Act July 1, 1898, c. 541, § 2 (1), 30 Stat. 546 [U. S. Comp. St. 1901, p. 3421], which confers on the District Courts jurisdiction to adjudge persons bankrupt "who have had their principal place of business, resided or had their domicile within their respective territorial jurisdictions for the preceding six months or the greater portion thereof," re-

lates to the time of the adjudication, and not to the time of the filing of the petition; and, where an order of adjudication has been entered without objection on a voluntary petition alleging the petitioner's residence within the district, and the court has proceeded to administer the estate, the proceeding will not be dismissed on motion of a judgment creditor, made more than three months after the adjudication, on the ground that at that time the bankrupt had not resided in the district for the required length of time, if the petition appears to have been filed in good faith and the bankrupt is still a resident of the district, but in such case the order of adjudication will be set aside and a new one entered as of a later date.

In Bankruptcy. On motion to dismiss proceedings.

Charles L. Hoffman, for bankrupt.
Frederick D. W. Searing, for judgment creditor.

CHATFIELD, District Judge. The Constitution of the United States (article 1, § 8) provides that:

"The Congress shall have power to establish * * * uniform laws on the subject of bankruptcies throughout the United States."

By virtue of the authority contained in this section, Congress conferred upon the District Courts of the United States original jurisdiction in their respective districts in all matters and proceedings in bankruptcy. This general jurisdiction is set forth in section 563, subd. 18, Rev. St. [U. S. Comp. St. 1901, p. 459]. In 1867, by chapter 176 of the Laws of that year (Act March 2, 1867, c. 176, 14 Stat. 517), subsequently set forth and published as section 5014 of the Revised Statutes of the United States, Congress defined the jurisdiction of the District Courts in bankruptcy by the use of the following language:

"If any person residing within the jurisdiction of the United States, and owing debts provable in bankruptcy exceeding the amount of three hundred dollars, shall apply by petition addressed to the judge of the judicial district in which such debtor has resided or carried on business for the six months next preceding the time of filing such petition, or for the longest period during such six months, setting forth his place of residence, * * * such petitioner shall be adjudged a bankrupt."

This was the law until the enactment of the repealing act of June 7, 1878 (20 Stat. c. 160). On July 1, 1898, the jurisdiction of the District Courts in bankruptcy was defined anew by chapter 541 of the Laws of 1898 (30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]), and the scope of the court's power specifically stated, in the following language:

Chapter 1, subd. 7: "'Court' shall mean the court of bankruptcy in which the proceedings are pending."

Chapter 1, subd. 20: "'Petition' shall mean a paper filed in a court of bankruptcy or with a clerk or deputy clerk."

Chapter 2, § 2: "That the courts of bankruptcy as hereinbefore defined, viz, the District Courts of the United States * * * are hereby made courts of bankruptcy, and are hereby invested * * * with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, * * * to (1) adjudge persons bankrupt who have had their principal place of business, resided, or had their domicile within their respective territorial jurisdictions for the preceding six months, or the greater portion thereof, or who do not have their principal place of business, reside, or have their domicile within the United States, but have property with-

in their jurisdictions, or who have been adjudged bankrupts by courts of competent jurisdiction without the United States and have property within their jurisdictions."

The subsequent subdivisions of section 2 of chapter 2, specifically set forth the different matters within the scope of bankruptcy jurisdiction in the course of a bankruptcy proceeding, and the section closes with the general language:

"Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated."

With this statement of the language of the statutes, let us consider the facts of this particular case. Objection has been made to the discharge of the voluntary bankrupt, upon the ground that the District Court of the United States in the Eastern District of New York has no jurisdiction over the said bankrupt, nor her petition, inasmuch as she had not resided within the said Eastern District of New York for the greater portion of the six months immediately preceding the time of filing her petition; it being undisputed that at the time of filing the petition she was actually domiciled in and a resident of this district. The bankrupt filed a voluntary petition in the District Court of this district upon the 18th day of July, 1907. At that time the bankrupt was residing in Richmond county, within this district, and had been a resident of that county since the 1st day of July, 1907, upon which day she had removed from the borough of Manhattan, which is in the Southern District of New York. The bankrupt applied for a discharge, and thereupon a creditor who had previously obtained a judgment in one of the Municipal Courts in the borough of Manhattan, and was proceeding against the bankrupt in supplementary proceedings at the time of the filing of the petition in bankruptcy, moved to have the discharge refused and the proceedings dismissed, upon the ground, as stated above, that the bankrupt was a resident and had a domicile within the United States, but had not resided or had a domicile within the Eastern District of New York for the greater portion of the six months immediately preceding the filing of the petition in bankruptcy. These facts are admitted by the answering affidavits, and the sole question is whether the United States District Court for the Eastern District of New York upon the 18th day of July, 1907, had any jurisdiction whatever over the person or property of Alice Lee Tully, the bankrupt, by reason of the petition in bankruptcy which she had filed upon that day in the district in which she then resided. The bankrupt has had no place of business within the Eastern District of New York during any of the time under discussion. She had had a domicile in the Eastern District of New York for three weeks prior to the filing of the petition, and there seems to be no evidence offered, nor any claim made, to a residence in the Eastern District of New York for any longer period. The petition of the bankrupt contains the following recital:

"The petition of Alice Lee Tully, of New York City, in the county of Richmond and district and state of New York, no occupation, respectfully represents that she has resided, or has had her domicile, for the greater portion of six months next immediately preceding the filing of this petition, at 20 Merse-

reau Ave., Port Richmond, Staten Island, within said judicial district, having in part of that time resided in the county and city of New York."

Upon the filing of this petition by a resident of the district, the court obtained jurisdiction over the bankrupt and over her property. This jurisdiction having been acquired, the court had a right to adjudicate upon the facts appearing. Having adjudicated, parties to the proceedings are estopped from attacking the correctness of that adjudication collaterally. In re First Nat. Bank, 152 Fed. 64, 81 C. C. A. 260.

But in the present instance the motion is in effect to set aside the adjudication, rather than to challenge the result thereof, and therefore the matter will be considered upon its merits. The limitation of section 1, c. 2, is particularly applicable to involuntary proceedings, wherein creditors might seek to file a petition against a bankrupt in some other district than that in which a business had been conducted, and at a time before the bankrupt had obtained a six months' domicile or residence in the new neighborhood. The section is also applicable to the case of a bankrupt who by the filing of a voluntary petition, and obtaining an adjudication in a district to which he has recently removed, and wherein he is not known, endeavors to take advantage of the bankruptcy statute, and cause annoyance and trouble to his creditors. But the provisions of section 1, c. 2, relate not to the filing of a petition, but merely to the order of adjudication, and the intent of the section is apparently that no adjudication can be had where three months have not elapsed, either as a place of residence, domicile, or business, prior to the adjudication. The form provided by the orders of the Supreme Court in bankruptcy proceedings contains a recital as to the residence of the bankrupt during this statutory period. If the petition shows that the bankrupt has not resided within the district, in the case of a voluntary bankruptcy, for the greater portion of the necessary six months, or if the issue is raised by any creditor, the court can refuse to adjudicate, and dismiss the proceedings, if satisfied that fraud exists, or that the petitioner is misleading the court, intentionally or through ignorance. Section 18, subd. "g," provides that:

"Upon the filing of a voluntary petition the judge shall hear the petition and make the adjudication or dismiss the petition."

If the adjudication were withheld until the statutory period had expired, creditors could within that time begin involuntary proceedings in any appropriate district, and, as between the different proceedings, the court could determine in which one the rights of the parties could best be preserved. Act July 1, 1898, c. 541, § 32, 30 Stat. 554 [U. S. Comp. St. 1901, p. 3434]. But it would be a hardship which certainly no court would allow, unless it is without jurisdiction to prevent, for a creditor, as in the case at bar, to conceal from the court the defect in the allegation of residence, to stand by and allow proceedings to go on before the referee, and then, when the estate has been administered and the matter progressed to the point where the bankrupt applied for a discharge, successfully nullify the proceeding to which he has been a party, and cause the bankrupt the expense of an additional proceeding, where no end would apparently be accomplished except harassing the bankrupt. A new proceeding

could now be brought nowhere but in this district, and no advantage would result. If there was any willful concealment of material facts by the bankrupt, that should be taken into account in considering an application for a discharge, but the bankruptcy proceedings should not be dismissed, when jurisdiction actually attached.

The order of adjudication will be vacated and set aside, inasmuch as it was granted within the period of three months after the bankrupt took up her residence in this district, and the clerk of the court will be directed to enter a second order of adjudication nunc pro tunc as of October 2, 1907, upon proper application.

In re CRENSHAW.

(District Court, S. D. Alabama. October 30, 1907.)

No. 493.

1. BANKRUPTCY—INVOLUNTARY PROCEEDINGS—SUFFICIENCY OF PETITION.
   Creditors other than the original petitioners may at any time join in a petition in involuntary bankruptcy, and on so joining subsequent to its filing may be reckoned in making up the number of creditors and amount of claims required by the bankruptcy act to support the petition.
2. SAME—INSOLVENCY.
   In determining the issue as to the solvency or insolvency of an alleged bankrupt, all of the property which he owns is to be reckoned in computing the amount of his assets, except such as he may have transferred or concealed in fraud of creditors, but not excluding property which is exempt from execution by the laws of the state.
3. SAME—BURDEN OF PROOF.
   Where a referee has found that an alleged bankrupt concealed property with intent to hinder, delay, or defraud his creditors, the burden rests upon him to prove his solvency, and it is incumbent on him to clearly show that the aggregate of his property at a fair valuation is sufficient to pay his debts, exclusive of any property so concealed.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 137.]
4. SAME—PETITION—AMENDMENT.
   An allegation in a petition in involuntary bankruptcy that defendant was engaged in trade under a firm name implies that he was not a wage earner nor farmer, and is sufficient to support an amendment expressly alleging such fact.
5. SAME—PERSONS SUBJECT TO INVOLUNTARY PROCEEDINGS—CHANGE OF OCCUPATION.
   Where property was acquired and debts contracted by an alleged bankrupt, while engaged in a mercantile business, he is not exempt from bankruptcy proceedings because he subsequently became a wage earner.

In Bankruptcy. On review of decision of referee.
See 155 Fed. 271.

Stevens & Lyons, for petitioning creditors.
Geo. W. Taylor, for respondent.

TOULMIN, District Judge. The first contention on the part of the respondent is that some of the original petitioners could not institute this proceeding on the ground or suggestion that said petitioners connived at a "fraud on the law," or attempted a fraud on the

other creditors. "It is well settled that creditors who have participated in the act of bankruptcy complained of * * * cannot afterwards be petitioning creditors in bankruptcy; nor can a creditor who connives at a 'fraud on the law' or attempts a fraud on the other creditors institute involuntary proceedings in bankruptcy." Collier's Bkcy. (7th Ed.) 465. The proof here does not show this to be such a case. The payments made to Griel & Co. and to Benish & Meyer were not preferences in contemplation of the bankrutpcy act because the proof shows that at the time of such payments the respondent was solvent and therefore had the right to make said payments. Moreover, such payments are not complained of as acts of bankruptcy in this case. Knapp v. Jarvis Adams Co., 135 Fed. 1008, 70 C. C. A. 536. But, assuming that the rule invoked applied to this case as originally instituted, it would have no effect now because a sufficient number of creditors other than the original petitioners have entered their appearance and joined in the petition. Creditors other than the original petitioners may, at any time, enter their appearance and join in the petition, and creditors so joining in a petition subsequent to its filing may be reckoned in making up the number of creditors and amount of claims required by the act to support the petition. Bankr. Act July 1, 1898, § 59, c. 541, 30 Stat. 561 [U. S. Comp. St. 1901, p. 3445]; In re Romanow et al. (D. C.) 92 Fed. 510. As to the contentions based on the alleged nonprovability of the claims of the original petitioners, and that said claims were unliquidated, and that attachments had been sued out on them, they need not now be considered. They are all answered by the rule of law last referred to—that creditors other than the original petitioners have joined in the petition, and may be reckoned in making up the number of creditors and amount of claims required by the act to support the petition.

As suggested by counsel for the respondent, the vital question in this case is solvency or insolvency. A person shall be deemed insolvent within the provision of the bankrupt act whenever the aggregate of his property, exclusive of any property which he may have transferred or concealed with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts. Bankr. Act, § 1. In determining the issue as to the solvency or insolvency of the respondent, all the property which he owns is to be reckoned in computing the amount of his assets, except such as he may have transferred or concealed in fraud of creditors, but not excluding property which is exempt from execution by the laws of the state. In re Baumann (D. C.) 96 Fed. 946; In re Hines (D. C.) 144 Fed. 142; In re Rome Planing Mill Co. (D. C.) 99 Fed. 937. The burden of proving insolvency rests upon the respondent, and it is incumbent upon him, the referee having found that he has concealed property with intent to hinder, delay, or defraud his creditors, to clearly show to the court that the aggregate of his property, at a fair valuation, was sufficient in amount to pay his debts, exclusive of any property which he had concealed with the intent to hinder, delay, or defraud his creditors. Section 1, subd. 15, Bankr. Act.

A further contention is that the petition does not allege that the

respondent was not a wage earner or farmer, and therefore it is insufficient. The original petition alleges that the respondent was engaged in trade under the firm name and style of Crenshaw & Co., which clearly implies that he was engaged in some mercantile pursuit, if it does not affirmatively show that he was not a wage earner or farmer. But the amended petition does affirmatively allege that respondent was engaged in trade as a merchant, and that the debts incurred by him, and for the collection of which this proceeding in bankruptcy was instituted, were incurred while engaged in the occupation of a merchant in trade, and that the property alleged to have been transferred and concealed was property acquired and owned by him as such merchant. He may have subsequently become a wage earner; but it has been said that the exemption from involuntary proceedings in favor of wage earners is not intended as a means of escape for insolvents whose property was acquired and whose debts were incurred in other occupations recently engaged in. In re Luckhardt (D. C.) 101 Fed. 809; In re Mackey (D. C.) 110 Fed. 361. If the original petition was defective in the respect referred to, such defect has been cured by the amendment. The right to amend the petition can go to the extent of bringing forward and making effective that which is in some form already in the record. In re Mercur, 122 Fed. 384, 58 C. C. A. 472. The amendment did not state a new case, nor change the case made in the original petition. There was no new act of bankruptcy alleged in the amendment, but one of the acts as set forth in the original petition was somewhat amplified, and was more specific in detail as to the facts constituting the alleged concealment of property by respondent with the intent to defraud, hinder, or delay his creditors.

The referee's finding and report on the question whether the respondent was solvent or insolvent at the date of the filing of the petition, and also of the alleged act of concealment of property by him, based on the examination of witnesses, will not be set aside by the court on review, unless plainly contrary to the evidence. In re Rider (D. C.) 96 Fed. 811; In re Covington (D. C.) 110 Fed. 143; In re Rome Planing Mill, supra; In re Waxelbaum (D. C.) 101 Fed. 228; In re Stout (D. C.) 109 Fed. 794.

No sufficient reason has been shown for disturbing the finding of the referee. On the contrary, the court concurs in the opinion and conclusions of the referee both as to the law and the facts presented by the record in the case.

The order of adjudication is affirmed.

BENDER et al. v. ENTERPRISE MFG. CO.

(Circuit Court of Appeals, Sixth Circuit. November 8, 1907.)

No. 1,674.

TRADE-MARKS AND TRADE-NAMES—UNFAIR COMPETITION—REPAIR PARTS FOR MACHINE.

The mere making and sale of repair parts for a well-known machine, the patents on which have expired, by other than the patentee and maker of the machine, which also makes and sells such repair parts, is not an act of unfair trade, unless they are put out as the goods of the original patentee, and especially where they are unmarked, while those made by the patentee are marked with its name.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, § 79.

Unfair competition, see notes to Scheuer v. Muller, 20 C. C. A. 165; Lare v. Harper & Bros., 30 C. C. A. 376.]

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

For opinion below, see 148 Fed. 313.

E. L. Thurston, for appellants.
Charles Howson, for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. This is an appeal from a decree enjoining the defendant from making and selling repair parts for the Enterprise meat chopper, without marking on each the name of the maker. The case was heard on an agreed statement of facts. It appears that the complainant below, the Enterprise Manufacturing Company, had been making and selling meat choppers for many years. It and its predecessor used as a trade-mark for its choppers, and other like hardware, the word "Enterprise." The meat choppers it makes at present have been manufactured since 1883. Since 1891, it has been making what is called the "Enterprise Tin Meat Choppers," and since 1892 that name has been registered as a trade-mark. The original Enterprise Meat Chopper was patented in 1883 and 1886. The patents have long since run out. Since 1887 and 1888, many of the repair parts of the Enterprise chopper have been marked as made by that company. It appears that for many years there has been a large independent trade in the repair parts of meat choppers, and that the defendant below has made and sold many thousand sets of such repair parts. These sets are packed in boxes which are labeled:

"Repair parts for the Enterprise Meat Chopper, manufactured by the Giant Lock Company, Cleveland, Ohio."

The court below held in its decree that as matter of fact the complainant had for many years used the name "Enterprise" as a trade-mark to distinguish its meat chopper from others on the market, and that it was well known to the trade and consumers as the complainant's product; that the wearing parts of the machine had for many years been sold by the complainant independent of the machine, and

that the complainant had an established good will in the business of making and selling such parts; that the defendant had made and sold wearing parts intended for the Enterprise chopper, and such parts were the same shape and appearance as those of the complainant, but were without any markings to indicate the maker, and that, while put up in packages labeled as claimed by the defendant, they reached the consumer without any markings to indicate their origin, and, by reason of this absence, purchasers of the defendant's wearing parts were misled into believing that they were made by the complainant, the well-known maker of the machines. Evidently, as a result of these findings, which virtually decide the case, the court decreed that the defendant be enjoined from making or selling any meat chopper parts not made by the complainant, without distinguishing such parts from similar parts made by complainant, by clearly marking upon each of said parts its own name or the name of the makers.

In its opinion the court refers to three cases: Flagg Mfg. Co. v. Holway, 178 Mass. 83, 59 N. E. 667, in which the defendant was enjoined from selling a zither of the peculiar shape of the complainant's without marking it as his own manufacture; Deering Harvesting Co. v. Whitman & Barnes, 91 Fed. 376, 33 C. C. A. 558, in which it appears that the parts of which complainant sought to enjoin the making and sale were plainly advertised by catalogue and labeled as the complainant's manufacture; and Neostyle Mfg. Co. v. Ellam's Duplicator Co., 21 R. P. C. 185, in which the court suggested it was the duty of the defendant to mark an ink sold for use in a duplicating machine as its own product, so as to distinguish it from that made by the manufacturers of the machine. The cases referred to by the court are, for the purposes he uses them, in line with the case of Singer Mfg. Co. v. June Mfg. Co., 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118, in which it was held that while any one, after the expiration of the Singer patents, was free to make and sell the Singer sewing machine under that name, it must mark the machine with the name of the maker, so that the public might not be misled into thinking it was the product of the original patentees. The decision below apparently extends the doctrine of this case so as to require not merely the machine, when made by others than the original patentees, but the repair parts of the machine, to be marked with the name of the maker. We think this is going too far, and that the resulting limitation upon the rights of the public is unjustified and therefore unreasonable. The cases themselves may be distinguished. In Flagg Mfg. Co. v. Holway, 178 Mass. 83, 59 N. E. 667, the zither was of a unique shape. The defendant purposely and wrongfully imitated its shape. The court held he had not the right to do this "to steal the good will attaching to the plaintiff's personality," and, to prevent it, required the defendant's zithers to be clearly marked so as to indicate they were the defendant's, and not the plaintiff's, goods. But in the present case no such attempt was shown. There was no effort to palm off the repair parts of the defendant below as those of the complainant. In the case of Deering Harvester Co. v. Whitman & Barnes Co., 91 Fed. 376, 33 C. C. A. 558, it does not appear that the repair parts were marked as

made by the defendant. They were advertised by catalogue and labeled as of their manufacture, but that was just what was done in the present case. In the Deering Harvester Case, the parts themselves were marked by certain letters showing where each belonged in the machine. This was quite a different thing, and unnecessary in the present case. In the English Case, Neostyle Mfg. Co. v. Ellam's Duplicator Co., 21 R. P. C. 185, there was an attempt to restrain the defendant from selling ink or paper for use on the Neostyle machine. This was defeated; the judgment being for the defendant. Having thus decided the case, the court suggested that they put their names on future tins of ink and this was accepted.

There was no actual deception charged in this case, nor any attempt at proof of any made. The only unfair trade was inferential or constructive. The present case goes on the assumption that unmarked repair parts are to be taken as made by the makers of the machine, the original patentees, and this although the makers marked their repair parts. We think a safer assumption would be, in view of the established trade in repair parts, that unmarked repair parts are to be taken as not made by the makers of the machine or original patentees, but by others. It is not to be inferred that they are made by the makers of the machine, unless so marked. The mere making and sale of repair parts for a well-known machine by other than the makers would therefore not be regarded as an act of unfair trade, unless they were put out as the goods of the original patentee. The patents having long since expired, the manufacture of meat choppers and all their parts are now open to all. To require every repair part, however small, to be branded with the name of the maker, would tend, it seems to us, to stifle competition in the manufacture and sale of repair parts, and put an unnecessary burden upon a large and important branch of trade.

The decree of the lower court is reversed.

NORTHPORT SMELTING & REFINING CO. v. TWITCHELL.

(Circuit Court of Appeals, Ninth Circuit. October 22, 1907.)

No. 1,357.

MASTER AND SERVANT—INJURY TO SERVANT—UNSAFE PLACE TO WORK.

Plaintiff, a boy 16 years old, was employed by defendant at its smelter, and was set to work at night to assist a man in the clean-up yard. This yard was paved with brick, and upon this floor was deposited cones of slag and other refuse which it was the duty of plaintiff and his fellow workman to load on cars and remove, it being necessary to break up the cones for that purpose. On the second night of such work plaintiff was breaking a cone with a sledge, when an explosion occurred by which he was seriously injured. It was shown that when cones contained molten metal, and there was any water or moisture in their vicinity, it was highly dangerous to break them while hot, as if the metal came in contact with water it would cause an explosion; also, that the floor of the yard had depressions where water might stand and that employés, with defendant's knowledge, sometimes emptied water in the yard. Plaintiff was given no instructions nor warning of danger, and, while he

knew the effect if the hot metal came in contact with water, he did not know that there was any water in the yard, and could not see by reason of the darkness, nor did he know that the cone which he was breaking was hot. *Held*, that the questions of defendant's negligence and of contributory negligence were properly submitted to the jury, and that a verdict for plaintiff would not be disturbed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1000, 1001, 1089–1132.]

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

W. E. Cullen, F. M. Dudley, C. S. Voorhees, and Reese H. Voorhees, for plaintiff in error.

Gallagher & Thayer, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. We have given to the record in this case and to the elaborate briefs of counsel careful consideration, and have reached the conclusion that there is no merit in the appeal. The action is one for damages for serious personal injuries sustained by the defendant in error while at work in the clean-up yard of plaintiff in error's smelter at Northport, Wash.

Among the acts of negligence charged in the complaint against the defendant to the action, and in support of which evidence was given upon the trial, were the following: That the brick floor provided by the defendant as a place for depositing slag from the pots and furnaces used in the operation of its smelter was at all times kept by the defendant in a dangerous and unsafe condition, in that it contained depressions caused by the bricks being worn by long use, in which depressions water frequently collected, so that, when the cones or slag were deposited upon the floor in the course of the defendant's operations, they would frequently rest over a pool of water in such a manner as to cover and conceal the water, and so that, when the cones were broken with the mallet provided by the defendant, the molten metal, if any there happened to be in the cone, would be precipitated into the water, and would explode with terrific and destructive force; that the defendant negligently adopted and pursued a dangerous and unsafe system in conducting its smelting operations, in that it permitted the dangerous slag and cones to be commingled with the harmless ones, with nothing to distinguish one from the other; that cones which are unsafe by reason of containing molten metal become harmless if permitted to cool until the molten metal solidifies; that the defendant negligently permitted and directed the placing of slag and cones on the floor at the times when the persons whose duty it was to remove them in cars were absent, and failed to adopt any rule or system or means by which the danger of injury to its employés from mixing dangerous with harmless slag and cones could be avoided, or the danger be discovered by such employés who should have occasion to go to the place where they were deposited for the purpose of removing them; that the defendant also negligently failed to furnish a sufficient amount of light to enable its employés to see and observe the

dangerous condition of the premises where the slag was deposited; that, if the defendant had adopted some reasonable rule, method, or system by which its employés could know which cones or slag were dangerous and which were not, or how long the slag and cones had been lying upon the floor, or by which the recently deposited cones and slag could be distinguished from those which had been lying there long enough to have cooled until they were safe, the danger to its employés would have been avoided, and the plaintiff in the case would not have received the injuries for which he sued. In addition to a denial of its alleged negligence, the defendant in its answer set up, among other things, contributory negligence on the part of the plaintiff, specifying such contributory negligence, in part, as follows:

"(a) That, if the plaintiff undertook to break up the cone mentioned and described in the amended complaint herein while the same was in the heated state described in said complaint, he did so in direct violation of his instructions received by him in connection with such work, which directed him to break up only such cones as were cooled off.

"(b) That plantiff failed and neglected to make use of his physical senses in determining whether or not the said cone which it is alleged in said complaint he undertook to break while in a heated, molten state was so cooled as to permit it to be broken within the scope of the instructions received by him in connection with the said work as aforesaid."

The evidence shows that the defendant in error, then a boy 16 years old, applied to one of the shift bosses of the plaintiff in error for work, who put him to work the first night wheeling sand, and the second night told him to help a man named Palamaruck to clean up the yard, which he did. The yard was paved with brick, and upon this floor was deposited from time to time cones, slag, and other refuse, some of which cones contained some molten metal. The shift boss testified that, when he employed defendant in error, he told him to be careful and not get hurt, but it is not pretended that the boy was given any explanation of the dangers attending such work. In his testimony the latter denied that he was told anything whatever, except to help Palamaruck. The defendant in error worked at the job of cleaning up the yard the night of July 1st, and commenced to work the next night at 6 o'clock. Between 10 and 11 o'clock of the latter night, having temporarily finished the work in the yard, he and Palamaruck went to another part of the smelter to break sows, returning to the yard about half past 12. They found there some more refuse, and had almost finished loading one car, by means of which the refuse was removed, when the defendant in error saw a cone lying on the floor of the yard which also required removal. A sledge hammer weighing about 10 or 12 pounds was provided by the plaintiff in error for the breaking of such cones, which hammer was lying there on the floor, and that hammer the defendant in error took and with it struck the cone one blow, and raised it to strike another, when a terrific explosion occurred, resulting in his serious injury.

The evidence is without conflict that, when such cones contain only slag, they may be safely broken even when red hot, but that, when they contain any molten metal and there is any water or moisture in their vicinity, it is highly dangerous to break them when hot. The defendant in error himself several times testified that he knew this to

be so. What he did not know, however, according to his testimony, was that there was any water on the floor of the yard, or that there were any depressions in the floor in which water could gather. Nothing to that effect was explained to him, nor was he told how long cones containing molten metal had to stand before being cooled enough to break with safety. There was also direct testimony to the effect that molten metal could not explode unless brought in contact with water or moisture, or with some cold damp substance. On the part of the plaintiff, evidence was given tending to show that there were depressions in the floor, and that water was frequently thrown upon the floor of the yard, which latter fact was also testified to by the shift boss of the defendant who employed the plaintiff, from whose testimony in that regard we extract the following:

"Q. I will ask you whether or not there were any rules with respect to the use of water in the clean-up yard?

"A. Well, that place we always observed less or more for the water. I kept the water out of it, yes, sir; and I always gave orders to that effect, too.

"Q. That there should be no water put in there?

"A. Yes, sir.

"Q. Had you ever endeavored to enforce those orders?

"A. Well, I stopped them several times, but they would do it. It seems like sometimes.

"Q. Were any of the men discharged for using water there?

"A. No, sir; not as I know of, but I threatened to, that I would do so.

"Q. Had you seen any water used in that part of the yard at all?

"A. No, sir.

"Q. Had you seen any used in that part of the yard on the previous shift when you were on there?

"A. I did later, when they dumped a settling pot there one time that it exploded a little. There was water there, and they drew out a settling pot, and it set the building a little on fire.

"Q. That was how long before this accident?

"A. I don't know.

"Q. A week or a month?

"A. It might be.

"Q. You cannot fix the time any more definite than that. You mean it may be a week or a month before the accident that you saw this?

"A. I don't understand that.

"Q. I asked you to fix as definitely as you could how long before the accident that you saw water around there at the time the settling pot was dumped in it, whether it was a week or month or how long it was, as near as you can tell.

"A. Well, I did not see any on the night shift, but there might be some put on the day shift. Sometimes in the day we would pull out settling pots. I don't know how long before it was."

It is true that there was no direct testimony that there was at the time of the accident water on the floor of the yard; but there being testimony going to show that the defendant frequently permitted water to be put there and that it was dangerous to do so, and that molten metal could not explode unless it came in contact with water or moisture or some cold damp substance, it was plainly a matter for the jury to say whether the explosion in question was or was not caused by the molten metal contained in the cone that the plaintiff struck coming in contact with the water that the defendant permitted to be put on the floor of the yard. Marande v. Texas Pacific Ry., 184 U. S. 173, 22 Sup. Ct. 340, 46 L. Ed. 487. While the plaintiff did distinctly testify

more than once that he knew that molten metal would explode when it came in contact with water or moisture or with any cold damp substance, he also testified that he did not know that there was any water on the floor of the yard, and that there was nothing to indicate it so far as he could see, that it was somewhat dark in the yard and that the cone did not look red, and that he did not know it was hot, nor that it contained any molten metal. He also testified that he was not given any explanation whatever of any danger attending the work that he was put to do.

The Supreme Court, in the case of Mather v. Rillston, 156 U. S. 391, 398, 15 Sup. Ct. 464, 467, 39 L. Ed. 464, said:

"All occupations producing articles or works of necessity, utility, or convenience may undoubtedly be carried on, and competent persons, familiar with the business and having sufficient skill therein, may properly be employed upon them; but in such cases where the occupation is attended with danger to life, body, or limb it is incumbent on the promoters thereof and the employers of others thereon to take all reasonable and needed precautions to secure safety to the persons engaged in their prosecution, and for any negligence in this respect, from which injury follows to the persons engaged, the promoters or the employers may be held responsible and mulcted to the extent of the injury inflicted. The explosive nature of the materials used in this case, and the constant danger of their explosion from heat or collision, as already explained, was well known to the employers, and was a continuing admonition to them to take every precaution to guard against explosions. Occupations, however important, which cannot be conducted without necessary danger to life, body, or limb, should not be prosecuted at all without all reasonable precautions against such dangers afforded by science. The necessary danger attending them should operate as a prohibition to their pursuit without such safeguards. Indeed, we think it may be laid down as a legal principle that in all occupations which are attended with great and unusual danger there must be used all appliances readily attainable known to science for the prevention of accidents, and that the neglect to provide such readily attainable appliances will be regarded as proof of culpable negligence. If an occupation attended with danger can be prosecuted by proper precautions without fatal results, such precautions must be taken by the promoters of the pursuit or employers of laborers thereon. Liability for injuries following a disregard of such precautions will otherwise be incurred and this fact should not be lost sight of. So, too, if persons engaged in dangerous occupations are not informed of the accompanying dangers by the promoters thereof, or by the employers of laborers thereon, and such laborers remain in ignorance of the dangers and suffer in consequence, the employers will also be chargeable for the injuries sustained. Both of these positions should be borne constantly in mind by those who engage laborers or agents in dangerous occupations, and by the laborers themselves as reminders of the duty owing to them. These two conditions of liability of parties employing laborers in hazardous occupations are of the highest importance, and should be in all cases strictly enforced."

And in the recent case of Mountain Copper Company v. Pierce, 136 Fed. 150, 69 C. C. A. 148, where an unexperienced servant was directed by the defendant smelting company to adjust a belt on a pulley shaft without instructing him with reference to a collar and set screws projecting from a shaft by which he was caught and seriously injured while endeavoring to adjust the pulley, we said:

"He [the plaintiff] testified that he knew nothing about the collar or set screws, and that neither the foreman nor Ryan nor any one else told him of their existence, nor the danger attending the operation, or how to perform it. While it is contended on the part of the plaintiff in error that both the collar

and set screws could have been seen by the defendant in error if he had properly looked, it is not contended that he was told of their existence or of the danger attending the operation or how to perform it. True it is that the defendant in error knew that it is dangerous to approach shafting, belting, or other machinery in motion. That fact not only appeared from his own testimony, but is a matter of such common knowledge that every one in his senses must be held to know it. Nevertheless it is the duty of the master, before sending or permitting an inexperienced employé to perform such dangerous work, to instruct him how to perform it, and especially to inform him of any hidden, concealed, or obscure danger. * * * The law in our opinion made it the duty of the plaintiff in error to inform the defendant in error of the collar and set screws, and how to perform the dangerous task, before sending or permitting him, in the course of his employment, to undertake it."

In the present case, the court below correctly left it to the jury to determine both the question of the alleged negligence of the defendant and the alleged contributory negligence on the part of the plaintiff under instructions which fully covered both questions, and which were quite as favorable to the plaintiff in error as they should have been.

The judgment is affirmed.

NOTE.—The following is the opinion of Whitson, District Judge, on overruling the motion for new trial:

WHITSON, District Judge. On the first trial I was of the opinion that the proximate cause of the injury had not been established as alleged, and the case was accordingly taken from the jury. On motion for new trial, I was convinced of my error in that regard upon the authority of Marande v. Texas Pacific Railway Company, 184 U. S. 173, 22 Sup. Ct. 340, 46 L. Ed. 487. While counsel for the defendant still maintain the soundness of their contention made at the first trial, they now rely chiefly in aid of their motion to set aside the verdict of the jury, and to grant a new trial, upon the showing of the plaintiff by his own testimony to sustain the defense of contributory negligence pleaded by the defendant. Their position is this: That which one knows cannot be intensified by communicating it to him. This argument is extremely plausible, but I have reached the conclusion that it is fallacious for two reasons:

First. To charge a boy 16 years old with contributory negligence because he knew the danger, it is necessary that he should have appreciated it in order to establish the defense. Thus it was expressed in Spillene v. Missouri Pacific Railway Company, 111 Mo. 555, 20 S. W. 293, as follows: "A boy may have all the knowledge of an adult respecting the dangers which may attend a particular act, but at the same time he may not have the prudence, thoughtfulness, and discretion to avoid them which are possessed by the ordinarily prudent adult person." This is the well-established rule. Great stress was laid upon the fact that the plaintiff testified that he knew it was dangerous to strike red hot cones. But it was not dangerous. The testimony was not in substantial conflict upon this question. It was shown to be dangerous to strike red hot matte cones in close proximity to water, or with wet steel. It was not dangerous to strike red hot slag cones under either condition. Therefore the testimony of the plaintiff must be taken in connection with the other testimony in the case, and with the qualification which he himself made in other parts of his testimony. To the contention made by counsel that the testimony of plaintiff shows that he fully appreciated the danger I cannot give my assent. True, the plaintiff was not able to stand up at all times against the skillful cross-examination of counsel, but he did repeat two or three times that he knew it was dangerous to strike hot matte cones when there was water there, and he said that he knew that he ought to break up only cold cones. The whole testimony, fairly considered, disclosed this state of affairs: The boy had observed generally certain occurrences around the yard. He had seen cones explode when coming in contact with water, and had seen the effect of cold, damp steel coming in contact with

hot metal. He had been permitted to go to work, however, without any instruction as to the danger attending such explosions. The master had allowed a boy of inexperience to observe for himself from the surroundings and apply his immature judgment in reasoning from cause to effect, without warning him of the danger which it is plain to my mind he did not fully appreciate. While counsel for the defendant have shown much ability in the presentation of their theory and have displayed much ingenuity and skill in cross-examining the plaintiff, I can but feel that the contention they make is technical, and that they have overlooked that phase of the case which requires the master to caution one of tender years not generally of danger, but to put him in possession of such facts as will enable him to appreciate it.

Second. While the rule is that one cannot deliberately enter a place of danger, or do an act which is manifestly dangerous and which in all reasonable probability will result in injury, yet that does not relieve the master from furnishing a safe place. The argument is made that the plaintiff knew that the cone which he struck must have been deposited between 11 and 1 o'clock, but the master is presumed to have known this also. Clearly the plaintiff was pursuing the work which he had been directed to do. The information that there was only one cone there, and that recently from the furnace, must have been equally in contemplation of law in the mind of the master as in the mind of the plaintiff. The cone did not appear to be hot. It was shown that it had cooled sufficiently to form a crust, so to speak, on the outside from one to two inches in thickness, and, of course, it was black. Plaintiff, then, acted on appearances, and it was a question for the jury to say, considering his age, experience, and the like, whether he was guilty of contributory negligence. Again, it was disclosed by the testimony of Sabin, the shift boss, that it was against the rules to put water at the particular place where those cones were being deposited. He said: "I kept the water out of it, yes, sir; and I always gave orders to that effect, too. Q. That there should be no water put in there? A. Yes, sir." It sufficiently appeared that the defendant had knowingly permitted the violation of this rule in relation to keeping this particular place dry, to such an extent as to establish a disregard of it. The plaintiff was justified in assuming that there would be no water there.

For these reasons, the motion for a new trial will be overruled.

BERNARD v. ABEL et al.

In re BERNARD.

(Circuit Court of Appeals, Ninth Circuit. October 14, 1907.)

No. 1,437.

1. JUDGMENT—CORRECTION AFTER TERM—AUTHORITY OF COURT.

It is within the power of a court to amend its record of a judgment at a subsequent term to prevent injustice through a mistake or inadvertence of the judge or counsel or the clerk, as by correcting the wording of an order of dismissal which by mistake did not conform to the motion on which it was based.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 594–599.]

2. SAME—NOTICE OF MOTION.

It is not a fatal objection to a nunc pro tunc order correcting a judgment on the ground of mistake that the motion therefor was not served as many days before the hearing as required by the rules of court in case of ordinary motions in suits.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 622.]

3. BANKRUPTCY—INVOLUNTARY PROCEEDINGS—DISMISSAL BY PETITIONERS.

The only issues triable in a contested bankruptcy proceeding are those of insolvency and whether the alleged act of bankruptcy has been com-

mitted, and the court is not required to deny a motion by the petitioning creditors for a dismissal of the proceeding, if satisfied that it is made in good faith, because of other issues sought to be raised by the answer and which it has no power to try.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 136.]

Petition for Review and Appeal from the District Court of the United States for the Western Division of the Western District of Washington.

J. C. Cross, for appellant.

W. I. Agnew and G. C. Israel, for appellees.

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

HUNT, District Judge. On July 18, 1905, a petition in involuntary bankruptcy was filed in the District Court of the United States for the Western District of Washington, Western Division, by Veysey Bros., T. H. McKay, S. M. Heath, and W. H. Abel, praying that Joseph Bernard, appellant here, be adjudged a bankrupt under the bankruptcy laws of the United States. The principal ground for the petition in involuntary bankruptcy was that within four months preceding the filing of the petition Bernard, while insolvent, committed an act of bankruptcy, in that he transferred a portion of his property to one or more of his creditors, with intent to prefer such creditors over his other creditors, by executing and delivering to the Northwestern Lumber Company a bill of sale purporting to convey a certain logging outfit, and that the instrument of sale was made by Bernard, and accepted by the lumber company, for the purpose and with the intent to injure, delay, and defraud the creditors of Bernard. The petition in bankruptcy also alleged that, in a suit brought in the superior court of the state of Washington by Veysey Bros. against said Bernard, the personal property just described—that is, the logging outfit—was attached, and was thereafter claimed by the Northwestern Lumber Company, and that in an action duly brought by it a judgment was rendered that, by the bill of sale referred to, it became the owner of the said property, and that said attachment was thereby released, and that certain real estate had been attached, but that petitioners in bankruptcy, Veysey Bros., had released said attachments, and in their petition in involuntary bankruptcy had expressly waived any right under the said attachments. Bernard answered the petition, denying any indebtedness to the petitioners, denying insolvency, and denying that he had committed the act of bankruptcy set forth in the petition. He also set up that about March 31, 1905, Veysey Bros. brought suit against him upon the alleged indebtedness referred to in their petition, and that they had wrongfully caused an attachment to be issued in said suit, wrongfully levied upon certain of his property, and that the attachment was one in full force and effect when the petition in bankruptcy was filed, and that the claim of Veysey Bros. was a disputed and unliquidated one. Bernard objected to being declared a bankrupt, and prayed that the questions involved should be tried by jury.

Replication in due form was filed by the creditors who had petitioned in the proceeding in bankruptcy. On May 4th the petitioning creditors moved the court to dismiss the proceedings "without right to further prosecute." The motion recited that it was made for the reason that, since the filing of the petition, the bankrupt had been engaged in business, and was then in a position to pay, and had stated his willingness to pay, the debts of the petitioning creditors, on account of which the proceeding was instituted. On May 28th Bernard filed an affidavit objecting to the allowance of the motion for a dismissal of the proceeding. The objections of Bernard were based upon the following grounds: That the proceeding had been brought without just cause; that, when the petition was filed, he was and ever since had been engaged in a profitable business; that he had been and then was in a position to pay his debts to petitioners, and had stated his willingness to pay any sum or sums due, and owing by him to petitioners. He further set forth that he had paid certain of the petitioners amounts found due, and, furthermore, that, when the petition in bankruptcy was filed, there was pending in the superior court of the state of Washington a suit brought by Veysey Bros. involving a claim made the basis of the petition in bankruptcy; that the amount of the claim was in issue, but that he had expressed his disposition and willingness to pay to Veysey Bros. any amount justly due. He then set forth that he had been damaged by reason of the proceedings, and that, upon proper proceedings, he was willing that the matter be dismissed, but he insisted "that such dismissal be upon the answer of this affiant made and served herein, as aforesaid." Thereafter, on June 13th, the court entered a judgment of dismissal. The judgment recited that the matter came on regularly to be heard on motion of the petitioning creditors, "praying for a dismissal of this petition without right to further prosecute"; and thereupon it was ordered "that the petition herein be, and the same is, dismissed without right to further prosecute their claims." Thereafter, on September 19th, the petitioning creditors moved the court that the order of dismissal be modified so as to show that the right of the petitioning creditors to sue upon their claims in the state courts was preserved by limiting the right to further prosecute, referred to in said order, to bankruptcy proceedings. Notice of this motion to modify was served on September 19, 1906, upon the attorney for Bernard by leaving a copy with him in his office at Aberdeen, Wash. Thereafter, on September 26th, Bernard filed a special appearance and objections in the matter of the motion for the modification of the judgment of dismissal. He objected because the time designated in the notice of hearing of the petition for modification was not a rule day; that the notice of hearing was not sufficient under the rules of practice of the bankruptcy court. In his appearance, however, it was set forth that, if the special appearance was not sanctioned, he would, subject to exceptions, appear generally within the time allowed therefor by the law or by order of the court, and plead. The court overruled the objections, and denied the request for the allowance of time to appear generally and plead. Exceptions were allowed. Thereafter, on the same day, the court entered an order

reciting generally the proceedings upon the motion of the petitioners to modify the judgment of dismissal, and reciting, also, as follows:

"And it appearing to the court that the judgment of dismissal filed in this cause on June 13, 1906, was inadvertently entered, and by inadvertence did not conform to the motion to dismiss the action filed by the petitioners."

It was ordered that the judgment of dismissal of June 13, 1906, be vacated and expunged from the record; that the motion to dismiss the bankruptcy proceeding filed on May 4th should be granted, and ordering that said cause—that is, the bankruptcy proceeding—"is hereby dismissed without right to further prosecute for adjudication of bankruptcy under the national bankruptcy law for any of the causes alleged in the petition herein." It was further ordered that the judgment then rendered by the court "be entered nunc pro tunc as of date June 13, 1906." Bernard thereafter duly filed his bill of exceptions, and appealed to this court, praying herein for a review of the proceedings of the district court. The respondents herein demur to the petition for review upon the ground that it does not state facts sufficient to entitle the petitioner to a writ.

Rev. St. § 572, 26 Stat. 45, c. 65, § 6 [U. S. Comp. St. 1901, p. 464], provides as follows:

"The regular terms of the district courts shall be held at the times and places following, but when any of said dates shall fall on Sunday, the term shall commence on the following day. * * * Washington, Tacoma, first Tuesday in February and July."

The principal question involved is whether the court had authority to vacate the judgment of dismissal, and to make a judgment nunc pro tunc at the time and under the circumstances stated. Courts have the power to amend their judgments, upon proper showing, within a reasonable time, when no such change of circumstances has occurred as would make an amendment unjust to third persons or to the parties themselves. It happens sometimes, for instance, that applications to amend verdicts are granted even after error has been brought. Such amendments have often been allowed upon the judge's notes of the evidence at the trial, or upon other evidence clearly establishing the justice of the proposed amendments. This principle is distinctly stated in Matheson's Adm'r v. Grant's Adm'r, 2 How. 263, 11 L. Ed. 261. "It is a familiar doctrine," said the Supreme Court in Insurance Co. v. Boon, 95 U. S. 117, 24 L. Ed. 395, "that courts always have jurisdiction over their records to make them conform to what was actually done at the time; and, whatever may have been the rule announced in some of the old cases, the modern doctrine is that some orders and amendments may be made at a subsequent term, and directed to be entered, and become of record, as of a former term."

This power is one to make the record speak the truth. It is salutary, and enables courts to prevent injustice through mere mistake or inadvertence of the judge, or counsel, or the clerk. After the expiration of the term at which a judgment is rendered, there is no power in a court of law to amend a record in order to make it show that which did not take place, as to do this would be to exercise a revisory or appellate power of the court's own decisions; but, upon proper showing, the

power to correct a record by amending a judgment at a subsequent term is thoroughly well established. Bank v. Moss, 6 How. 31, 12 L. Ed. 331; 1 Freeman on Judgments, § 72; Odell v. Reynolds, 70 Fed. 656, 17 C. C. A. 317. The record in this case shows that the first judgment of dismissal did not conform to the motion for dismissal. It clearly appears that litigation between certain of the creditors and Bernard was pending in the state courts when the order of dismissal of the bankruptcy proceedings was applied for, and that the original motion to dismiss did not contemplate a judicial injunction by the bankrupt court against the pursuit of that litigation. It is evident that all that the court meant by its action was a dismissal of the proceedings in bankruptcy, without right to carry on such proceedings, and such only, any longer. But, by inadvertence, the order read as if it intended to cut the creditors off from carrying on their suits in other courts to recover certain claims. That the court, under the circumstances, was within its power when, upon motion, it made its record speak the exact truth by limiting the words expressing its meaning seems too plain to require further discussion.

There is no real merit in the point that notice of hearing of the motion to modify was not given for as many days before the hearing as the rules of the United States court in and for the district of Washington require in usual practice pertaining to motions. It is apparent that petitioner, Bernard, was in no way injured by the correction of the record. In his affidavit resisting the motion to dismiss the proceedings, after stating that they had been instituted without good cause, he alleged general damages, and stated that upon "proper proceedings" he was willing that the matter might be dismissed, but insisted "that such dismissal be upon the answer of this affiant made and served herein as aforesaid." He expressly alleged payments to certain of the petitioning creditors since the petition in bankruptcy had been filed, and admitted the pendency of litigation with certain other petitioning creditors in the state court, involving a claim of Veysey Bros., which claim was the basis of the petition in bankruptcy, and admitted also a willingness to pay such creditors "the amount justly due and owing." The bankruptcy court, however, was not justified in retaining the bankruptcy proceeding in order that it might determine the issues still pending and undetermined in the state court, while it was wholly beyond its power to have tried the question of damages for a wrongful institution of bankruptcy proceedings, inasmuch as the only issues triable upon a contested bankruptcy case are those of insolvency and whether the alleged act of bankruptcy has been committed. Bankr. Act, § 19, subds. "a," "b" (Act July 1, 1898, c. 541, 30 Stat. 551 [U. S. Comp. St. 1901, p. 3429]); Collier on Bankruptcy, p. 257.

Under the circumstances, therefore, if petitioning creditors wished to dismiss their petition in bankruptcy, and to try their suit in the state court, they had a right to move for a dismissal of the bankruptcy matter, and, if the court believed they were in good faith, to obtain such an order.

The petition for a writ will be dismissed.

AACHEN & MUNICH FIRE INS. CO. v. MORTON.

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

No. 1,683.

1. LIMITATION OF ACTIONS—COMPUTATION OF PERIOD OF LIMITATION—ACCRUAL OF RIGHT OF ACTION.

The statute of limitations begins to run from the time a right of action accrues for a breach of duty or contract or for a wrong, without regard to the time when actual damage results.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 217, 218.]

2. SAME—BREACH OF CONTRACT.

An insurance company undertook to cancel a policy in accordance with its terms by giving notice and returning the unearned premium. The policy having been lost, a lost policy receipt was given, signed by the owner of the property and mortgagees, to whom the policy was made payable, by which they agreed that, if the policy was found, it would be surrendered. The property was burned, and the policy, having been found, was assigned by the mortgagees to a third person, who recovered thereon against the company. *Held*, in an action by the company to recover the amount so paid out by it from one of the mortgagees, based on an alleged breach of the cancellation agreement, that such breach occurred and plaintiff's cause of action accrued at the time the policy was assigned by defendant in violation of his agreement to surrender it, and that the statute of limitations commenced to run at that time.

In Error to the Circuit Court of the United States for the Southern Division of the Western District of Michigan.

The Aachen & Munich Fire Insurance Company, a foreign corporation doing business in Michigan, insured against loss by fire a certain hotel building and furniture therein situated in that state, and owned by a Michigan corporation known as the "St. Joseph Hotel Company." This contract of insurance bore date of July 17, 1897, and covered the risk for one year, unless sooner terminated by cancellation, as provided by the policy. Attached to the policy was a slip providing "loss, if any, payable to Andrew Crawford and John H. Graham, as their interest may appear." These persons were at the time mortgagees and stockholders. February 28, 1898, notice was given to the hotel company and to said Crawford and Graham of an intention to cancel the policy. On March 3, 1898, the unearned part of the premium was accordingly returned to the hotel company, but the policy was not actually delivered up, because it had been lost or misplaced. In consequence of this fact an agreement in the following words and figures was made and delivered to the insurer:

"Policy No. 61,251. Return Premium, $17.75.

"Agency at Benton Harbor, State of Michigan.

"In consideration of seventeen and 75-100 dollars to us paid, the receipt whereof is hereby acknowledged, we hereby surrender, release and relinquish all our rights, title and interest in policy No. 61,251 of the Aachen and Munich Insurance Company of Aix-la-Chappelle, issued at its Benton Harbor Agency, and all advantages to be derived therefrom and the said policy having been lost or mislaid, we agree to make no claim whatever for any loss or damage on which the said company would be liable under said policy, and to return said policy, (if the same should be found) to the said company forthwith, and without further compensation and we certify that said policy has not been assigned or transferred in any manner whatsoever.

"Dated March 3, 1898. Hotel St. Joseph Company,
"Per S. J. Morton, Assured.
"J. H. Graham,
"A. Crawford,
"Mortgagees."

On or about July 10, 1898, the hotel was destroyed by fire. On January 13, 1898, the policy, which in the meantime had been found, was assigned by the hotel company and by Crawford and Graham to one H. G. Stone, a citizen of Illinois. On January 15, 1898, Stone, the assignee, brought suit in a circuit court of the state of Illinois against the insurer in the name of Crawford and Graham for the use of said Stone. The insurance company appeared and set up the cancellation of the policy as a defense, and upon a trial there was a judgment for the defendant. The cause was thereupon taken by appeal prayed and allowed the said Graham, Crawford having died, to the Appellate Court of the First District of the state of Illinois, which court reversed the judgment of the circuit court and entered judgment against the insurance company for the full amount, with interest and costs. This judgment was affirmed by the Supreme Court of the state of Illinois on October 25, 1902. The judgment was thereupon paid, together with costs and the expenses of the litigation. On January 17, 1906, this suit was started against the said Graham, assignee of the said policy and plaintiff in the said Illinois suit, to recover from him the amount of the said Illinois judgment, together with costs, interests, and expenses of the said litigation. The opinions of both the Illinois courts, by agreement, are made a part of each count in the declaration. Graham meantime died, and the suit was revived against his administrator. A demurrer to the plaintiff's amended declaration was sustained and judgment rendered for the defendant. From this judgment, the insurance company has sued out this writ of error.

Arthur Webster and Willard Kingsley, for plaintiff in error.
G. M. Valentine, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge (after stating the facts as above). Two questions have been argued as defenses arising under the demurrer to the plaintiff's declaration: First, the effect of the judgment of the Illinois court as res adjudicata; and, second, the Michigan statute limiting personal actions to six years. These in their order.

The policy of insurance upon which Graham's suit for the use of Stone was brought contained the usual provision that "this policy shall be canceled at any time at the request of the insured, or by the company, by giving five days' notice of such cancellation," etc. The defense made to the Illinois suit was that the policy had been effectually canceled before any loss had occurred. The Illinois Appellate Court found as a fact that both Graham and Crawford had an insurable interest in the property insured as the property of the St. Joseph Hotel Company, both as mortgagees and as stockholders, and that their interest in the policy as stockholders had not been canceled or surrendered, but had been effectually transferred after loss to Stone, the beneficial plaintiff in that suit. Upon this finding that court gave judgment against the insurance company for the full amount of the policy with interest and costs. Upon a writ of error to the Supreme Court this judgment was affirmed. This affirmance, from the opinion of that court, appears to have been based upon the fact that findings of the Appellate Court had been made a part of the judgment of that court, thereby leaving open for review no question except whether upon the facts so made a part of the judgment the law had been correctly applied. Upon the record, as made up, that court also held that no propositions of law had been saved under the practice of the court which would enable it to question the propositions of

law held by the Appellate Court in behalf of the plaintiffs in the lower court. Thus finding its hands tied, the Supreme Court affirmed the judgment of the Appellate Court against the present plaintiff in error, the Aachen & Munich Fire Insurance Company. Aachen & Munich Fire Ins. Co. v. Crawford, 199 Ill. 367, 65 N. E. 134. Unless the plaintiff in error can escape the effect of this Illinois judgment as an adjudication, it is clear that the insurance company cannot recompense itself by a recovery against Graham's administrator in an action which is necessarily grounded upon the proposition that the recovery in the Illinois court against it was wrongful and erroneous. In short, it was adjudged in that action, it being one in which Graham was an actor on one side and the insurance company upon the other, that Graham's interest in the hotel as a stockholder was insured, and that the cancellation agreement did not effectually cancel the policy as to that interest. The present action is in direct contravention of that adjudication.

But the learned attorneys who now represent the insurance company say that the judgment in that case is not conclusive here under the averments of the amended declaration, which, they say, sets forth a state of facts in respect to the cancellation agreement which make an issue which was not presented by the pleadings in the Illinois case, and thus not then adjudged. These new facts are, in substance, that the parties intended that the stockholder's interest of Graham and Crawford should be canceled and surrendered, and that if the cancellation agreement, called the "Lost policy receipt," did not plainly express this intent, it is because it is defective in form and fullness. It is now averred that Graham actively undertook to fully cancel and effectually surrender any benefit under said policy in every character, and that he affirmed and represented that the receipt given for the lost policy "was in manner and form a good, valid, and efficient surrender, discharge, and cancellation of said policy and loss slip attached thereto." It is further alleged that that contract or receipt was delivered by him to the company "with the intent to cancel and release all the interests which he had or claimed to have" in the policy or lost slip.

Assuming, as we must, for the purposes of this case, that the "lost policy receipt" did not operate in terms as a cancellation and surrender of the policy in so far as that policy protected Mr. Graham's interest as a stockholder, a very grave question is presented as to whether it can be varied or contradicted by parol evidence of the intent and purpose of the parties or their antecedent declarations; its execution and delivery not being denied. Assurance Company v. Building Association, 183 U. S. 308, 349, 361, 22 Sup. Ct. 133, 46 L. Ed. 213, has greatly narrowed the limits within which such evidence is available when the written instrument is unambiguous and actual fraud in the execution or delivery is not relied upon. But, passing the question without express decision, we think that relief must be denied, because plaintiff's right of action arose more than six years before this suit was begun. A right of action accrues whenever such a breach of duty or contract has occurred, or such a wrong has been sustained, as will give a right to then bring and sustain a suit. That

the statute begins to run from the time that a right of action accrues, without regard to when the actual damage results, is well settled. 26 Cyc. 1065, 1069, 1116, and cases there cited: Wilcox v. Plummer, 4 Pet. 172, 7 L. Ed. 821.

If an act occur, whether it be a breach of contract or duty which one owes another or the happening of a wrong, whether willful or negligent, by which one sustains an injury, however slight, for which the law gives a remedy, that starts the statute. That nominal damages would be recoverable for the breach or for the wrong is enough. The fact that the actual or substantial damages were not discovered or did not occur until later is of no consequence. The act itself, which is the ground of action, cannot be legally separated from its consequences. Were this so, successive actions might be brought in many cases of contract and tort as the damages developed, although all the consequential injuries had one common root in the single original breach or wrong. This would in effect nullify the statute.

There is a class of actions for consequential damages which are distinguishable from the class to which we refer and from the one at bar. The breach of duty or other wrongful act may or may not be legally injurious to the plaintiff until he has suffered some consequence therefrom. Thus a railway may be operated without the exercise of statutory precautions intended to safeguard the public. But, until one has sustained some injury in consequence, he has no right of action. It is the duty of a municipality to maintain its streets so that they may be safely used by the public. But the mere fact that a street is in a dangerous condition will not give a right of action to every one who chooses to sue. It is only when some injury has occurred as a consequence that the statute begins to run against the injured person's right of action. One may maintain a dangerous wall along a public street, but no individual right of action against him will arise until some injury shall result. If one has the legal right to take the coal or other mineral below the surface of premises occupied by another, he owes that person the duty of doing it in such manner as will not disturb his enjoyment of the surface. But until the enjoyment of the surface premises is interfered with no right of action arises for the breach of this duty. This last illustration is from the case of Bonomi v. Backhouse, 9 H. L. Cases, 305, and the decision in that case went upon the ground that the cause of action did not arise until the enjoyment of the surface was affected by the falling in of the ground. The surface owner was not bound to bring his suit when the mischief was done which ultimately led to the injury of his rights, because no legal injury had occurred until there was some interference with the enjoyment of his surface estate. The case of Smith v. City of Seattle, 18 Wash. 484, 51 Pac. 1057, 63 Am. St. Rep. 910, is to the same effect. The case of State v. McClellan, 113 Tenn. 616, 625, 85 S. W. 267, has been relied upon by the plaintiff in error as an authority holding that it is the occurrence of actual damage which starts the statute. That was an action upon the official bond of a register of deeds, etc., for damages resulting from his failure to correctly register a deed placed in his hands for that pur-

pose by the plaintiff. It was held that the statute of limitations did not begin to run until the plaintiff had sustained some injury in consequence. But this was placed upon the well-recognized distinction between the liability of a public official for a breach of official duty and the right of action which may arise between persons having only private relations with each other when there has been a breach of some contract or duty which one personally owes to the other. The Tennessee court, speaking by Judge Shields, said:

"Public officers are not liable for a breach of official duty to an individual unless he can show that in the public duty was involved a duty to himself as an individual, and that he has suffered a special and peculiar injury, not common to the general public. In other words, without special injury, the wrong is to the public only, and punishable by indictment or removal from office, or both. The plaintiff, in an action against a public officer for a breach of a duty primarily due to the public, must show both the breach of an official duty, in the correct discharge of which he was interested, and the special resultant injury to himself. All these elements must be present. This rule is necessary to prevent public officers from being annoyed and harassed by groundless actions and in the promotion of good public services. 23 A. & Eng. Ency. of Law, 379, 380; Mechem on Public Officers, §§ 670–674. Therefore a right of action against a public officer growing out of a breach of official duty involving individual rights is not complete and does not accrue until the happening of a consequential injury resulting proximately from the breach."

To the same effect is the case of Moore v. Juvenal, 92 Pa. 490. People v. Cramer, 15 Colo. 159, 25 Pac. 302, Steel v. Bryant, 49 Iowa, 117, and Bank of Hartford v. Waterman, 26 Conn. 324, were similar to the Tennessee case, and stand upon the distinction already stated, being actions upon the official bonds of public officers for neglect of official duty resulting in loss to the plaintiffs. The later Iowa case of Russell v. Abstract Co., 78 Iowa, 216, 42 N. W. 654, 4 L. R. A. 536, illustrates the distinction. That was an action against a private abstract company. It was held that the statute began to run when an erroneous abstract was furnished, although the damage did not result until later. To the same effect as the case last cited are Kinnison v. Carpenter, 9 Bush (Ky.) 606, and Carpet Co. v. Dornan, 64 Mo. App. 25.

The ground of the present action is the wrongful assignment of the policy of insurance to Stone. That act was in breach of his express agreement to deliver same to the company "forthwith" when it should be found. That act was also in direct contravention of his implied obligation, in view of the averments of the declaration in respect of the actual intent of the parties as to the full cancellation of the policy and his "affirmation and representations" as to the full effectiveness of the "lost policy receipt" as a cancellation of every interest which he claimed. Everything which followed was the plain result or consequence of that act, whether we treat it as a mere breach of contract or a tortuous and wrongful act in view of his obligations and relations to the insurance company. A right of action then arose. That the damages immediately accruing may have been purely nominal does not alter the case. For the nominal damages the plaintiff might have maintained its suit. Actual damages accrued when suit was actually brought upon the policy for the company was then com-

pelled to incur the expense of a defense, and, when judgment was finally rendered for the amount of the policy with interest and costs, the full extent of the injury done by the act of assignment was determined. The act of wrongfully assigning the policy is the cause of action, or the plaintiff has stated none, and the damages which resulted cannot be legally separated from the act which constituted the legal wrong which lies at the foundation of this suit.

The case of Wilcox v. Plummer, 4 Pet. 172, 181, 7 L. Ed. 821, is not only a leading case, but an authoritative one. That was an action in assumpsit to recover the amount of a loss sustained by the negligent and unskillful conduct of a litigation. A promissory note was placed in the attorney's hands for collection by suit against the maker and indorser. The maker alone was sued. Judgment had. He proved to be insolvent. Suit was then brought against the indorser. This action was nonsuited for a negligent misnomer of the plaintiff. By the termination of this action the statute had run in favor of the indorser. The question in the case was whether the statute of limitations commenced running when the error was committed in the commencement of the action against the indorser, or only when the actual damage was sustained by the loss of the debt through the bar of the statute in favor of the indorser. The court held that the statute began to run when the negligent act of the attorney was committed. Among other things, the court said:

"When the attorney was chargeable with negligence or unskillfulness, his contract was violated, and the action might have been sustained immediately. Perhaps, in that event, no more than nominal damages may be proved, and no more recovered; but, on the other hand, it is perfectly clear that the proof of actual damage may extend to facts that occur and grow out of the injury, even up to the day of the verdict. If so, it is clear the damage is not the cause of action. This is fully illustrated by the case from Salkeld and Modern, in which a plaintiff, having previously recovered for an assault, afterwards sought indemnity for a very serious effect of the assault, which could not have been anticipated, and of consequence could not have been compensated in making up the verdict.

"The cases are numerous and conclusive on this doctrine. As long ago as the 20th Eliz. (Cro. Eliz. 53), this was one of the points ruled in the Sheriffs of Norwich v. Bradshaw. And the case was a strong one; for it was altogether problematical whether the plaintiffs ever should sustain any damages from the injury. The principle has often been applied to the very plea here set up, and in some very modern cases. That of Battery v. Faulkner, 3 B. & Ald. 288, was exactly this case; for there the damage depended upon the issue of another suit, and could not be assessed by a jury until the final result of that suit was definitely known. Yet it was held that the plaintiff should have instituted his action, and he was barred for not doing so. In the case of Short v. McCarthy, which was assumpsit against an attorney, for neglect of duty, the plea of the statute was sustained, though the proof established that it was unknown to the plaintiff until the time had run out. And the same point is ruled in Granger v. George, 5 B. & C. 149; in both cases the court intimating that, if suppressed by fraud, it ought to be replied to the plea, if the party could avail himself of it. In Howell v. Young, the same doctrine is affirmed, and the statute held to run from the time of the injury, that being the cause of action, and not from the time of damage or discovery of the injury."

Judgment affirmed.

KOBUSCH v. HAND.

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

No. 2,479.

1. BANKRUPTCY—"CREDITORS"—SURETY OR INDORSER.
A surety or indorser for a bankrupt is a creditor within the meaning of Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418].

2. SAME—VOIDABLE PREFERENCE—PAYMENT FOR BENEFIT OF SURETY.
Where the president of a corporation was an indorser on its notes given to a bank, and with knowledge of its insolvency and within four months prior to its bankruptcy caused it to pay the notes with intent to relieve himself from liability and to secure an advantage over other creditors, a preference was given which may be recovered from him by the trustee 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. 1907, p. 1031].

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

B. Schnurmacher and William A. Kinnerk, for plaintiff in error.
Warren Hilton, for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

HOOK, Circuit Judge. The trustee in bankruptcy sued Kobusch to recover the amount of a voidable preference claimed to have been received from the bankrupt, and obtained judgment which this writ of error is brought to review. The bankrupt was a manufacturing company, and Kobusch was its president. It had executed to a bank four notes aggregating $4,800 upon which Kobusch was an indorser for its accommodation. Within four months of the filing of the petition in bankruptcy, and whilst the company was insolvent, he, as president, caused it to pay the notes to the bank. The trial court found from the evidence that, when the notes were paid, he had reasonable cause to believe his company was insolvent, that the payment was made with intent on the part of the company to give a preference, and that he, Kobusch, intended to secure such preference. The question is whether Kobusch received such a preference as may be recovered from him under the preference clauses of Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418], as amended by Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799 [U. S. Comp. St. Supp. 1907, p. 1031].

There is no doubt that, as abstractly defined by section 60a, a preference was given by the bankrupt. Nor in view of the findings of the trial court, which are not disturbed by the contents of the bill of exceptions, is there doubt that Kobusch was benefited by being discharged from his obligation to the bank as surety or indorser upon the notes of the bankrupt. Section 60b provides:

"If a bankrupt shall have given a preference, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall

be voidable by the trustee, and he may recover the property or its value from such person."

There is a significant resemblance between the language of this section and that of the corresponding sections of Act March 2, 1867, c. 176, 14 Stat. 517. Section 35 (page 534) of the act of 1867 provided that if any person insolvent or in contemplation of insolvency, within the period limited, with a view to giving a preference to any creditor or person having a claim against him, or who is under any liability for him, makes any payment, etc., the same shall be void and the assignee may recover the property or the value of it from the person so receiving it or so to be benefited. Section 39 (page 536) of the same act also provided for the recovery of preferences given to persons under liability for the bankrupt "as indorsers, bail, sureties or otherwise." It is quite clear that in passing the existing act Congress intended to adopt the substance of the prior provisions upon this subject, and in doing so to employ terms more concise, but equally as comprehensive. The act of 1867 was construed in Bartholow v. Bean, 18 Wall. 635, 21 L. Ed. 866. In that case the bankrupts when insolvent paid their note, indorsed by one Wilcox, which they had discounted with their bankers. Shortly afterwards bankruptcy proceedings were instituted, and the assignee who was appointed sued the bankers, not Wilcox, the indorser, to recover the payment as a voidable preference. In treating of the relation to the case of the fact that the indorser was solvent and the right of the bankers to refuse payment from the bankrupts without danger of losing their claim upon the indorser, the court said:

"The statute in express terms forbids such preference, not only to an ordinary creditor of the bankrupt, but to any person who is under any liability for him; and it not only forbids payment, but it forbids any transfer or pledge of property as security to indemnify such persons. It is therefore very evident that the statute did not intend to place an indorser or other surety in any better position in this regard than the principal creditor, and that, if the payment in the case before us had been made to the indorser, it would have been recoverable by the assignee. If the indorser had paid the note, as he was legally bound to do, when it fell due, or at any time afterwards, and then received the amount of the bankrupt, it could certainly have been recovered of him. Or if the money had been paid to him directly, instead of the holder of the note, it could have been recovered, or if the money or other property had been placed in his hand to meet the note or to secure him, instead of paying it to the bankers, he would have been liable."

If Wilcox, like Kobusch in the case before us, had occupied a position of power and control over the affairs of the bankrupts with authority to direct their business acts, and by virtue thereof had caused the preferential payment to be made to the holders of the note with intent to relieve himself from liability, it is difficult to perceive how he could have escaped liability under the statute as so construed. Landry v. Andrews, 22 R. I. 597, 48 Atl. 1036, arose under the present act. Andrews had indorsed a note of the bankrupts given to a bank. Within four months of the commencement of the bankruptcy proceedings, and when insolvent, the bankrupts paid to the bank the amount of the note, thereby discharging it and relieving Andrews from liability. Andrews, with knowledge of the insolvency

of the bankrupts, directed them to pay the note in order that he would be benefited, and, when the payment was made, he had reasonable cause to believe that it was intended thereby to give him a preference over other creditors. The trustee sued Andrews to recover the preference. The Supreme Court of Rhode Island held that the declaration which exhibited the foregoing facts was sufficient to entitle the trustee to recover. The case is like the one at bar in all substantial particulars.

It is contended that no one but a creditor can receive a preference, and that an indorser or surety is not a creditor. But is it true that an indorser or surety is not a creditor within the meaning of the bankruptcy act? The contrary was held in Swarts v. Siegel, 117 Fed. 13, 54 C. C. A. 399. Siegel & Bro. were accommodation indorsers upon the notes of the bankrupts given to a bank. Within the four months before the bankruptcy proceedings, and when insolvent, the bankrupts made partial payments on the notes. After the adjudication and selection of a trustee, Siegel & Bro., having paid to the bank the balance due on the notes, presented claim for allowance. We held that their claim should not be allowed until they had surrendered the preference received by the bank, one of the grounds being that their relation as sureties to the bankrupts constituted them creditors. It was said:

"An indorser, an accommodation maker, or a surety on the obligation of a bankrupt is a creditor under the act of 1898, and a payment on such an obligation by the principal debtor while insolvent to the innocent holder of the contract within four months before the filing of the petition for adjudication in bankruptcy will constitute a preference which will debar the indorser, accommodation maker, or surety from the allowance of any claim in his favor against the estate of the bankrupt unless the amount so paid is first returned to that estate."

It is almost an imperceptible step in advance of this decision, but a logical and reasonable one, to say that where the surety is the president of the bankrupt, and with knowledge of its insolvency directs the payment to the holder of the obligation with intent to relieve himself from liability and to secure an advantage over other creditors, a preference arises which may be recovered from him by the trustee.

The judgment is affirmed.

SCHLOSS v. A. STRELLOW & CO. et al.

(Circuit Court of Appeals, Third Circuit. November 12, 1907.)

No. 6.

BANKRUPTCY—INVOLUNTARY PROCEEDINGS—TRIAL OF ISSUES ON PETITION.

An issue as to the insolvency of an alleged bankrupt involves as elements the questions of the amount of his indebtedness and the fair valuation of his property, both of which he is entitled to have determined by a jury; and the court cannot make a preliminary finding as to the validity and amount of the claims of certain creditors which will be conclusive on the jury upon the trial of such issue.

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

For opinion below, see 149 Fed. 907.

Edward W. Thayer, for plaintiff in error.
R. W. Rymer, for defendants in error.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

DALLAS, Circuit Judge. On March 9, 1906, a petition was filed wherein it was prayed that Henry P. Schloss might be adjudged a bankrupt. He answered that he had not committed the act of bankruptcy alleged, that he was not insolvent, and that he was not indebted to the petitioners; and he demanded a trial by jury. On August 7, 1906, the petitioners moved the court "to limit the issue, after setting down the case for hearing before a jury, for the determination of the insolvency of the alleged bankrupt, and the act of bankruptcy alleged in said petition"; and, on the same day, this motion was granted. Subsequently a decree was entered, as follows:

"Now, September 29, 1906, the above case having been put at issue by petition and answer filed, and the case having been heard by the court on the question whether or not the petitioning creditors in this case were the creditors of Henry P. Schloss, the alleged bankrupt, it is now ordered, adjudged, and decreed by this court that the said Henry P. Schloss is indebted to, and purchased goods, wares, and merchandise from, the said petitioning creditors, to wit, A. Strellow, William A. Leggett & Co., Williamson Bros., and the Honesdale Shoe Company, to the amounts set forth in the petition filed in this case."

After the making of this decree, several persons, firms, and corporations united in a petition wherein it was stated that they were creditors of the alleged bankrupt in the respective amounts therein specified, but that he denied that he was indebted to them, and intended "to set up said defense on the trial of said case"; and they prayed to be permitted to intervene, in order that they might "make a proper presentation of their respective claims." This petition was followed by answer and replication, and thereupon there was a decree as follows:

"Now, January 30, A. D. 1907, on the issue raised by the petition of Harris & Brody, Cohen & Lange, J. A. Scriven & Co., Fuld Bros., Julius Franklin, Hirsch Bros. Co., John N. Hines & Co., Samuel Greenstein, Ascher & Abramson, A. Kraner & Co., J. R. Palmenberg & Sons, Wright & Wright, S. W. Korn Sons & Co., Emil Messner, Modern Cloak & Suit Co., S. Steinfeld & Co., Empire Frame & Art Co., Sulla & Kurtz, I. Brozen, Zins & Rossner, and Revealon Freres, requesting that as creditors of the alleged bankrupt they be admitted as additional petitioners, and the answer of the respondent denying that they are creditors, the court, after due hearing, sustains the petition, adjudging that the petitioners are creditors of the bankrupt, and that they are entitled to come in as prayed."

On February 28, 1907, there was a jury trial as to both insolvency and the act of bankruptcy; but the assignment of errors concerns only the issue as to insolvency, and the single point presented by the several specifications is whether, for the trial of that issue, the orders of September 29, 1906, and of January 30, 1907, had conclusively determined the validity and amount of the claims of the petitioners, original and intervening. The case was tried and decided upon the theory that they had, and in this we think there was error. The

precise question, as defined by the bankruptcy act (Act July 1, 1898, c. 544, cl. 15, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3420]), was whether the property of Schloss would, "at a fair valuation, be sufficient in amount to pay his debts," and for the solution of that question it was quite as needful to ascertain the amount of his debts as the value of his property. These elements were both inherent in "the question of his insolvency." There was no separate issue as to his indebtedness. That was matter of evidential fact, and the plaintiff in error was entitled to a finding of the jury upon it, notwithstanding its supposed predetermination by the court.

The judgment is reversed, and a new trial is directed.

ANDREW et al. v. GLOBE ELEVATOR CO. et al.

(Circuit Court of Appeals, Seventh Circuit. May 18, 1907.)

No. 1,318.

INJUNCTION—PRELIMINARY INJUNCTION—REVIEW ON APPEAL.

A preliminary injunction, restraining the enforcement of a state grain inspection law in respect to interstate shipments pending a final hearing as to its constitutionality, *held* not improvidently granted upon the facts shown, and sustained, without consideration of the case on its merits.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, §§ 305, 306.]

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

For opinion below, see 144 Fed. 871.

L. K. Luse, for appellants.

Ralph Whelan, C. H. Crownhart, and J. A. Murphy, for appellees.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

PER CURIAM. This is an appeal from an interlocutory order, which restrains, pending the final hearing, the appellants from interfering with the business of the appellees under color of a Wisconsin statute, which the appellees claim, on the state of facts averred by them, violates their rights under the commerce clause of the federal Constitution. The appellants have not satisfied us that the order staying the hands of appellants, pending a final hearing, was entered improvidently. We do not at this time consider any of the questions which go to the ultimate merits of the case, which were pressed upon our attention at this hearing.

The order appealed from is affirmed.

COOPER v. OTIS CO.

(Circuit Court, D. Massachusetts. November 11, 1907.)

No. 133 (Old No. 1,790).

1. PATENTS—INFRINGEMENT—KNITTING MACHINES.
The Hurley patent, No. 572,679, for improvements in circular knitting machines used for knitting ribbed fabrics which employ two revolving needle cylinders, one above the other, describes as the substantial improvement intended to be covered such a construction of the machine as to enable the finished work to be taken up either above or below the cylinders, and an essential feature of such construction is the making of the two cylinders of the same size and form. As so construed the patent *held* not infringed by a machine in which the cylinders were not of the same size nor form.

2. SAME—CAMS FOR KNITTING MACHINES.
The Barratt patent, No. 601,408, for an improved cam for circular knitting machines, strictly construed as required by the prior art, *held* not infringed.

In Equity. On final hearing.

Charles F. Perkins and Everett N. Curtis, for complainant.
Franklin Scott and William A. Macleod, for defendant.

COLT, Circuit Judge. This is a suit for infringement of the Hurley patent, No. 572,679, dated December 8, 1896, for improvements in circular knitting machines, and the Barratt patent, No. 601,408, dated March 29, 1898, for improvements in cams for knitting machines. The Hurley patent relates to the type of knitting machines which employ two revolving needle-cylinders located one above the other, and which are used for knitting ribbed fabrics.

The patent says:

"My invention relates to certain improvements in circular knitting machines wherein two revolving needle-cylinders, one above the other, are employed."

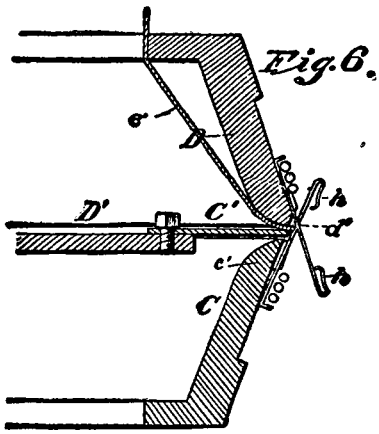
The patent then proceeds to state the objects of the invention: First, "to simplify the driving or revolving mechanism of the cylinders to produce a more even and steady movement"; second, "to effect the ready and compact assembling of the parts"; third, "to provide a vertical adjustment of the upper cylinder with relation to the lower one, to enable the varying of the length of the loop as may be required in the operation of producing the fabric"; fourth, "to so construct the machine as to enable the finished work to be taken up either above or below the cylinders." An examination of the Hurley patent discloses that the substantial improvement described and intended to be covered by the patent relates to the last enumerated object, namely, "to so construct the machine as to enable the finished work to be taken up either above or below the cylinders."

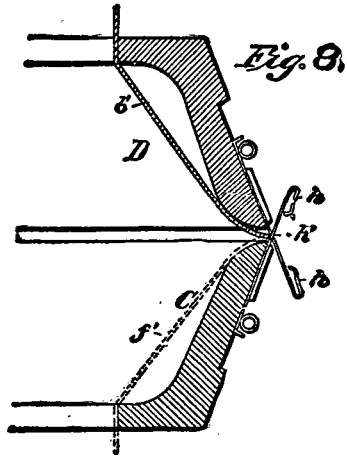
This feature of the patent is covered by claim 4, and it is to this claim that the evidence and briefs of counsel, on the issue of infringement, are mainly directed.

Claim 4 reads as follows:

"4. In a circular-knitting machine, the combination with two oppositely-arranged conical needle-cylinders of the same size and form supported on the

main frame, said cylinders having a space between their opposing edges and said edges being rounded on their inner surfaces, each of said cylinders having formed in its periphery a series of grooves for the reception of needles, a series of needles supported in said grooves and crossing each other on a line midway of the space between the cylinders whereby the finished work may be taken upwardly or downwardly from the needles, as and for the purpose set forth."





The prior art and the invention covered by claim 4 are set forth with great clearness and fullness in the following extract from the specification:

"In Fig. 6 I have represented the old way in which conical needle-cylinders are arranged, with a space between them, the lower cylinder, C, being slightly smaller than the upper one, D, and in this case having its needle-grooves, c', at the same angle with grooves, d', in the lower outer edge of the upper cylinder, so that the lower needles traverse both sets of grooves. By this arrangement of the cylinders the needles working in the grooves above and below will cross each other on a line with the upper edge of the space between the cylinders, so that when the loops are being formed on the needles of the upper cylinder it becomes necessary that the needles of the lower cylinder be pushed outward that the loops previously formed can be cast off, and this is done by means of an adjustable cam, C', on a stationary arm, D', on the inside of the cylinder, or by some other equivalent device, in most cases where conical cylinders adjacent to each other and spring-needles have been used.

"In all cases where the cylinders are constructed so that the needles will cross each other at the upper or lower edge of the space between them the cam, C', is required to be adjusted near the edge of the cylinder on the opposite side of the space from where the needles cross, so that the finished work, as it is cast off from the needles, can pass within the cylinders between the end of the cam and the point where the needles cross and be taken up. As illustrated in Fig. 6, it is clearly shown that by such a construction the finished work, e', will pass into the cylinder above the cam, C', and be taken up above the cylinders, though the cylinders may be reversed in another machine, so that the finished work may pass under the end of the cam, C', and down through the lower cylinder to the take-up below.

"It is clearly evident, then, that machines constructed prior to my invention have not been so arranged that in any one machine the finished work can pass to the take-up either above or below the cylinders after passing in between them, as the circumstances of the case may demand, as when the ceiling is very low in the room in which the machine is operated and there not being room above the machine the finished work can be lowered to a take-up below, or

when the ceiling is high in the room the finished work can pass to a take-up above the cylinders, which is preferable, as then the work is preserved without soiling and is always in view of the operator.

"The object of my particular construction and arrangement of conical needle-cylinders is to remedy the difficulty heretofore experienced in not being able in the same machine to adjust the parts so that the finished work can pass to the take-up from the interior of the cylinders to either above or below the cylinders, and to this end Fig. 8 represents my improved conical cylinders, each of which is of the same form and size, and the upper one adjusted above the lower one by means of the brackets, J, leaving the ordinary space between their adjacent ends. In this arrangement of parts the needles of each cylinder are confined to their own separate grooves and must necessarily cross each other at *h'*, in the center of the space between the cylinders, as is clearly indicated in the drawings, and the loops formed on the needles are cast off by means of the cams and pressers, as hereinbefore described, and shown in Fig. 1, and the stationary arm, D', and adjustable cam, C', thereon for pushing the needles outward, as shown in Fig. 6, are dispensed with, leaving the interior space of the cylinders unobstructed to enable the finished work to extend up through the center of the cylinder to the take-up above, as indicated in the section-line, *b'*, or to be let down through the lower cylinder to the take-up below, as indicated by dotted lines, *f'*. In order that the finished work in passing from the needles to the take-up may not be injured, the opposing edges of the needle-cylinders are rounded on their inner faces, as indicated in Fig. 8, thereby presenting a smooth surface over which the work may pass as it leaves the needles in being taken up above or below the cylinders."

The foregoing drawings and extract from the specification make perfectly plain the substantial invention covered by claim 4 as it lay in the mind of the patentee. Hurley conceived the simple idea of making the two cylinders of the same size and form as shown in figure 8, as distinguished from prior machines in which one cylinder was slightly larger than the other, as shown in figure 6. This was the way he accomplished his object of constructing a machine in which "the finished work may be taken upwardly or downwardly from the needles." This was the "remedy" he devised for overcoming "the difficulty heretofore experienced in not being able in the same machine to adjust the parts so that the finished work can pass to the take-up from the interior of the cylinders to either above or below the cylinders." From the very nature of the problem, it is difficult to see how it could have been solved in any other way. In other words, in order to accomplish Hurley's object of taking the finished work either upwardly or downwardly to a take-up, the cylinders must be of the same size and form.

Starting with the simple idea of making the cylinders of the same size and form, all the results enumerated in the patent are merely the incidents which accompany the carrying out of this conception: First, "the needles of each cylinder are confined to their own separate grooves"; second, the needles "must necessarily cross each other at *h'* in the center of the space between the cylinders, as is clearly indicated in the drawings"; third, "the loops formed on the needles are cast off by means of the cams and pressers, as hereinbefore described, and shown in Fig. 1"; fourth, "the stationary arm, D', and adjustable cam, C', thereon for pushing the needles outward, as shown in Fig. 6, are dispensed with, leaving the interior space of the cylinders unobstructed to enable the finished work to extend up through the center of the cylinder to the take-up above, as indicated in the

section-line, *b'*, or to be let down through the lower cylinder to the take-up below, as indicated by dotted lines, *f'*."

While the words "of the same size and form" were in the original application, they were omitted from claim 4 as originally drawn, and the claim was rejected. It was only upon the insertion of these words that the claim was finally allowed. These proceedings in the Patent Office not only emphasize the fact that cylinders of the same size and form constitute the very essence of the Hurley invention, but they impose this specific limitation upon the claim.

It is also manifest that Hurley used the words "same size and form" in their ordinary sense of bigness and shape, and hence as signifying two cylinders which are duplicates or counterparts of each other. In figure 6 we find one cylinder is "slightly smaller" than the other, in consequence of which the needles cross each other "on a line with the upper edge of the space between the cylinders." This is the prior art. In figure 8 we find the two cylinders identical in size and form, in consequence of which the needles "must necessarily cross each other at *h'* in the center of the space between the cylinders," and, further, the inside cam and stationary arm are dispensed with, "leaving the interior space of the cylinders unobstructed to enable the finished work to extend up through the center of the cylinder to the take-up above," "or to be let down through the lower cylinder to the take-up below." It is also apparent that "same size and form" in the Hurley patent refers particularly to what are known as the knitting ends of the cylinders. As seen in figure 8, the knitting ends of the cylinders are of the same diameter, the angle of inclination of the sides of each cylinder is the same, and the knitting ends of the cylinder are of the same form or shape. It is evident that the cylinders must possess the first two features in order to have the needles pass in the center of the space between the cylinders, and that they must possess all these features in order to accomplish Hurley's object of taking the finished work either upwardly or downwardly from the needles in the manner described in his patent.

As further showing that Hurley contemplated that the knitting edges should be of the same form, the patent says:

> "In order that the finished work in passing from the needles to the take-up may not be injured, the opposing edges of the needle-cylinders are rounded on their inner faces, as indicated in Fig. 8, thereby presenting a smooth surface over which the work may pass as it leaves the needles in being taken up above or below the cylinders."

This language is conclusive upon the point that the knitting edges are identical in form.

From this analysis it is plain that needle-cylinders which are not of the same size and form, and especially needle-cylinders which are not of the same diameter at their knitting ends, or in which the angle of inclination of the sides of each cylinder is not the same, so that the needles do not cross in the center of the space between the two cylinders, or in which the knitting ends are of different shape so that the finished work will not pass to the take-up in the manner shown in figure 8, are not needle-cylinders within the meaning of the Hurley

patent, and are not, therefore, within the invention which is the subject matter of claim 4.

The complainant takes a different view of the Hurley invention and of the meaning of the words "of the same size and form" in the patent, and it is upon this view that it bases its whole theory of ininfringement. This view may be stated as follows: The chief object of the Hurley invention was to dispense with the inside cam. For the purpose of accomplishing this, the cylinders are made of the same size and form. Same size and form means substantially of the same size and form, size having reference to the diameter of the cylinders at their knitting ends, and form having reference solely to the angle of inclination of the sides of the cylinders. Any variation in the diameters of the cylinders at their knitting ends, and any variation in the angles of inclination of the sides of the cylinders, is immaterial so long as the inside cam is dispensed with. The center of the space between the cylinders means any portion of the space between the edges of the cylinders, and hence any variation in the diameters of the cylinders, or in their angles of inclination, is immaterial so long as the needles cross between those edges and operate without the aid of the inside cam.

This whole theory is manifestly founded upon a radically wrong construction of the Hurley patent. There is nothing in the patent which in any way supports such a construction. It is not only at variance with Hurley's generic idea, but with the clear and unmistakable language of the specification and of claim 4.

The complainant asks the court to adopt this construction of the Hurley patent upon the ground that the Hurley machine was the first practical rotary spring-needle machine for knitting ribbed shirts and underwear. I cannot see the force of this argument. The Hurley patent is simply for certain mechanical improvements in a highly advanced art. It refers in no way to the fabric which is produced. The issue in the case is plainly a mechanical issue, and not a fabric issue.

But, if we should assume that the fabric produced by the Hurley machine has some bearing on the construction of the patent, the following considerations are important: It is admitted that rotary spring-needle machines for knitting ribbed fabrics were old in the art, the only contention being that the old machines were not of sufficient size to knit underwear; second, in my opinion it is doubtful whether a machine constructed after the Hurley patent was a successful commercial machine without the addition of a depending flange on the upper cylinder—at all events, the evidence shows that this was a defect in the Hurley machine.

As to the superiority of the fabric produced on the Hurley machine, which is also urged by the complainant, I am not satisfied that the evidence supports this contention, first, because of the defect in the original Hurley machine; and, second, because it does not appear to what extent the claimed superiority of the fabric made on the present Hurley machine is due to the several additions which have been made to that machine in the progress of the art.

The defendant's machine is of the same type of knitting machine as that described in the Hurley patent; that is, it employs two re-

volving needle-cylinders located one above the other, and is used for knitting ribbed fabrics. In this machine one cylinder is slightly larger than the other, and the angles of inclination of the cylinders differ slightly, so that the needles do not cross each other "on a line midway of the space between the cylinders." In this machine the ends of the cylinders are not of the same form, since the upper cylinder has a depending flange which causes the fabric to run downwards below its edge before it passes to the take-up above. Further, in this machine the fabric can only pass upwardly to a take-up above the machine. The defendant's machine does not infringe claim 4 of the Hurley patent, because the cylinders are not of the same size and form within the meaning of that patent, and because the finished work cannot be taken upwardly or downwardly within the meaning of that patent.

The three remaining claims in issue are as follows:

"1. In a circular-knitting machine, the combination of upper and lower brackets on the main frame, upper cap-plate and lower annular bed-plate supported by and secured to said brackets, each of said plates having an annular recess at its inner periphery, upper and lower supporting-rings each provided with a flange fitting in the recess of its cap or bed plate whereby the supporting-rings are carried by and revolved within the cap and bed plates, upper and lower needle-cylinders connected to the supporting-ring to revolve therewith, gear-rings also connected to said supporting-ring, and suitable gearing to impart uniform movement to both cylinders, as and for the purpose set forth.

"2. In a circular-knitting machine, the combination with stationary brackets on which the lower needle-cylinder is supported, of vertically-adjustable brackets to which the upper needle-cylinder is connected, screw heads or nuts secured to a fixed portion of the frame of the machine, and jack-screws working in said nuts and engaging the under side of the adjustable brackets, as and for the purpose set forth.

"3. In a circular-knitting machine, the combination of vertical standards provided with slots near their upper ends, stationary brackets on said standards below said slots, a lower needle-cylinder supported by said stationary brackets, adjustable brackets connected to said standards by suitable devices passing through said slots and upper needle-cylinder supported by said adjustable brackets, screw heads or nuts secured to the standards below said slots, and jack-screws working in said screw heads or nuts and engaging the under sides of the adjustable brackets whereby the upper needle-cylinders are vertically adjusted, as and for the purpose set forth."

It is difficult to point out specifically in what the inventions consist which were intended to be covered by these claims. The combination of elements enumerated in claim 1 seems to have reference to the first two objects of the inventions mentioned in the specification, namely, first, "to simplify the driving or revolving mechanism of the cylinders to produce a more even and steady movement"; and, second, "to effect the ready and compact assembling of the parts." The combinations of elements enumerated in claims 2 and 3 seem to have reference to the third object of the invention set forth in the specification, namely, "to provide a vertical adjustment of the upper cylinder with relation to the lower one, to enable the varying of the length of the loop as may be required in the operation of producing the fabric."

If, in view of the prior art, these claims possess any patentable novelty, the novelty resides in mere details of construction; and the

defendant's machine does not infringe these claims because it differs substantially in these details. With respect to claim 1, it is sufficient to say that the defendant's machine has no upper or lower brackets on the main frame, which are an element in the claim, no lower annular bed-plate supported by and secured to said brackets, as specified in the claim, and no combination of an upper cap-plate, upper supporting-ring, gear-ring, and upper cylinder combined with each other and with other parts, as specified in the claim.

Claims 2 and 3 relate to the vertical adjustment of the two cylinders, which was common in the art, and the specific means for accomplishing this adjustment set forth in these claims are not found in the defendant's machine.

The remaining patent in suit is the Barratt patent, No. 601,408. This patent relates to one of the cams which are used in circular-knitting machines, and it is for improvements upon a prior Barratt patent. The specification says:

"My invention has reference to improvements upon the draw-up cam patented to me December 8, 1896, No. 572,690.

"My patented cam is made in two parts adjustable with respect to each other; but the parts are hinged together by a knee-joint and so constructed with reference to each other that when the part provided with the point of the cam is adjusted it is necessary to also adjust the casting-off part, which is not always desired. Furthermore, the construction of my patented cam is such at the casting-off point that ten or twelve stitches are drawn tight at once. This is objectionable in that if the yarn is tender or uneven when the strain comes on tight stitches it is liable to break and thereby result in imperfect work.

"The objects of my invention therefore are, first, to provide a cam of the kind stated in which the adjustments at either the end where the needles press or the end where the needles are cast off are entirely independent of each other, thereby economizing time in adjusting the cams properly to do the work, and, second, to provide a cam with means for casting off the stitches and drawing them tight, one at a time, so that when the loops are not all of the same length it will draw from the loose to the tight ones and even them up and thereby improve the character of the work and enable the more tender yarn to be more safely used than heretofore and to provide adjustable means on the cam for casting off; and my invention consists in the peculiarities of construction hereinafter described, and more particularly set forth in the claims."

The claims are as follows:

"1. In a knitting-machine, the combination with a supporting-bracket having an arm formed with two grooves located adjacent to each other and with an elongated opening between each of said grooves and the nearer vertical edge of the arm of a draw-up cam divided upon a straight line into two independently-adjustable parts, guide-pins projecting from said parts into the grooves, and two fastening-bolts projecting into said elongated openings for holding said parts independently in adjusted position, substantially as and for the purpose set forth.

"2. In a knitting-machine, the combination with the cam having an opening in its edge and a groove in its face, of a casting-off piece adjustably secured to said cam, and having a stem received by said groove and a laterally-enlarged curved head received by said opening, substantially as and for the purpose set forth.

"3. In a knitting-machine, the combination with the cam, and the casting-off piece adjustably secured thereto and operating to draw the stitches tight one at a time, of a plate adjustably secured to said cam and having a bent upper end extending over the edge thereof at a slight distance therefrom, and an in-

clined arm extending from said bent part of the plate above the casting-off piece, substantially as and for the purpose set forth.

"4. The herein-described draw-up cam comprising two independently-adjustable parts, a casting-off piece adjustably secured upon one of said parts and operating to draw the stitches tight one at a time, and a needle-returning plate adjustably secured to said part of the cam and extending over the end thereof rearward of the casting-off piece and having an arm projecting over said casting-off piece, substantially as and for the purpose set forth."

This patent covers only structural details, and I have grave doubt whether any of the combinations set forth in the claims involve anything more than mere mechanical skill, when considered in connection with the prior art, including the first Barratt patent. But, passing by the question of validity, it is clear that the prior art imposes such a limitation upon these claims that they must be strictly construed.

Limiting claim 1 of the Barratt patent to the guide-pins, and to the location of the elongated openings, as specified therein, the defendant's cam does not infringe this claim. Limiting claim 2 to the groove therein specified, the defendant's cam does not infringe this claim. Limiting claim 3 to the plate "having a bent upper end extending over the edge," etc., the defendant's cam does not infringe this claim; and, for the same reason, the defendant's cam does not infringe claim 4.

Upon the whole case, the complainant has failed to prove infringement of either the Hurley patent or the Barratt patent; and the bill must be dismissed.

Bill to be dismissed.

PIEPER et al. v. ELECTRO DENTAL MFG. CO.

(Circuit Court, S. D. New York. September 26, 1907.)

PATENTS—INVENTION—REGULATOR FOR ELECTRIC MOTORS.

The Pieper patents, No. 704,099 and No. 721,229, for improvements in electric-motor regulation, are void for lack of invention, the only novel feature being a permanent shunt around the armature in an alternating current motor to control the motor at any speed and maintain a uniform speed, which device had previously been used in direct current motors, and the transfer from one class to the other not involving invention. The second patent is also void for anticipation by the first.

In Equity. On final hearing.

Frederick F. Church, for complainants.

Howson & Howson (Charles Howson, of counsel), for defendants.

HOLT, District Judge. This suit is brought to restrain the alleged infringement of two United States letters patent granted to the complainants, No. 704,099, issued July 8, 1902, and No. 721,229, issued February 24, 1903, for alleged improvements in electric-motor regulation. The defenses alleged are invalidity of the complainants' patents and noninfringement.

I think that the complainants' second patent is clearly invalid because anticipated by the first patent. The only difference between the

two patents is that a resistance coil in the shunt is, in the later patent, an inductive coil, and in the former patent it is not. The coils in the shunts of both patents cause a resistance to the electric current; but the coil in the first patent causes only the natural or ohmic resistance, due to the size and conducting power of the wire; while the coil in the second patent, in addition to such natural resistance, creates a resistance due to the counter electromotive force induced within the coil by its particular construction or arrangement. These two kinds of resistance coils in a shunt were well known in the art before the complainants' patents were issued. The inductive resistance coil is a mere substitute or equivalent for the ohmic resistance coil. The second patent, therefore, in my opinion, involved no invention over the first patent, and was anticipated by it, aside from any question whether both patents were anticipated by previous patents or publications.

The general statement in the first patent of the invention is as follows:

"The invention, which is designed more particularly for small motors intended for operating dental engines or machines where accurate speed regulation is the leading requisite, relates to alternating-current motors of the direct-current type having the usual laminated field-magnets and the windings designed for a relatively high electromotive force or relatively high self-induction, armature-coils designed for a relatively low electromotive force or having a relatively low self-induction, commutator and commutator-brushes arranged at the neutral point, said field and armature windings being connected in series; and the novel features of the invention relate to the control of such motors at any speed and with or without a load by a permanent shunt around the armature, and the accurate regulation of the motor is accomplished by the manipulation of a variable resistance interposed in said shunt."

This statement, in my opinion, is an admission by the patentees that such an arrangement of the alternating current motor as is described was usual, and that the only novel features claimed for the invention related to the control of the motor at any speed and with or without a load by a permanent shunt around the armature, and the accurate regulation of the motor by the manipulation of a variable resistance interposed in the shunt. Prof. Kennelly, the complainants' expert, regards, in this quotation from the patent, the word "usual" as qualifying alone the words "laminated field magnets," and not the succeeding clause. I understand his view to be that alternating current motors did not at that time usually have field windings designed for a relatively high electromotive force and armature coils designed for a relatively low electromotive force, and I infer that Prof. Kennelly holds that the arrangement in an alternating current motor of field windings designed for a high electromotive force and armature coils designed for a low electromotive force was a part of the invention. But, in the first place, no claim is made for such an invention in the patent. In the second place, the evidence shows that, while large alternating current motors were not usually so constructed, small alternating current motors were then made and in common use principally for driving electric fans, in which the field windings developed a high electromotive force and the armature windings a low electromotive force. I think, therefore, that the entire construction of a small alternating current motor as described in the specification was usual, and that the natural grammatical

construction of the language used shows that the only novelty claimed by the patentee was the regulating device. The language of the claims also supports this view. The first claim, for instance, is as follows:

"1. The combination in a motor for alternating currents, of field-windings, armature-coils, commutator and commutator-brushes arranged at the neutral point, all connected in series, as customary in constant-current motors, and a regulating device for controlling the speed of the motor consisting of a variable resistance permanently in shunt across the armature."

This language shows, I think, that all the combination mentioned before the clause "as customary in constant-current motors" was admittedly old, and that the invention claimed related only to the regulating device. The other claims are similarly drawn, and all suggest a similar conclusion. The question, therefore, is whether invention was involved in applying to a usual form of alternating current motor described in the patent the regulating device of a permanent shunt around the armature described in the patent.

The evidence shows that electric motors of the precise style of construction described in the patent, except that they were direct instead of alternating current motors, regulated by a permanent shunt around the armature, of the same kind as described in the patent, were well known and in common use before the complainants' patent was applied for. The patents to Thomson, Davidson, Johnson Brown, and Davidson, and Richardson were all such patents. The patent to Johnson Brown and Davidson was stated in the specification to be for a dental motor. The patents to Davidson and Richardson were obviously intended particularly for dental motors; and their original issue to the S. S. White Dental Manufacturing Company as assignee indicates such intended use. All these patents are for motors of the direct current type, but in all other respects are like the motor described in the complainants' patent. They have, as described in claim 1, field windings, armature coils, commutator, and commutator brushes arranged at the neutral point, all connected in series, as customary in constant current motors, and a regulating device for controlling the speed of the motor consisting of a variable resistance permanently in shunt across the armature. They equally fill the requirements of the other claims, except that they are direct instead of alternating current motors. Moreover, alternating current motors and controllers or regulating devices similar to those described in the complainants' patent existed and were in common use before the complainants applied for their patent. The Westinghouse motor, the Novelty motor, and the Stanley motor were all small alternating current motors of the direct current type, having field windings designed for relatively high electromotive force, and armature coils designed for relatively low electromotive force, a commutator and commutator brushes arranged at the neutral point, and all connected in series, as customary in direct currents. The Garhart patent shows a controller or regulating device similar to that shown in the Thomson patent, and in the complainants' patent, and at all times after July, 1898, direct current electric dental engines provided with the Garhart controller were made and sold and in public use in the United States. The simple question in this case, therefore, is whether invention was shown by applying a regulating device formerly used on a direct current mo-

tor to an alternating current motor, precisely similar, except that an alternating, instead of a direct, current was employed; or by applying to an alternating current motor, such as the Westinghouse, Novelty, or Stanley motor, a regulating device like the Garhart controller, which had long been used to regulate similar direct current motors. I cannot see that it was.

The sole claim for invention made by the complainants' expert and counsel is that alternating currents are so different in their inherent nature from direct currents that apparatus and processes applicable to one are not necessarily applicable to the other. Undoubtedly, in many important respects, alternating currents differ from direct currents, and require different arrangements and machinery; but the evidence shows that in many respects they also produce the same results and can be used with similar appliances. Direct currents were used commercially some years before alternating currents, and direct current appliances were therefore generally perfected first; but there is nothing in the evidence to show that, when alternating currents came into general use, an electrician, called upon to devise a regulating device for an alternating current dental motor, would have any reason to suppose that the usual regulating device used on direct current motors would not work on an alternating current motor. Undoubtedly he might have suspected that it might not. The action of alternating currents is, in some respects, peculiar and complicated. But as, in many respects, they produce the same results in operation as direct currents, it seems to me that the first suggestion which would arise in any mind, in devising appliances to use with them, would be to try appliances which had succeeded with direct currents, unless there was some obvious objection to doing so. In short, I think no invention was involved in using the same regulating device on an alternating current motor which had been successfully used on a direct current motor of substantially similar construction, and that there was no invention involved in attaching to such an alternating current motor as that used to drive the Westinghouse fan such a regulating device as the Garhart controller. I think, therefore, that the complainants' patents are invalid for want of invention.

This was the original view of the examiner in the Patent Office. The application was twice rejected on the ground, as stated on the first rejection, that "it involved no invention to merely operate the motors of Davidson, Richardson, and Garhart by means of alternating instead of direct currents." The applicants finally amended their specification by adding before the claims the following:

"The function of the resistance in shunt with the armature of a series-wound motor of the direct-current type, which is wound, as stated, for alternating currents, is not only to maintain the voltage at the armature-terminals constant, but permits an armature-winding of relatively low self-induction or few turns, which is necessary in an alternating-current motor of this type to prevent excessive sparking."

After this amendment the patent was allowed. I think, from the evidence, that the statements contained in the amendment were incorrect, and, in any event, I cannot see how its insertion in the specification changed the fact that it involved no invention to operate a motor by

means of an alternating instead of a direct current, when the motor is of a kind which will operate in the same way with either kind of current.

The conclusion that the complainants' patents are invalid for want of invention makes it unnecessary to pass upon the subtle and difficult question whether the operation of the regulating device in the defendant's motors is so substantially identical with that shown in the complainants' patents that, if those patents were valid, it would infringe.

My conclusion is that the complainants' bill should be dismissed, with costs.

H. C. COOK CO. v. LITTLE RIVER MFG. CO.

(Circuit Court, D. Connecticut. October 31, 1907.)

No. 1,123.

PATENTS—SUIT IN EQUITY FOR INFRINGEMENT—SUPPLEMENTAL BILL TO BRING IN NEW PARTIES.

After a suit for infringement of a patent against a corporation has been litigated to a conclusion on the merits, resulting in an interlocutory decree sustaining the validity of the patent, and directing an accounting for profits and damages, and the master has taken such accounting, the court will not permit the complainant by a supplemental bill to bring in officers or directors of defendant to charge them with liability as individuals upon the final decree which may be entered, but will leave him to his remedy by a plenary suit, in which the defendants may have their day in court.

In Equity. On petition for leave to file supplemental bills. See 136 Fed. 414.

Verrenice Munger and George D. Seymour, for complainant.
Williams & Harriman, for defendant.

PLATT, District Judge. The original bill herein offers a peculiar and rather interesting story. It is a patent suit, based on a fingernail-clipper patent (No. 569,903, October 20, 1896), demanding the usual remedies. At the hearing on the merits I found a trace of invention in the patent which saved its life, but the quantity was so trifling that I thought the defendant's device avoided it. The higher court was persuaded by my expressed views to sustain the patent, but thought that defendant invaded the territory pre-empted by one of the claims. As a result of such action an injunction was granted, and a master appointed to take an account of damages and profits and report.

Complainants in their petition say that during the accounting they discovered that the four directors of the defendant company, as individuals, aided and abetted the corporation defendant in the infringing acts, and that by reason of such acts the defendant has become insolvent, and therefore demand that said directors, as individuals, be made jointly responsible with the defendant for the damages, if any, which may be found due the complainant on the master's report. They

did not file the petition when they first learned the facts, but say with delicious frankness that it was not worth while to do so until they knew what view the master would take of their contentions on the accounting against the defendant company. In opposing the petition, the directors, as individuals, say that they have only acted as officers of the corporation; that they have not received a penny of salary or of profit, and never will; and that their official action was animated by the best of faith. They further say that the defendant was solvent at the start, and that they had no idea, when as officials they were directing the management of the defendant, that it was likely to be financially embarrassed; and that the whole trouble is that the complainant has ruined it by insistent and successful attack in this litigation. My view of the matter relieves me from deciding the disputed questions of fact, if indeed any exist.

Let us assume that all which the complainant alleges, and much more, is true. Up to this time the only defendant has been the corporation itself. If the directors have committed individual wrongs upon the complainant, they cannot as individuals be said to have been privies in the pending suit. It is now proposed to foreclose them from all right to litigate the validity and infringement of the patent, and to bind them by the results of the master's report, if the court happens to accept any part of his recommendations. There is nothing left to litigate, except the question of individual responsibility on the part of the four directors. Such action would deprive these new parties of at least two days in court—one on the patent, and one on damages and profits. If the complainants think that the entire course pursued by the organizers of the defendant corporation spells out a conspiracy, then obviously, the evil having been done, the remedy is in law rather than equity, but they have not gone to the extent of making such a charge as that. After unusually careful deliberation, induced by the peculiarity of the situation and an intense desire to do absolute justice, I am convinced that it would be a great abuse of my discretionary power as an equity judge to permit the filing of the supplemental bill.

The petition is denied.

GEORGE FROST CO. v. E. B. ESTES & SONS.

(Circuit Court, D. Massachusetts. October 30, 1907.)

No. 389.

TRADE-MARKS AND TRADE-NAMES—UNFAIR COMPETITION—IMITATION OF PATENTED ARTICLE.

Complainant, as exclusive licensee, manufactured a hose supporter having a rubber button for attachment to the hose which was protected by a patent, and advertised and sold its supporters under the trade-name of "Velvet Grip." Defendant made and sold wooden buttons or collets intended for similar use, colored in imitation of rubber, and used on hose supporters which were sold by dealers as rubber button supporters, and sometimes as "Velvet Grip" supporters. *Held*, that such sales constitut-

ed unfair competition, and that defendant was chargeable as a contributor thereto and would be enjoined.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, §§ 78–86.

Unfair competition, see notes to Scheuer v. Muller, 20 C. C. A. 165; Lare v. Harper & Bros., 30 C. C. A. 376.]

In Equity. On motion for preliminary injunction.

Fish, Richardson, Herrick & Neave, for complainant.

George C. Wing and George C. Wing, Jr., for defendant.

LOWELL, Circuit Judge. This is a bill in equity to restrain unfair competition. The complainant is the exclusive licensee under letters patent No. 552,470, issued to Gorton for an improvement in the button by which hose are attached to hose supporters. The feature of novelty contained in the patent, as stated by the Circuit Court of Appeals for the Second Circuit, resides only in the material of which the button is composed, viz., rubber. Geo. Frost Co. v. Cohn, 119 Fed. 505, 56 C. C. A. 185. The complainant has reserved for itself the exclusive use of that particular form of the Gorton invention wherein a rubber button with metal rivet is employed, and has established a large manufacture and sale of hose supporters containing this button. "Velvet Grip" is the trade-name of these supporters. In advertising them, particular attention is directed by the complainant to the rubber button in question. The defendant is the maker of a wooden button or collet intended for use with a metal rivet like that employed by the complainant. This wooden collet is colored to imitate rubber, and the whole button is made in imitation of the complainant's. The evidence shows that hose supporters containing wooden buttons precisely like the defendant's are commonly sold for rubber button hose supporters, and, in some instances, have been sold specifically for "Velvet Grip" supporters. In both cases the public has been led to believe that it is getting the complainant's wares. I am satisfied that the defendant makes his collets for the purpose of aiding in this deception and unfair trade, and I hold that it should be enjoined from contributing to the wrong done the complainant. Tubular Rivet & Stud Co. v. O'Brien (C. C.) 93 Fed. 200, and cases there cited.

Motion for preliminary injunction allowed.

THE ASK.

(District Court, S. D. New York. October 21, 1907. On Motion to Amend Libel October 31, 1907.)

1. SHIPPING—VESSEL UNDER CHARTER—LIABILITY FOR DAMAGE TO CARGO.

The owner of a chartered vessel, which becomes unseaworthy on the voyage to the port of loading, but fails to report her disability on her arrival, in consequence of which a cargo is procured or prepared for shipment, is liable for the damage legally resulting to the charterer from such inability to take it or from delay in making repairs.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, § 449.]

2. SAME—CONSTRUCTION OF CHARTER PARTY—DELAY FOR REPAIRS.

A steamer was chartered by a time charter for four round trips to West India or Central or South American ports. The charter party clearly contemplated the use for the carriage of tropical fruits, but the charterer was not limited to such use. It also provided that, in case of breakdown or delay for repairs for more than 24 hours, charter hire should cease until she was in an efficient state to resume service. She made three trips, each time bringing a cargo of bananas. On her arrival at the same port of loading for a similar cargo on her fourth trip her furnaces had become defective, rendering a delay for temporary repairs necessary. *Held*, that the fact that the last cutting of bananas for the season was then ready to be made, and that owing to her delay she was unable to take the cargo intended for her, did not authorize the charterer to terminate the charter, nor affect her liability, which, under the charter party, was limited to the loss of hire during the time of the delay in making repairs.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, § 136.]

On Motion to Amend Libel.

3. ADMIRALTY—PLEADING—AMENDMENT OF LIBEL.

An amendment to a libel cannot be allowed after the hearing, where it would substantially change the cause of action and require for its support other and different proof, and especially where such proof would be inconsistent with the evidence given on the hearing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Admiralty, § 525.]

4. SHIPPING—LOSS OF CARGO—RIGHT OF CHARTERER TO RECOVER DAMAGES.

A charterer of a vessel to carry a cargo of which he is not the owner, but merely the agent for its sale on commission, has no legal interest therein which will support an action against the vessel for its loss or damage; nor can he maintain such action as trustee for the owner, who was not a party to the charter.

In Admiralty. Libel in rem against the Ask and in personam against her owner for breach of contract.

Libelant was time charterer of the Ask for four round trips from North Atlantic ports to the West Indies and/or any Central or South American port (with some trifling exceptions) north of the River Plate. The charter party is entitled, in prominent type, "Time Charter, West India Fruit Trade." It provides for building a deck in the vessel's hold "strong enough to hold tiers of fruit." It prohibits the crew from carrying "bananas or other merchandise for their own account," and declares that the "donkey boiler shall not be worked when bananas are carried." The vessel is forbidden under ordinary circumstances to stop for salvage purposes "on account of the perishable nature of the cargoes that this steamer is intended to carry." As matter of fact the Ask did carry bananas from Nipe Bay to North Atlantic ports for three trips, and the loss and damage sued for occurred while she was upon her fourth trip for the same purpose. The foregoing are all the provisions of the charter party emphasizing the proven fact that the specific object of the charter was to get a vessel for the carriage of perishable tropical fruit. The range of occupations, however, permitted by the charter party was far greater than merely carrying fuit. The carriage of any "lawful merchandise, including petroleum or its product in cases," was contracted for; and, as above indicated, the ports to which the Ask might be sent included many not known in the fruit trade. Charter moneys were to be paid each calendar month, and hire was to continue "until her delivery to owners (unless lost) at a port in the United States." The vessel was in the usual form warranted as "in every way fitted for the service," and the owners further covenanted to "maintain her in a thoroughly efficient state in hull and machinery for and during the services, guaranteeing to maintain the boilers in a condition to bear a working pressure of at least 60 pounds (and this pressure to be carried continuously) during the whole term" of the charter. The breakdown clause is as follows: "In the event of * * * breakdown of machinery or damage pre-

venting the working of the steamer for more than 24 hours at sea, the payment of hire shall cease until she be again in an efficient state to resume her service; * * * also any loss of time * * * from repairs to hull and machinery, which are for owner's account, not being complete after cargo and coals are on board and hour of sailing has been fixed by charterers, and notice given to captain, the time lost is for the steamer's account."

On her fourth trip the Ask arrived at Nipe Bay on the afternoon of October 31st. On the morning of November 1st the master went ashore and saw his charterers, "to find out where we were to sail for." At 10 a. m. he returned to his ship and was then informed by his chief engineer that the crown sheets in two out of the three furnaces "were down; there were pockets in them." Believing that this would necessitate only a reduction of steam pressure, and that to a degree not vitiating the steam warranty above noted, the master gave orders to continue to prepare for loading. About two hours later the engineer came again, saying that all three furnaces had pockets in them, and that it might be unsafe to proceed, and that at all events the vessel could not sail until after a survey had been held upon her. Early on the afternoon of the same day the master went ashore and reported this condition of affairs to the charterers, who had in the meantime cut and prepared for shipment a cargo of bananas, which was ruined before the Ask could sail with temporary repairs. This was the last cargo of the season. There was no other business at Nipe Bay. The charterers repudiated all liability upon the charter party, and now sue for all the charter hire paid on account of this fourth round trip, all expenses incurred by them in respect thereof, and for the value of the lost bananas. The cutting of these bananas had begun as soon as the Ask was in the harbor. Some of them had undoubtedly been removed from the plants before the master could have had any opportunity to report the unseaworthy condition of his vessel; and by the time he did make such report the cargo was entirely ready for shipment.

When the vessel began her outward voyage on the last round trip there is nothing in the case to show that she was not in a seaworthy condition. I find that when she arrived at Nipe Bay she was in an unseaworthy condition for the carriage of any cargo. That change in condition was caused by the undue heating of the crown sheets of the furnaces, rendered possible by a deposit of greasy dirt on the upper side of the crown sheets, which deposit was the result of negligence in the management of the filter, a part of the condensing apparatus. The consequent deformation of the crown sheets should have been visible upon an investigation by a competent engineer before arrival in Nipe, and I conclude as matter of fact that the vessel's condition existed on arrival, should have been known on arrival, and her owner is responsible for all the consequences of failing to communicate to the charterers what he was bound to know, as fully as if he had actually known it. It appeared upon the trial that the libelant's only interest in the lost cargo of bananas was as a commission merchant, and it did not appear that any advances had been actually made thereon.

Wheeler, Cortis & Haight, for libelant.
Convers & Kirlin, for claimant and respondent.

HOUGH, District Judge. The claim for loss of bananas becomes academic, through the unexpected testimony showing that libelant had lost nothing by the destruction thereof. The Habil (D. C.) 100 Fed. 120. But my view of that question may render clearer the disposition of the rest of the case. This is not an instance of premature cutting of perishable fruit, as in The Curlew, 55 Fed. 1003, 5 C. C. A. 386, and The Disa (D. C.) 153 Fed. 322. These cases recognize the duty on the charterer's part to give timely and reasonable notice of inability to perform his expected contractual obligation. As soon, therefore, as the Ask had reported and said nothing as to such actually existing inability, the charterer had full right to expect transportation of his

cargo; and it was well known to both parties that that cargo consisted of bananas, that would soon rot after cutting, if not removed from the tropical climate. The right above recognized is not expressed in the words of the charter party, but grows out of the relation of the parties. It could hardly be contended that the ship might conceal her known defects, load her cargo, and then remain in port making repairs, with no greater liability than temporary loss of charter hire; yet to that extent must an argument go which denies all liability for failure to communicate known disabilities at a time when the other party has a right to presume fitness and upon such presumption is changing his own position for the worse. Whether the liability is in rem, as well as personal, need not be considered.

This cause of action, however, having been swept away by the evidence, there is left the inquiry whether the failure to inform the charterers of the Ask's unseaworthiness, with the result that the last cargo of the Nipe Bay crop could not be transported upon her, afforded any reason for throwing up the charter. This query is very different from that relating to the loss of the cut bananas. The charter party did not engage the Ask to carry that cargo or none, nor is there anything in the evidence showing on the shipowner's part any knowledge or duty to know that with the cutting of November 1st the banana crop was ended. Laying aside all questions arising from the negligence and silence of the engineer and the consequent misinformation of the captain, the material facts are simply these: The Ask broke down and required temporary repairs. When such repairs were made she could carry 60 pounds of steam. For such contingencies the charter party provides a stipulated measure of damage—i. e., loss of charter hire—and no other measure is permissible, unless a covenant could be found in the contract obliging the vessel to transport the last cargo of the season from Nipe Bay, and no other. It is too plain for argument that no such contract was made.

It follows that the libelant should have a decree for the amount tendered at the beginning of the trial, viz., $259. If, however, libelant thinks that under the principles above laid down more than that sum is recoverable, it may take a reference, all costs after tender to be on the libelant unless more than $259 be recovered. If the tender be accepted without reference, costs of the trial must be paid by libelant.

On motion to amend libel, made after testimony closed and case submitted and argued.

HOUGH, District Judge. The amendment proposes to state that libelant at the times in the libel set forth was trustee for the Dumois Nipe Company, that the bananas in question were intrusted to libelant by said company, and that libelant "is accountable to said Dumois Nipe Company for the same." "Amendments in matters of substance should not be allowed on the hearing, unless the justice of the case requires it, and then to conform to the proof; and in no case should an amendment be allowed on the hearing which would change the entire cause of action." The Habil (D. C.) 100 Fed., at page 123. Even more stringently is the rule enforced after hearing, both in admiralty and eq-

uity. The Thomas Melville (D. C.) 31 Fed. 486; Gubbins v. Laughtenschlager (C. C.) 75 Fed. 615. These rules have recently been restated in our own circuit in The Minnetonka, 146 Fed. 509, 77 C. C. A. 217, and The Hamilton, 146 Fed. 724, 77 C. C. A. 150.

The amendment here prayed for is most substantial. I incline to think it changes the cause of action, and am sure it does not conform to the proof. If libelant had originally pleaded that the charter party was made by it as trustee for the Dumois Nipe Company, the contract, nevertheless, would have been that of libelant, and not that of its cestui que trust; and, though the fruits of any action for breach thereof would have inured to the benefit of the Dumois Nipe Company, such breach, if usable as a basis for action, must have been an infraction by ship or owner of the contract made with libelant, and not with its cestui que trust. If, therefore, the Cuba Planters' Company were a trustee, it alone could sue for breach; but that company suffered no damage, as positively sworn to by Mr. Dumois. In truth, the testimony already taken shows that it was not a trustee, but merely a selling agent, as also clearly sworn to; and from these vital statements Mr. Dumois cannot be permitted to depart, or contradict his own testimony by trying to show, in the language of the amendment, that libelant "is accountable to said Dumois Nipe Company for the" bananas in question.

The reason for a trustee being entitled to recover damages which do not fall upon his private purse is that he has the legal title to that which is injured; but it is impossible to read Mr. Dumois's frank statements, made in entire ignorance of the legal effect thereof, without feeling that libelant never had the legal title to said bananas. It is thus clear that what this motion really seeks is, not to make the pleadings conform to existing proof, or merely to change the title or capacity of the libelant and recover on testimony already adduced (The Hamilton, supra; Morgan v. Halberstadt, 60 Fed. 592, 9 C. C. A. 147; Van Doren v. Pennsylvania R. R. Co., 93 Fed. 260, 35 C. C. A. 282), but first to change the pleadings by putting the cause of action into the ownership of another legal entity, and then endeavor to vary or explain away material evidence by further testimony. Such a proceeding I think entirely without warrant or precedent and beyond the power of any court.

The motion to amend is therefore denied.

In re BALL.

(District Court, E. D. New York. November 1, 1907.)

1. BANKRUPTCY—INVOLUNTARY PETITION—SUFFICIENCY.

The statements made in a petition in involuntary bankruptcy in accordance with the form prescribed by the rules in bankruptcy, in which the petitioners "represent" certain facts to be true, are of matters which must necessarily be alleged on hearsay, and do not purport to be of facts to which the petitioners make oath as personal witnesses, and hence the statement in the petition that it is made on information and belief does not add to nor detract from the strength of the allegations made, nor is a statement, in the verification, that affiants believe the matters so alleged

on information and belief to be true, ground for dismissing the petition, although improper in form.

2. SAME—ACTS OF BANKRUPTCY—PAYMENTS MADE WITH INTENT TO PREFER CREDITORS.

A petition in involuntary bankruptcy is not demurrable because the alleged acts of bankruptcy consisted of the making of numerous small payments to creditors by the defendant while insolvent, since the effect of such payments was to give preferences, and such effect must have been known and intended by the debtor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, §§ 72–74.]

In Bankruptcy. On demurrer to petition.

David H. Solotaroff, for bankrupt.
Simon Rasch, for petitioning creditors.

CHATFIELD, District Judge. A demurrer was filed to the original petition in bankruptcy herein, on the ground that the petition was indefinite and merely in the language of the statute. Under direction of the court, an amended petition was filed, to which a demurrer has been interposed, upon the ground that, "upon the face thereof, the facts alleged in the amended petition do not constitute acts of bankruptcy." In support of the demurrer, argument has been made as to the sufficiency, as to form, of the various allegations, and of the verification. It is apparent that this ground of objection is not included within the scope of the demurrer as filed, but, the argument having been made, and answered by the attorney for the petitioning creditors, it will be considered first.

The precise language of the allegation in each instance is that:

"Your petitioners further show that the said alleged bankrupt is insolvent, and that within four months next preceding the date of the original petition herein, * * * and while insolvent, committed an act of bankruptcy, in that, as your petitioners are informed and verily believe, that the said alleged bankrupt, while insolvent, * * * with intent to hinder, delay, and defraud his creditors, and with the intent and purpose of giving preference * * * upon an alleged antecedent indebtedness, * * * made a payment of money * * * with intent," etc.

There are some 22 instances of this character alleged, and the allegation is also added that the petitioners are informed and verily believe that the said alleged bankrupt within four months next preceding the date of the filing of the petition herein "* * * did transfer, conceal and remove part of his assets and property," etc. The verification is as follows:

"* * * Being duly sworn, deposes and says: That he is a member of the firm of ———, one of the petitioners mentioned in and described in, and who have subscribed the foregoing petition; that the members of the said firm are * * *; that the foregoing petition has been signed by deponent for and with the authority of said firm of petitioners, and that deponent has personal knowledge of the facts contained in the foregoing petition and makes solemn oath that said facts are true, excepting as to those matters stated to be alleged on information and belief, and as to those matters he believes it to be true."

Under the authority given by the bankruptcy statute, certain forms were adopted and promulgated by the Supreme Court of the United

States upon the 28th day of November, 1898, to take effect January 2, 1899, of which the fifth form provides for a creditor's petition in involuntary bankruptcy. The particular allegation in this form relating to the point raised here is as follows:

"And your petitioners further represent that said ——— is insolvent, and that within four months next preceding the date of this petition the said ——— committed an act of bankruptcy, in that he did heretofore, to wit, on the ——— day of ———."

The petition is to be followed by a verification:

"United States of America, District of ———.—ss.: ———, ———, ———, being three of the petitioners above named, do hereby make solemn oath that the statements contained in the foregoing petition subscribed by them are true."

It would seem from the language of the prescribed form that a petition in involuntary bankruptcy is looked upon in the same light as a complaining affidavit in the matter of a criminal charge. The language "your petitioners further represent that" is the statement of a conclusion and of an allegation which it is apparent must in all cases be made upon hearsay, information, and knowledge derived from sources other than the actual personal knowledge of the party making the petition. The language of the verification is to the effect that the petitioners swear that the statement made by them is true. This statement is that they "represent" or allege to the court the doing of certain things by the alleged bankrupt. The affiant swears that he charges certain acts against the bankrupt, and he implies that he has verified them so as to be willing to stand by the consequences of his charge. He is not testifying as to what he has seen or done. The verification is not equivalent to an oath that the person making the verification has actual knowledge that certain acts were done because they occurred in the presence of the petitioner. The oath is not subject to the rules of competency with respect to hearsay testimony. On this account, the insertion of the words in a petition that it is made upon information and belief neither add to nor detract from the strength of the allegation, and likewise in the verification the additional statement, that the petitioners believe the matters which are stated to be alleged upon information and belief to be true, is mere surplusage, and, while the language should not be used, it is no ground for dismissing the petition. The cases cited are not, in the opinion of the court, in contradiction of this view.

As to the other objection raised, that each of the payments were small in amount and made in the ordinary course of business, and that this would indicate that the alleged bankrupt was attempting to pay his debts instead of creating a fraudulent preference, it is only necessary to say that the character of the payments, and the smallness of their amounts, certainly do seem to indicate that the bankrupt was paying his current incidental debts, as he had the opportunity and funds so to do. Nevertheless, if he was insolvent, and if he made each of these respective payments with a knowledge that he could not at that time pay his other creditors whose claims were due, and with the additional knowledge that each of these payments was in

effect a preference, although the bankrupt actually expected to defraud no one, and hoped to pay his debts in full, the acts alleged come within the provisions of the bankruptcy statute.

The demurrer, therefore, will be overruled, and the matter will take the regular course.

In re WILCOX.

(District Court, W. D. Michigan, S. D. June 15, 1907.)

BANKRUPTCY—FEES OF REFEREE—SERVICES RENDERED ON APPLICATION FOR DISCHARGE.

Under Bankr. Act July 1, 1898, as amended in 1903 by adding section 72 (Act Feb. 5, 1903, 32 Stat. 800, c. 487, § 18 [U. S. Comp. St. Supp. 1907, p. 1033]), providing that "neither the referee nor the trustee shall in any form or guise receive, nor shall the court allow them, any other or further compensation for their services than that expressly authorized and prescribed in this act," the court has no power to allow special compensation to a referee for services rendered on a reference to him of a contested application for discharge as authorized by general orders in bankruptcy No. 12.

In Bankruptcy.

KNAPPEN, District Judge. Objections having been filed to the bankrupt's discharge, the matter was referred to the referee, who now asks for special compensation for his services under that reference. The sole question presented is whether the statute permits special compensation for such service.

The original bankruptcy statute provided that referees should receive as full compensation for their services a fee of $10, plus a commission of 1 per cent. on sums paid as dividends and commissions, or one-half of 1 per cent. on amounts paid creditors under composition. Bankr. Act July 1, 1898, 30 Stat. 556, c. 541, § 40 [U. S. Comp. St. 1901, p. 3436]. Under this section it was held in at least two reported cases that the referee was entitled to additional compensation for services under a reference of this nature upon the ground that the referee acted in such case as a special master. Fellows v. Freudenthal, 102 Fed. 731, 42 C. C. A. 607; In re Grossman (D. C.) 11 Fed. 507. The contrary was held in Re Troth (D. C.) 104 Fed. 291. But for the statute of 1903 I should be inclined to hold that the referee is entitled to extra compensation for this class of services. The fees given by the statute of 1898 were generally regarded as inadequate, and in several districts it seems to have been the practice, by one method or another, to provide for additional compensation to referees. In 1903, however, the bankrupt act was amended by increasing the referee's fee to $15, and providing for an additional fee of 25 cents for every proof of claim filed for allowance, and extending the 1 per cent. commission to all moneys disbursed to creditors by the trustee. The amending act of 1903 contained this express condition:

"Sec. 72. That neither the referee nor the trustee shall in any form or guise receive, nor shall the court allow them, any other or further compensation

for their services than that expressly authorized and prescribed in this act." Act. July 1, 1898, amended by Act. Feb. 5, 1903, c. 487 [U. S. Comp. St. Supp. 1907, p. 1033], 32 Stat. 797.

All the decisions above cited were made previous to the 1903 amendment. Mr. Collier seems to think that, notwithstanding this amendment, it is within the province of the court to give additional compensation for services as special master. Collier on Bankruptcy (6th Ed.) p. 361. Mr. Loveland is apparently of the contrary opinion. Loveland on Bankruptcy (3d Ed.) § 36. It seems to me clear that the act of 1903, increasing the compensation of the referee, and adding the stringent prohibition against the receipt or allowance of "any other or further compensation for their services than that expressly authorized and prescribed in this act," without any limitation to services performed under the act, was passed to meet the conditions above referred to, and was intended to effectually forbid allowances of the nature here in question. It is difficult to imagine language more apt to that end. The case of In re Goldville Manufacturing Company (D. C.) 123 Fed. 579, does not hold to the contrary of this view. There the compensation was allowed because the services had been rendered before the act of 1903.

It is suggested that the services in this class of reference are performed, not as referee, but as special master, and not under the statute, but under the general orders in bankruptcy, and that, therefore, the statute above quoted does not apply. The statute provides that referees shall "perform such part of the duties, except as to questions arising out of the applications of bankrupts for compositions or discharges, as are by this act conferred on courts of bankruptcy and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided." Bankr. Act July 1, 1898, 30 Stat. 555, c. 541, § 38–a4 [U. S. Comp. St. 1901, p. 3435]. The referees, therefore, could not be authorized to determine the question of the bankrupt's discharge, but the Supreme Court has authority to make general orders within that limitation. General Order No. 12 accordingly provides:

"(3) An application for a discharge * * * shall be heard and decided by the judge. But he may refer such an application or any specified issue arising thereon, to the referee to ascertain and report the facts."

That the Supreme Court did not intend that additional compensation should be given for services under such reference appears from General Order No. 35–2.

"The compensation of referees, prescribed by the act, shall be in full compensation for all services performed by them under the act, or under these general orders; but shall not include expenses necessarily incurred by them in publishing or mailing notices, in traveling, or in perpetuating testimony, or other expenses necessarily incurred in the performance of their duties under the act and allowed by special order of the judge."

I see no escape from the conclusion that under the present law the referee can receive no compensation for services except the fees and commissions specified in the statute; and that the only specific allowance which can be made to him in connection with the services here

involved is for expenses necessarily incurred. In re Daniels (D. C.) 130 Fed. 597.

The application for such special compensation must therefore be denied.

UNITED STATES v. BALE.

(District Court, D. South Dakota, W. D. September 3, 1907.)

WOODS AND FORESTS—FOREST RESERVATIONS—VIOLATION OF REGULATIONS.

The pasturing of live stock on a forest reservation of the United States without a permit, in violation of the regulations of the Secretary of the Interior and the Secretary of Agriculture, is punishable as a criminal offense under Act June 4, 1897, c. 2, § 1, 30 Stat. 35 [U. S. Comp. St. 1901, p. 1540], which authorizes such regulations, and prescribes the punishment for their violation.

On Demurrer to Indictment.

E. E. Wagner, U. S. Atty.
Chauncey L. Wood, for defendant.

CARLAND, District Judge. The defendant has interposed a general demurrer to the indictment returned against him, and for ground of demurrer states that said indictment does not state facts sufficient to constitute a public offense under the laws of the United States.

It will only be necessary to set forth the language of the first count in order to present the question raised by the demurrer, as the counts of the indictment do not differ, except as to the time of the offense and as to the number of cattle. Count No. 1 is as follows:

"That Robert Edward Bale on the 29th day of June, 1906, at the Black Hills Forest Reserve, South Dakota, then and there did unlawfully and wrongfully graze upon the Black Hills Forest Reserve certain live stock, to wit, 75 head of cattle, the said Robert Edward Bale then and there not having any permit or license therefor and without any authority of law so to do contrary to the form, force, and effect of the statutes of the United States in such cases made and provided and contrary to the rules and regulations of the Secretary of Agriculture duly made and promulgated pursuant to said statutes regarding forest reserves to regulate their occupancy and use and to preserve the forests thereon from destruction."

Section 5388, Rev. St., as amended by Act June 4, 1888, c. 340, 25 Stat. 166 [U. S. Comp. St. 1901, p. 3649], provides:

"Every person who unlawfully cuts, or aids or is employed in unlawfully cutting, or wantonly destroys or procures to be wantonly destroyed, any timber standing upon the land of the United States which, in pursuance of law, may be reserved or purchased for military or other purposes, or upon any Indian reservation or lands belonging to or occupied by any tribe of Indians under authority of the United States, shall pay a fine of not more than $500, or be imprisoned not more than 12 months, or both, in the discretion of the court."

The act of June 4, 1897, entitled, "An act making appropriations for sundry civil expenses of the government for the fiscal year ending June 30, 1898, and for other purposes" (chapter 2, 30 Stat. 35 [U. S. Comp. St. 1901, p. 1540]), provides:

"The Secretary of the Interior shall make provisions for the protection against destruction by fire and depredations upon the public forests and forest reservations which may have been set aside, or which may hereafter be set aside, under act of March 3, 1891, and which may be continued, and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use, and to preserve the forests thereon from destruction; and any violation of the provisions of this act or such rules and regulations shall be punished as provided for in the act of June 4, 1888, amending section 5388, Rev. St. U. S."

Pursuant to the act of June 4, 1897, regulations were promulgated by the Secretary of the Interior and the Secretary of Agriculture, upon whom the authority was subsequently conferred to prohibit the grazing of stock on forest reservations.

The demurrer challenges the sufficiency of the indictment on the ground that it was unlawful for Congress to delegate authority to the Secretary of Agriculture and Secretary of the Interior to promulgate rules making the grazing of live stock upon a forest reserve without a permit a public offense. The error in the position taken by counsel for defendant is in assuming that the Secretary of the Interior or of Agriculture did by making a regulation that no live stock should graze upon a forest reserve without a permit create a public offense. Among the regulations made by the Secretary of the Interior and subsequently by the Secretary of Agriculture under the act of June 4, 1897, was one forbidding the "grazing upon or driving across a forest any live stock without a permit, or in violation of the terms of a permit, except as otherwise allowed by regulation." No offense is hereby created, but we turn to the act of June 4, 1897, and find that a violation of this regulation is punishable as provided in the act of June 4, 1888. It was clearly within the power of Congress to confer upon the Secretary of the Interior or Secretary of Agriculture the authority to make rules and regulations in regard to the occupancy and use of forest reserves. When the Secretary of the Interior or of Agriculture declared that a violation of the acts forbidden in the regulation quoted was punishable by fine and imprisonment, neither intended to denounce the doing of the forbidden act as a crime under and by virtue of their own authority, but merely to state the fact that the laws of the United States punished a violation of the regulation by fine and imprisonment. The regulation itself being clearly within the power conferred by the act of June 4, 1897, no complaint can be made in reference thereto, except as to the matter of making its violation a crime, but that was done by Congress, not by the Secretary of the Interior or of Agriculture.

An indictment under this same regulation was sustained in United States v. Domingo (D. C.) 152 Fed. 566, and in United States v. Deguirro (D. C.) 152 Fed. 568. In the case of United States v. Matthews (D. C.) 146 Fed. 306, a contrary view is held. With all due respect to the learned court which rendered the decision in the case last cited, the case principally relied on to sustain its decision (United States v. Eaton, 144 U. S. 677, 12 Sup. Ct. 764, 36 L. Ed. 591) is direct authority for the position here taken. In United States v. Eaton, supra, it was held that a regulation made by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury for carrying

into effect Act Aug. 2, 1886, c. 840, 24 Stat. 209 [U. S. Comp. St. 1901, p. 2228], requiring certain acts to be done by dealers in oleomargarine, were not acts required by law within the meaning of section 18 of said act, which made the willful omission, neglect, or refusal to do or cause to be done any of the things required by law to be done a crime, but the Supreme Court, at page 688 of 144 U. S., page 767 of 12 Sup. Ct. (36 L. Ed. 591), in the opinion in that case, said:

"If Congress intended to make it an offense for wholesale dealers in oleomargarine to omit to keep books and render returns as required by regulations to be made by the Commissioner of Internal Revenue, it would have done so distinctly, in connection with an enactment such as that above cited, made in section 41 of the act of October 1, 1890 (26 Stat. 621, c. 1244 [U. S. Comp. St. 1901, p. 2235]). Regulations prescribed by the President and by the heads of departments, under authority granted by Congress, may be regulations prescribed by law, so as lawfully to support acts done under them and in accordance with them, and may thus have, in a proper sense, the force of law; but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a criminal offense in a citizen, where a statute does not distinctly make the neglect in question a criminal offense."

This language of the court clearly indicates that, if section 18 referred to had specifically punished a violation of certain rules of the Commissioner of Internal Revenue, the prosecution would have been sustained.

The judgment of the court is that the demurrer be overruled.

STANDARD LEATHER CO. v. NORTHERN ASSUR. CO. OF LONDON, ENGLAND.

(Circuit Court, W. D. Pennsylvania. November 14, 1907.)

No. 42.

INSURANCE—CANCELLATION OF POLICY—NOTICE TO BROKER.

Plaintiff authorized a firm of insurance brokers to procure insurance on property in a certain amount, and the brokers obtained a policy from defendant and notified plaintiff of the fact. Subsequently defendant notified the brokers of its intention to cancel the policy, which by its terms it could only do on notice. The brokers had not delivered the policy to plaintiff, nor notified it of the cancellation, when the property was burned. *Held*, that they were agents for plaintiff for the purpose of procuring the insurance, but for that purpose only; that delivery of the policy to them was delivery to plaintiff, but that on such delivery their agency ceased, and the notice to them was ineffective to authorize the cancellation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 501, 503.]

At Law. On motion for judgment non obstante veredicto.

J. S. & E. G. Ferguson, for plaintiff.

J. H. Harrison, for defendant.

BUFFINGTON, Circuit Judge. This was a suit by the Standard Leather Company against the Northern Assurance Company upon a policy of insurance. The company defended upon three grounds: First, that the policy was canceled before the fire; second, that it was

avoided by naphtha on the premises; and, third, that immediate notice of the fire was not given. The second and third grounds were decided in favor of the plaintiff by the verdict, and defendant now moves to enter judgment in its favor non obstante veredicto on the reserved question, viz.:

"Whether the notice of cancellation in this case, given to the brokers who procured the insurance and not given to the insured, was sufficient to cancel the policy."

The facts of the case are: Prior to May 31, 1904, the Negley & Clark Company, a firm of insurance brokers, solicited from Mr. Lappe, an officer of plaintiff, an order for insurance, and on May 31st wrote the plaintiff making an offer to secure $75,000. They were authorized to secure it; Clark, one of the firm, testifying their instructions were "simply general instructions to place some insurance, if we could." Thereupon they procured from the defendant's agent the policy in suit, were duly charged with the premiums, and no question of premium payment is made. On report to the defendant of the issue of the policy by its agent, defendant directed its cancellation. The policy provided as follows:

"This policy shall be canceled at any time at the request of the insured, or by the company by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate, except that when this policy is canceled by this company by giving notice it shall retain only the pro rata premium."

Notice of cancellation was given to the Negley & Clark Company the latter part of June, but none to plaintiff by defendant or the Negley & Clark Company. The policy had not been delivered by the Negley & Clark Company to the plaintiff when they received notice of cancellation. On July 3d Clark, a member of the Negley & Clark Company, informed Mr. Lappe they had secured $75,000 insurance on plaintiff's property. That property, so insured by the defendant's policy, was destroyed by fire on July 11th.

Now it is clear that in point of fact the Negley & Clark Company were agents of the plaintiff solely for the purpose of procuring insurance, for no express authority, verbal or written, authorizing any other act is shown. When they procured such insurance, and the defendant's policy was delivered to them as the plaintiff's agents, they had as between the plaintiff and defendant carried out their agency. To this effect is Grace v. American Central Ins. Co., 109 U. S. 282, 3 Sup. Ct. 207, 27 L. Ed. 932, where it is said:

"As the uncontradicted evidence was that Anthony's (Negley & Clark's) agency or employment extended only to the procurement of the insurance, * * * his agency ceased when the policy was executed."

That the policy remained in the hands of the agents did not enlarge the scope of their agency. The policy being in their hands as agents to procure, subsequent delivery or nondelivery to their principal neither broadened the agency nor affected the principal's rights. The policy having been executed by defendant and delivered to the plaintiff's agent, that, as between the defendant and the plaintiff, was a delivery

to the plaintiff. Such being the case, the law is well settled in the federal courts (Grace v. American Central Ins. Co., supra; Kehler v. New Orleans Ins. Co. [C. C.] 23 Fed. 709; Adams v. Mfg. Co. [C. C.] 17 Fed. 630) that notice of cancellation to the broker did not affect the rights of the insured.

The motion of the defendant for judgment is denied. The clerk will enter judgment for the plaintiff on the verdict.

In re BAILEY.

(District Court, E. D. New York. October 29, 1907.)

BANKRUPTCY—POWERS OF COURT—DISPUTED TITLE TO REAL ESTATE—INJUNCTION.

A court of bankruptcy is without jurisdiction, on a motion by a trustee for an injunction, to determine a disputed question of title to real estate between the state and the trustee, which can only be determined in an appropriate action at law or in equity; nor is there any reason why such court, conceding its power, should enjoin the state officers from making a sale of the property, which would be ineffective to injure the estate should the trustee establish his title.

In Bankruptcy. On motion for injunction.

William Schuyler Jackson, Atty. Gen., for the State.
Robert McC. Robinson, for trustee.

CHATFIELD, District Judge. This question involves the settlement of a disputed title between the state of New York and the bankrupt. The trustee in bankruptcy has held a sale at which certain land, more or less under water, was purchased, and title thereto has not been conveyed to the purchaser by the trustee, for reasons not appearing upon the record, but apparently having to do with an examination of the bankrupt's title. The state of New York claims the land as land under water, and there is an issue of fact as to whether this particular property, known as "Sloop Bar Hassock," in Jamaica Bay, in this district, was or was not included in the property as to which title was adjudicated in a certain action for the partition of real estate, in which suit the grantor of the bankrupt was a party defendant, and in which his rights were litigated. Incidentally the motion raises the question of the authority of this court to pass upon the rights of the state of New York, and to enjoin the state, or any of its officers, in a proceeding in bankruptcy wherein the title of the state in real property is directly involved as an issue. But, inasmuch as the motion must be disposed of upon other grounds, it is unnecessary to consider the legality of the proceedings under the order to show cause, by which a sale, advertised by the state engineer under direction of the commissioners of the land office of the state, was stayed and prevented, pending a consideration of this motion.

The question raised by such a stay is not whether a suit to determine the state's alleged title to the lands in question could have been constitutionally maintained in any court by the bankrupt, but whether a

District Court of the United States, having jurisdiction in bankruptcy over all property in the bankrupt's estate or apparently belonging thereto, could enjoin a proceeding which would affect the rights of creditors in the bankrupt estate, and throw a cloud upon the title of the trustee in bankruptcy to certain land pending a determination by the court in bankruptcy of the contention which arises ad limine, namely, whether an issue is involved which must be litigated in an action at law or in equity, and not upon affidavits or testimony in bankruptcy proceedings. The power of any United States court to enjoin a state officer under a federal statute or upon constitutional grounds is too serious a matter to dispose of when its decision is unnecessary. And the Attorney General of the state having in this proceeding presented the real issues involved, making it unnecessary to consider the power of injunction, the decision upon this motion will not be made to include a determination of that question. It is sufficient to say that this court saw fit to issue the injunction, and that the injunction has not been vacated, but is rendered unnecessary as the matter now appears.

Upon the affidavits submitted a dispute of title is certainly involved. The provisions of the bankruptcy law give no jurisdiction for the determination of such a dispute on affidavits in the bankruptcy proceeding, unless the court in bankruptcy considers the transaction to have been so clearly the occasion of such fraudulent or dishonest action upon the part of the claimant or his grantor that no title could have passed or been acquired. If the state of New York has not title to these lands, then the estate of the bankrupt will not ultimately be injured by an attempted sale. If the state of New York has title, this should be determined by a suit in a proper court, and cannot be decided upon affidavits.

The motion for a permanent injunction will be denied, and the temporary stay vacated upon the entry of an order herein.

THE ROCKAWAY.

(District Court, D. New Jersey. June 17, 1907.)

1. MARITIME LIENS—STATE STATUTE CREATING LIENS—CONSTITUTIONALITY.

Where a vessel is used on waters navigable only between different places in the same state, a proceeding in rem to enforce a lien thereon created by a statute of the state may be prosecuted in a state court as authorized by such statute, although, where it is used on waters navigable between any point in that state and any other state or country, a lien for repairs or necessaries, though created by the state statute and not by the general maritime law, is enforceable by a proceeding in rem only in the admiralty courts. Therefore a state statute providing for liens on vessels for work, materials, or necessaries furnished for the same is not unconstitutional because it prescribes a procedure in rem in a state court for the enforcement of such lien, which provision must be construed as applicable only in case of vessels used wholly in domestic waters.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Maritime Liens, § 22.

Created by state laws, see note to The Electron, 21 C. C. A. 21.]

2. SAME—REPAIRS ON DOMESTIC VESSEL—STATUTORY LIEN.

Under the New Jersey statute (Act March 20, 1857 [P. L. p. 382]) as amended by Act April 24, 1884 (P. L. p. 248), which gives a lien on a ves-

sel for repairs made thereon under contract with the owner, a libelant is entitled to a lien enforceable in a court of admiralty for repairs made in that state on a domestic vessel under charter, where it appears that they were ordered by an authorized agent of the owner, and not by the charterer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Maritime Liens, § 46.]

In Admiralty.

James Parker, for libelant.
Cushman, Dewell & Cushman, for claimant.

LANNING, District Judge. The libel filed in this case is for the recovery of the value of certain repairs to the steam lighter Rockaway, made at Perth Amboy, N. J., in June and July, 1905. In the argument counsel on both sides have assumed that the repairs were made in the Rockaway's home port, but there is nothing in the libel, answer, or proofs expressly showing this to be the fact. In the libel there is, it is true, an averment that the materials were furnished and the labor performed at Perth Amboy, N. J., and that by the act of the Legislature of New Jersey entitled, "An act for the collection of demands against ships, steamboats and other vessels," approved March 20, 1857 (P. L. p. 382), and the supplement thereto, approved April 24, 1884 (P. L. p. 248), the libelant has a lien upon the vessel for the repairs made. To this averment the answer merely interposes a denial of any lien "under the statutes of the state of New Jersey, or in any other way." If the Rockaway is a New Jersey vessel, a lien may exist under the New Jersey statute. The Lottawanna, 21 Wall. 558, 580, 22 L. Ed. 654; Hankins v. Cox & Sons Co., 63 N. J. Law, 512, 44 Atl. 206; The J. E. Rumbell, 148 U. S. 1, 13 Sup. Ct. 498, 37 L. Ed. 345; The Glide, 167 U. S. 606, 17 Sup. Ct. 930, 42 L. Ed. 296; The Roanoke, 189 U. S. 185, 23 Sup. Ct. 491, 47 L. Ed. 770. I shall assume, as I doubt not the fact is, that the Rockaway is a New Jersey vessel, and that she was repaired in a home port. The case rests therefore on the provisions of the New Jersey statute.

That statute provides that:

"Whenever a debt shall be contracted by the master, owner, agent or consignee of any ship or vessel within this state for either of the following purposes: On account of any work done, or materials or articles furnished in this state for or towards the building, repairing, fitting, furnishing or equipping such ship or vessel * * * such debt shall be a lien upon such ship or vessel, her tackle, apparel and furniture, and continue to be a lien on the same until paid, and shall be preferred to all other liens thereon except mariners' wages."

It also authorizes any commissioner appointed by the justices of the Supreme Court of the state to take special bail and to administer oaths or affirmations, or any one of the justices of the Supreme Court of the state, or any one of the judges of the courts of common pleas, to issue a warrant to the sheriff, coroner, or any constable for the seizure of the vessel, her tackle, apparel, and furniture, to answer the liens that may be established against her by the procedure prescribed by the statute. Under the authorities above cited, the procedure in rem thus prescribed cannot be prosecuted for the enforcement of any lien

against a vessel employed on the navigable waters of the United States; but the procedure doubtless is applicable to a vessel used only for local traffic on one of the small lakes of New Jersey which has no communication with any of the navigable waters of the United States. See The Montello, 11 Wall. 411, 20 L. Ed. 191, and Birch v. King and Walton, 71 N. J. Law, 392, 59 Atl. 11. In The Robert W. Parsons, 191 U. S. 17, 28, 24 Sup. Ct. 8, 48 L. Ed. 73, it was held that a proceeding in rem to enforce a lien given by a statute of New York against a canal boat used in the Erie Canal and the Hudson river was wholly within the jurisdiction of the admiralty courts, and that the lien could not be enforced by any proceeding in rem in any state court. But it was also said:

"It is not intended here to intimate that if the waters, though navigable, are wholly territorial and used only for local traffic, such, for instance, as the interior lakes of the state of New York, they are to be considered as navigable waters of the United States."

Where a vessel is used on waters navigable only between different places within the state of New Jersey, a proceeding in rem to enforce a lien thereon created by the New Jersey statute may be prosecuted under that statute; but, where it is used on waters navigable between any point in New Jersey and any other state or country, the lien for repairs or necessaries, though created by the New Jersey statute, and not by the general maritime law, is enforceable by a proceeding in rem in the admiralty courts only. The part of the New Jersey statute creating the lien is separable from the part prescribing the procedure for the enforcement of the lien. Where that procedure is inapplicable as in the present case, the lien may be enforced in a court of admiralty. The objection of the claimant that the New Jersey statute is unconstitutional must therefore be overruled. With the restricted construction above suggested, it is valid legislation.

The remaining question is: Do the facts justify the conclusion that a lien exists under the provisions of the New Jersey statute? It appears that the repairs were made between June 21 and July 28, 1905. On June 14, 1905, the claimant, being the owner of the Rockaway, executed to George B. Bidwell, who seems to have acted as agent of the New York & New Brunswick Transportation Company, a charter party, by which the owner hired to Bidwell the Rockaway, with the services of her engineer, for the period of 60 days from the date of the charter party, at the rate of $10 per day. Bidwell agreed to "provide and pay for all provisions for and wages of the master, officers and crew, except the wages of the engineer," and also to "pay for all stores, coals, fuel, port charges, pilotages, stevedores, agencies, and all other debts whatsoever excepting fire insurance." The owner agreed to pay the engineer's salary. The seventh clause of the charter party is:

"That in the event of loss of time from break down of machinery or boilers, and continuing at one time for more than twenty-four hours, the payment of hire shall cease at the time of such accident or disaster, and shall not be resumed until said propeller be repaired by the party of the first part (the owner), and put in an efficient state for the services for which she is required, and re-delivered at the place of repairs, unless it be mutually agreed to make the delivery elsewhere."

The vessel's machinery broke down on the night of June 20th, and on June 21st she was taken to the libelant's dock in Perth Amboy for repairs. The libelant says that Mr. McLaury, who was the agent of the owner, told him, before any of the work had been done, to make the necessary repairs, saying that the boat must be gotten out as soon as possible, and that nothing more than what was actually necessary to put it into running condition should be done. The repairs made to the vessel on June 21st amounted to less than $200. The vessel was thereafter put into service, and again brought to the libelant's dock for further repairs about July 5th. John Kress, the libelant's foreman, says that after the vessel was brought the second time to the libelant's dock McLaury personally gave orders to make the additional repairs. McLaury, when called as a witness for the owner, testified that his conversation with the libelant in regard to the repairs referred exclusively to a pump for which the charge is $42.50, which he admits he directed the libelant to furnish, and he denies that he authorized anything else to be furnished. Mr. Wiedenmayer, who is the president of the company owning the vessel, says that he spoke over the telephone to some one representing the libelant, and told him that the boat was under charter, and that the libelant should, under no consideration, do any repairs to her, except on the credit of the charterer. The libelant admits that he was informed, before doing any work on the vessel, that she had been chartered, but it does not appear that he was informed as to the nature of the charter party nor as to who were the parties thereto. Mr. Henderson was produced as a witness on the part of the libelant, and says that he was acting as an agent of the New York & New Brunswick Transportation Company. Henderson says the Rockaway was put on the New York & New Brunswick Transportation Company's line, according to the best of his recollection, on the morning of June 15th—that is, the next morning after the date of the charter party—that she broke down on the night of the 20th, and that on one occasion, which I think was after the second breakdown, McLaury, the agent of the owner, came aboard the vessel and gave an order to John Kress, the libelant's agent, "to fix her up and put her in shape to run on as little expense as possible." Kress also declares in his testimony that McLaury directed him to have the repairs made.

As above stated, the seventh article of the charter party expressly provided that, if there should be a loss of more than 24 hours resulting from a breakdown of the machinery of the vessel, the charge of $10 a day should be suspended, and not resumed until the owner should put the vessel into a proper state of repair. There is some conflict in the proofs, but when McLaury was recalled on behalf of the owner, just before the testimony in the case was closed, he declared that, "if the truth came out, he [referring to the engineer in charge of the machinery] would be the man who ordered these repairs." It will be remembered that the engineer, according to the charter party, was an employé of the owner. His wages were paid by the owner, and he was not in any sense a representative of the libelant or of the charterer. The effort of McLaury to shift responsibility for ordering the repairs

from himself, an authorized agent of the owner, to the engineer, an employé of the owner without authority to order repairs, is one that to my mind weakens the force of his testimony that he did not order the repairs. As agent of the owner, he doubtless desired the repairs to be made as soon as possible so as to avoid any loss of rental. I am satisfied the repairs were not ordered by the charterer. If they were ordered by the engineer, and McLaury, knowing that fact, remained silent, he must be held to have impliedly authorized them. I think there is no doubt but that McLaury either expressly or impliedly authorized the repairs.

Having reached this conclusion, it must be remembered that we are dealing with a lien created, not by the general maritime law, but by the New Jersey statute. That statute declares that whenever a debt shall be contracted by the owner of a vessel within the state of New Jersey for repairs the debt shall be a lien on the vessel, her tackle, apparel, and furniture. In The Iris, 100 Fed. 104, 112, 40 C. C. A. 301, 309, Judge Putnam said:

"There remains the third principal point which we have stated—that, in the absence of proof that credit was given the vessel, no admiralty lien can arise, although the circumstances fulfill all the conditions which the local statute requires. This is supported by two supposed authorities. In The Samuel Marshall, 54 Fed. 396, 402, 4 C. C. A. 385, there is a dictum, in effect, that a local lien can be enforced in admiralty only where credit is given the vessel, and that in this respect there is the same limitation as with reference to supplies furnished a ship in a foreign port. The Lottawanna, 21 Wall. 559, 22 L. Ed. 654, is supposed to lay down a similar rule at page 581; but this question did not arise in that case, and at page 580 the opinion says: 'The rights of materialmen furnishing necessaries to a vessel in her home port may be regulated in each state by state legislation.' Also, in The Glide, 167 U. S. 620, 17 Sup. Ct. 930, 42 L. Ed. 296, the opinion quotes from the Lottawanna the unqualified language which we have already cited. In truth, this third point is but a repetition, in a new form, of the last question which we have answered, and seems to be disposed of by what we have said about The Glide and The J. E. Rumbell; and we have shown, by a full citation of authorities in the early part of this opinion, that the Supreme Court has reiterated the unrestricted power of state Legislatures to create liens on domestic vessels under such limitations as each may determine."

The above language is quoted, with approval, by the Circuit Court of Appeals of this circuit in the recent case of The Vigilant, 151 Fed. 747, 752, 81 C. C. A. 371. These authorities make it clear that the debt incurred for the repairs to the Rockaway is a lien on the vessel, and that it is the duty of this court to enforce it.

There will be a decree in favor of the libelant; but, as there is no proper proof of the cost of the repairs, the decree must be an interlocutory one with a reference to a commissioner to take proofs on that point.

BROWN v. ALLEBACH et al.

(Circuit Court, E. D. Pennsylvania. October 31, 1907.)

No. 10.

1. COURTS—JURISDICTION OF FEDERAL COURT—ANCILLARY SUIT BY RECEIVER.
Where a federal court has appointed a receiver for an insolvent corporation, a suit brought by such receiver for the collection of an assessment made by the court on stockholders of the corporation to pay its debts is ancillary to the main suit, and is cognizable by a federal court, regardless of the citizenship of the parties or the amount in controversy.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 801. Suits by or against receivers of, see note to J. I. Case Plow Works v. Finks, 26 C. C. A. 49.]

2. CORPORATIONS—INSOLVENCY PROCEEDINGS—CONCLUSIVENESS OF ORDERS ON STOCKHOLDERS.
An order made by a court of equity in a suit for winding up the affairs of an insolvent corporation levying an assessment on stockholders of the corporation who are indebted on unpaid subscriptions for the payment of the debts of the corporation is within its jurisdiction, and is binding on the stockholders without notice to them.

3. EQUITY—JURISDICTION—PREVENTING MULTIPLICITY OF SUITS.
A receiver of an insolvent corporation may maintain a suit in equity to collect an assessment made against the stockholders, joining a number of stockholders as defendants, on the ground of preventing a multiplicity of suits, and the inadequacy of the remedy at law, where the defendants are numerous, the assessments are less than the full legal liability of the defendants, and are comparatively small, so that the cost of separate actions would be disproportionate to the amount recovered in many cases, and where from all the circumstances it appears that a single suit will best subserve the substantial interests of all parties.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 167, 168.]

4. CORPORATIONS—STATUTORY PROCEEDINGS IN INSOLVENCY—EFFECT OF BANKRUPTCY LAW.
The provisions of section 65 of the New Jersey corporation act (Laws 1896, c. 185, p. 298), authorizing proceedings in a court of equity against insolvent corporations and the appointment of receivers therein, were not superseded by the national bankruptcy law.

In Equity. On demurrers to bill.

Burr, Brown & Lloyd, for complainant.

Peter M. MacLaren, James S. Alcorn, George Irving Merrill, Samuel K. Louchheim, L. L. Eyre, R. O. Moon, Geo. P. Rich, P. F. Rothermel, Jr., Henry S. Drinker, Jr., H. E. Kohn, F. K. Swartley, Ellis Ames Ballard, Simpson & Brown, and Morgan & Lewis, for respondents.

HOLLAND, District Judge. This bill is filed by the receiver of the American Alkali Company against certain preferred stockholders residing in this district to recover the sum of $2.50 a share, assessed by the United States Circuit Court of New Jersey on August 31, 1905, upon this preferred stock owned by each of the defendants, respectively, and standing in his name upon the books of the company, or in the name of his representative. The collection of this $2.50 a share is for the payment of the debts and the expenses of the receiver of the

insolvent alkali company. It is only a part of the amount still due from the owners of this preferred stock to the company. A suit at law had been brought against most of the defendants, and subsequently a petition was presented to this court and leave granted to the receiver to file this bill, joining all the defendants herein named. The bill alleges the incorporation and insolvency of the alkali company, the appointment of a receiver, and the assessment of $2.50 per share upon the preferred stockholders of the company by the United States Circuit Court of New Jersey on August 31, 1905. This decree, set forth in the bill, shows that the assessment was made for the payment of debts of the company and expenses of the receivership. There are about 150 defendants, nearly all of whom have demurred to the bill.

The questions raised are very few, and I shall take up in order those which require attention.

First. The objection that the Circuit Court has no jurisdiction where the receiver's claim against each defendant is for an amount less than $2,000 is answered by the decision of the Supreme Court of the United States in White v. Ewing, 159 U. S. 36, 15 Sup. Ct. 1018, 40 L. Ed. 67, where it is held that the Circuit Court obtained jurisdiction "by the appointment of a receiver, and that any suit by or against such receiver, in the course of winding up of such corporation, whether for the collection of its assets or for the defense of its property rights, must be regarded as ancillary to the main suit, and as cognizable in the Circuit Court, regardless either of the citizenship of the parties or of the amount in controversy."

Second. It is contended that the parties defendant were not parties to the litigation in New Jersey, and are therefore not bound by the decree authorizing the assessment. If this is intended merely to raise the question of the right of the chancellor, in the absence of fraud, with all the necessary facts before him, to make an assessment for the payment of legitimate debts and expenses of this insolvent corporation, the objection is not well taken. The Supreme Court of the United States, in the case of Great Western Telegraph Co. v. Purdy, 162 U. S. 329, 16 Sup. Ct. 810, 40 L. Ed. 986, said:

"The order of assessment, whether made by the directors as provided in the contract of subscription, or by the court as the successor in its respect of the directors, was doubtless, unless directly attacked and set aside by appropriate judicial proceedings, conclusive evidence of the necessity for making such an assessment, and to that extent bound every stockholder, without personal notice to him."

See, also, Hawkins v. Glenn, 131 U. S. 319, 9 Sup. Ct. 739, 33 L. Ed. 184.

Third. Equity has no jurisdiction, because the action should have been at law. It is urged that, unless equity will take jurisdiction solely for the convenience of the plaintiff to the suit, and bring into one proceeding for his convenience a number of persons who it is alleged are separately liable to him, there is no jurisdiction, and in support of this proposition the cases of Tompkins v. Craig, 93 Fed. 885, and Hale v. Allinson (C. C.)102 Fed. 790, affirmed by the Circuit Court of Appeals in 106 Fed. 258, 45 C. C. A. 270, and by the Supreme Court of the United States in 188 U. S. 56, 23 Sup. Ct. 244, 47 L. Ed.

380, are cited as the cases nearest in point to sustain this contention. The first case was a bill filed by a receiver of an insolvent Iowa bank for the collection of an assessment of 50 per cent. of the statutory liability of stockholders in the insolvent corporation. The bill was dismissed for want of equitable jurisdiction. The second was a suit instituted in this district by the receiver of an insolvent corporation of Minnesota, appointed by the Minnesota courts, for the recovery of the entire amount of the statutory liability of stockholders of the insolvent corporation in this district. Both these cases were decided in this district by District Judge McPherson. In the last case the district judge, in effect, concedes that there may arise cases closely analogous to the one he was then so ably considering, where proceedings in equity may be had to collect less than the whole amount for which the subscribers are liable, and refers to what was said by the Supreme Court of the United States in the case of Kennedy v. Gibson, 75 U. S. 505, 19 L. Ed. 476, which has been followed since in a number of cases. It was held, however, in Hale v. Allinson, supra, that, as that was a suit to collect the full amount of the statutory liability, no question remained in which the defendants had a common interest, and the suit was merely an aggregation of separate suits, each involving separate issues and having little relation to each other, except that there was a common plaintiff, and in each of which a remedy at law was adequate. The Supreme Court, in affirming this decision, discusses the question of equity jurisdiction, for the purpose of preventing a multiplicity of suits, at some length. After calling attention to a number of cases where the jurisdiction was assumed, as well as cases where it was denied, Justice Peckham said:

"Cases in sufficient number have been cited to show how divergent are the decisions on the question of jurisdiction. It is easy to say it rests upon the prevention of a multiplicity of suits, but to say whether a particular case comes within the principle is sometimes a much more difficult task. Each case, if not brought directly within the principle of some preceding case, must, as we think, be decided upon its own merits and upon a survey of the real and substantial convenience of all parties, the adequacy of the legal remedy, the situations of the different parties, the points to be contested, and the result which would follow if jurisdiction should be assumed or denied; these various matters being factors to be taken into consideration upon the question of equitable jurisdiction on this ground, and whether within reasonable and fair grounds the suit is calculated to be in truth one which will practically prevent a multiplicity of litigation and will be an actual convenience to all parties, and will not unreasonably overlook or obstruct the material interests of any. The single fact that a multiplicity of suits may be prevented by this assumption of jurisdiction is not in all cases enough to sustain it. It might be that the exercise of equitable jurisdiction on this ground, while preventing a formal multiplicity of suits, would nevertheless be attended with more and deeper inconvenience to the defendants than would be compensated for by the convenience of a single plaintiff, and, where the case is not covered by any controlling precedent, the inconvenience might constitute good ground for denying jurisdiction. * * * We are not disposed to deny that jurisdiction on the ground of preventing a multiplicity of suits may be exercised in many cases in behalf of a single complainant against a number of defendants, although there is no common title nor community of right or interest in the subject-matter among such defendants, but where there is a community of interest among them in the questions of law and fact involved in the general controversy."

In the case at bar the question has been raised as to the validity of the assessment, in which all the defendants are interested, as well as in the question of the effect of the national bankruptcy law upon the New Jersey act of 1896. Laws 1896, p. 298, c. 183. The defense, if any they have to the payment of the assessment of all the owners of the stock, seems to me will be the same. Of course, where the party defendant denies ownership, the evidence as to that question would not be common as to all. In this case the defendants are very numerous, the amounts collected are comparatively small compared with the total of indebtedness and the expense of receivership, and we think it is a case where it is "for the real and substantial convenience of all parties that jurisdiction in the case should be assumed" to prevent the expense which would naturally follow the collection of these amounts in suits at law. The record costs of separate suits at law, the expense of the receiver, and the fees of attorneys to contest these cases could easily result in requiring that another small assessment be made to meet these expenditures as well as for the accumulated interest resulting from a failure to expeditiously collect the amounts and liquidate the claims. We think, therefore, this is a case where the convenience of all parties and the inadequacy of the legal remedy under the circumstances require that equity shall take jurisdiction to prevent a multiplicity of suits; there being a community of interest among the defendants in a number of questions of law and fact involved in the general controversy.

The above are the objections to the bill urged by nearly all the defendants who have demurred. There are other objections; but we do not think they require any extended discussion. The objection that the New Jersey act of 1896 is superseded by the national bankruptcy law cannot be sustained. It has been so held in the cases of Singer v. National Bedstead Co., 65 N. J. Eq. 290, 55 Atl. 868; In re Wilmington Hosiery Co. (D. C.) 120 Fed. 180. See, also, Land Title Co. v. Asphalt Co., 127 Fed. 1, 62 C. C. A. 23. The liability of the transferees of the preferred stock of the alkali company has been settled by the decisions in the alkali suits in this district. We do not recall that any of the other matters of demurrer were seriously urged at the argument.

The demurrer filed by each one of the defendants, respectively, is hereby overruled, with leave to the defendants to answer within 20 days.

HUNTINGTON'S DEVISEES v. TAYLOR et al.

(Circuit Court, S. D. West Virginia. November 9, 1907.)

1. ACTION—COURTS—JURISDICTION—PROCEEDINGS AFTER FINAL JUDGMENT.

Where an action in ejectment has been terminated by a verdict and judgment awarding a writ of possession, which has become final, the powers of the court therein are at an end, and it has no jurisdiction to thereafter adjudicate upon the independent rights of persons not parties simply at the instance of the marshal or other officer charged with the execution of the judgment seeking instructions from the court as to how

he shall perform his ministerial duties, even though such persons appear and submit their contentions.

2. EJECTMENT—EXECUTION OF JUDGMENT—DUTY OF OFFICER.
The duty of a marshal or other officer in executing a writ of possession issued on a judgment in ejectment is purely ministerial, to deliver possession of the land pointed out to him by the plaintiff, who takes possession of the same at his peril, and the officer has no right of appeal to the court for instructions because of protests or notice served on him by persons not parties to the action who claim independent rights in the land.

Action in Ejectment. On motion to instruct the marshal as to execution of writ of possession.

On August 28, 1794, William Morris, for Jacob Skiles, entered 40,000 acres of land in Kanawha county, and on October 24, 1795, a survey thereof was made and admitted to record in said county. On January 19, 1795, John Steele entered 60,000 acres, and on the 21st day of January, 1795, lifted or withdrew 19,500 acres thereof and entered the same, and on March 17, 1795, a survey thereof was made, and on November 11, 1796, a patent issued from the commonwealth of Virginia to said John Steele for these 19,500 acres. On July 11, 1798, a patent likewise issued to Jacob Skiles for the 40,000 acres. These two tracts of land adjoined each other and were situate on Cambell's, Blue, Bell, and Kelley's creeks in said county. C. P. Huntington, by purchase from some of the Steele heirs, became the owner of 7,697 acres of this 19,500-acre Steele tract, which had been partitioned in a chancery suit of Taliafero et al. v. Patrick et al. by the circuit court of Kanawha county. This 7,697 acres, known as "lot C," in partition suit, adjoins the Skiles 40,000-acre tract. This Skiles tract became forfeited for nonpayment of taxes, and one J. D. Lewis at a tax sale on February 3, 1841, became the purchaser and owner thereof. Some time prior to February 2, 1874, Lewis had placed one John Lewis Taylor upon this Skiles tract as his tenant. At July rules, 1875, Huntington filed in the District Court of the United States for this district, then having jurisdiction, his declaration in ejectment against Mecca C. Trimble, Aaron S. Trimble, Isaac White, Andrew White, and said John Lewis Taylor, alleging his ownership in fee of said 7,697 acres, describing it by metes and bounds, and charging unlawful entry and withholding from him of the possession thereof by said defendants. Meanwhile Lewis had on February 2, 1874, sold and conveyed the Skiles land to George W. Norris and Henry Clarke by deed which provided substantially that they were to pay therefor $5 per acre for all that had not been conveyed away, was not reserved expressly by the deed, and for which good title could be given. On the 13th day of October, 1875, in the ejectment suit of Huntington v. Taylor, an order was entered, dismissing the action as to Mecca C. Trimble, Aaron S. Trimble, Isaac White, and Andrew White, confirming the office judgment had at rules against John Lewis Taylor, impaneling a jury, setting forth its verdict for the plaintiff for the 7,697 acres claimed, described and bounded as set forth in the declaration, awarding judgment against Taylor therefor and a writ of possession to the plaintiff. On May 3, 1876, at a term following the one at which this judgment was rendered, George W. Norris and Henry Clarke appeared and moved the court to set aside the verdict and judgment of the preceding term, which motion was resisted by Huntington, and the court took time to consider thereof. This consideration continued for a period of 20 years, when the court on May 29, 1896, having maturely considered all questions involved in the motion to set aside the verdict and judgment and Huntington's motion to vacate the rule and award him a writ of possession for the lands claimed by him, adjudged that said motion for a rule came too late, that the rule was improvidently awarded, should be dismissed without prejudice to any rights Norris and Clarke might have, if any, in any other proceeding, and that a writ of possession should be awarded Huntington for the land as described in the original verdict and judgment.

Meanwhile, Lewis and his vendees, Norris and Clarke, had disagreed as to the amount of purchase money due Lewis from them. Suit and countersuit had been brought. Norris and Clarke set out, among other things, that Hunt-

ington had recovered and deprived them of 400 acres of the land which they ought not to be compelled to pay for. The court so held, but required them to convey back this parcel to Lewis, and such proceedings were had finally in these suits that the heirs of Lewis, who died pendente lite, became purchasers of and reinvested with the lands. One of these heirs was Mary D. Dickenson. Another conveyed to her, the other heirs and to her husband, John Q. Dickenson, his interest, and by an instrument dated July 22, 1893, the parties in interest made partition, whereby about 6,651 acres were assigned to said John Q. and Mary D. Dickenson, including the 400 acres in controversy. Here it is necessary to carefully note how the controversy about this 400 acres arises. As heretofore stated, the two original surveys—Skiles and Steele—adjoin. The Steele calls for the Skiles lines. In the Skiles grant three lines constitute the dividing ones between the two. The descriptive words of these lines are: "Beginning at two beeches and a maple, corner to William Morris, at the head of Kelley's creek, and running west 930 poles to a dogwood and white oak, corner to William Morris and Andrew Donnally;" then going around the tract until the last two calls, which are from a beech, sugar, and maple "S. 100 poles to a pine and beech on a fork of Bell's creek; thence S. 40° W. 1,500 poles to the beginning"—or, putting these three division lines together, they would be: From the dogwood and white oak, corner to William Morris and Andrew Donnally, E. 930 poles to two beeches and maple, corner to William Morris at the head of Kelley's creek (beginning corner to Skiles); thence N. 40° E. 1,500 poles to a pine and beech; thence N. 100 poles to a beech, sugar, and maple. In the Steele patent the calls are exactly these, except that the call, "N. 100 poles to the beech, sugar, and maple beginning corner," is left out, and the preceding call, "N. 40 E. 1,500 poles," calls to go to the beginning, which it cannot do. When the surveyor ran the lines of the several parcels, allotted to the parties in interest in the suit of Taliafero et al. v. Patrick et al., in which the Steele 19,500 acres was partitioned, instead of supplying the line, "N. 100 poles to beech, sugar and maple," he changed the preceding call N. "40° E. 1,500 poles" to "thence leaving the fork with original Steele line N. 76° E. 1,310 poles, to beginning corner of the 19,500 acres" at the beech, sugar, and maple which closed the survey. This was reported by the commissioners to the court on November 13, 1856, and carried into the partition decree. If the line be run according to this change, an overlap upon the Skiles is created, consisting of a triangle that would be bounded as follows: Beginning at the beech, sugar, and maple, and running thence S. 100 poles to pine and beech, thence S. 40° W. 1,500 poles to two beeches and maple, beginning corner to Skiles survey, thence N. 76° E. 1,310 poles to the beginning. This triangle constitutes the subject-matter in controversy, and is said to contain 400 acres of very valuable land, in the heart of the coal field, from which timber by agreement has been sold, and a large sum realized therefrom has been deposited in bank to await the judicial determination of the parties' rights. Huntington's declaration in ejectment against Taylor demanded his 7,697 acres by metes and bounds exactly in accord with those set forth in the partition, including the changed call of "thence leaving the fork, with the original Steele line, N. 76° E. 1,310 poles to the beginning corner of said 19,500 acres." And the verdict and judgment rendered him also follow exactly these descriptive metes and bounds. When, on May 29, 1896, after 20 years' deliberation, Judge Jackson determined that Norris' and Clarke's motion to set aside this verdict and judgment came too late, and that the rule against Huntington, to show cause why the same should not be set aside, had been improvidently awarded and should be discharged, Huntington it seems immediately sued out the writ of possession awarded him, and placed it in the hands of the marshal for execution. At this time the defendant John Lewis Taylor was living, but not on this land, having moved therefrom in the spring of 1877, as shown by his affidavit. He sold his "improvement" to one M. H. White, who took a lease direct from John D. Lewis, then living.

On January 4, 1897, an order was entered in this cause setting forth that the marshal to whom the writ of possession was directed had that day appeared and reported to the court that he had been served with a notice from John Q. Dickenson and Mary D. Dickenson, stating that John Lewis Taylor was dead, and that they claimed to hold the land by title other than that

under which the said John Lewis Taylor held said land, and could not be dispossessed under the writ in this cause; that said Marshal therefore asked the court for instructions as to his duties under said writ and in the execution thereof; that the plaintiff, by attorneys, appeared and moved the court to direct the said marshal to execute the writ according to its direction, and also offered to prove that the defendant, John Lewis Taylor, was not dead, but still living; that the tenant then on said land occupied the same house that said Taylor occupied, and claimed to be tenant of the same landlord that Taylor was tenant of. The court thereupon continued the hearing of the matter until the next day, and on the 9th of January 1897, another order was entered reciting the "appearance" of John Q. and Mary D. Dickenson and M. H. White tenant by their attorneys; that the plaintiff Huntington again moved the court to instruct the marshal to dispossess the tenant White under the writ of possession, which motion the said Dickensons and White resisted, and leave was thereupon given them to show the grounds of their said objections until the tenth day of the next term.

It is certain, now, that at the time of the entry of these orders John Lewis Taylor was not dead, as suggested, for his affidavit, produced by the Dickensons, bears date as of May 12th following. However, according to the affidavit of Crist, produced by the Dickensons, he did finally depart this life, as Crist remembers, some time in the year 1905. And Huntington also died, and thereupon, on December 10, 1902, an order was entered reviving the cause in the name of his devisees, H. E. and Arabella D. Huntington. At the November term, 1906, the parties introduced their evidence, consisting of records and affidavits, from which and from the record of the case itself the facts above stated have been obtained and the matters involved were orally argued. Subsequently briefs were filed by counsel and the case fully submitted on the motion to instruct the marshal as to his duties touching the execution of the writ of possession.

F. B. Enslow, for Huntington's devisees.

Wesley Mollohan and Brown, Jackson & Knight, for Dickenson and wife.

DAYTON, District Judge (sitting specially, after stating the facts as above). This matter has been argued orally and by briefs by all attorneys engaged to great length and with conspicuous ability. Very many perplexing questions have been suggested, the solution of which in my judgment would require a long and patient study of the history and evolution of the modern action of ejectment as regulated by legislative enactments from time to time. For instance, it is earnestly insisted for the Dickensons that (a) the writ cannot be executed with Taylor the sole defendant dead; (b) that the case cannot be revived, since Taylor, before judgment, abandoned the premises, and his heirs have never claimed the land or been in possession of it; (c) that a writ of possession against Taylor, whose tenancy and possession ended long before the issuance of the writ, cannot be used to evict a later tenant, who was not nor was his landlord nor those under whom the landlord claims ever parties to the suit or to the judgment upon which the writ issued; (d) that the return of service of the original declaration upon Taylor is void because verified before a notary who has not attached his seal thereto; and (e) that, under the descriptive terms of the writ following the judgment, the triangle of land in controversy is not included, the call, "thence leaving the fork with original Steele line N. 76° E. 1,310 poles to beginning corner of the 19,500 acres," only warranting the following of the "original Steele

line" of N. 40° 1,500 poles to the Skiles pine and beech corner, and then by the omitted line N. 100 poles to the beginning. On the other hand, it is earnestly contended that this action of ejectment was brought prior to the act of February 28, 1877, which for the first time allowed the landlord to be sued, although he might appear and cause himself to be made a defendant; that, therefore, plaintiff could only sue the tenant in possession; that all such changes in the title and possession pendente lite must be held to have been made with notice and subject to the judgment in such action; that the Lewis heirs are estopped by the court's decree releasing Norris and Clarke from paying for these 400 acres of land under their purchase from John D. Lewis because the same had been lost by Huntington's recovery; that Norris and Clarke, from whom the Lewis heirs derived back the title, having appeared and sought to set aside the verdict, bound themselves and their vendees by such judgment and estopped all further assaults thereon, except by appeal, for either technical or other defects in the judgment, and in effect made themselves and their vendors, as owners, parties to the proceeding. To this is answered, however, that their motion to set aside was refused without prejudice to their rights in any other proper proceeding.

No matter how fascinating the idea may be, with the aid of so able counsel, to consider and seek to determine these and other very interesting questions suggested, I am fully persuaded that I must refrain from doing so, and simply hold that under the pleadings, or, rather, lack of pleadings, in this case, there is nothing before this court to determine. I can find no authority warranting the ascertainment and adjudication of independent rights vested in persons not parties, in an action at law, ended by verdict and judgment, simply at the instance of the marshal or other officer seeking instruction from the court as to how he shall perform his ministerial duties in execution of the judgment. When the judgment was finally confirmed in this case, the rule to set aside, and annull, dismissed, and the writ of possession awarded, the case in my judgment became an ended cause, and no further action could be taken as between the parties thereto without a reconvention of them by some proper and authorized method of procedure. For the marshal, simply because a notice in pais which, in legal effect, can have and must have no restraining effect upon him, to come to the court and ask for instructions, is no such "proper and authorized method of procedure" to effect such reconvention of the parties themselves, and a fortiori to convene new and additional parties claiming independent rights. The judgment is simply the precept of the law, and, when once enunciated, becomes final in the case unless set aside and annulled by fixed methods of procedure. The duty of the marshal, in execution of this precept of the law, is purely ministerial, and it is no right of his to appeal to the court whose sole duty it is to enunciate the law's precept to instruct him how to perform such ministerial duty. He assumes the responsibility of knowing or of being willing and able to find out how to perform these duties when he assumes his office. In a writ of possession, based upon a judgment in ejectment, as in case of other executions based upon

judgments, it is his plain duty to obey the mandate of his writ. The court will not order such officer to execute a writ of possession in any particular manner. Bowie v. Brahe, 4 Duer (N. Y.) 676; Id., 2 Abb. Pr. (N. Y.) 161. The plaintiff should point out the premises to the officer, who should deliver possession according to his direction, but he, the plaintiff, on his part, must take possession at his peril. Den v. O'Hanlin, 18 N. J. Law, 127; Simpson v. Shannon, 5 Litt. (Ky.) 322; Jackson v. Rathbone, 3 Cow. (N. Y.) 291; 15 Cyc. 188. The law's precept, as enunciated in the judgment, is not to be presumed by such ministerial officer to be either wrong or defective, and he is certainly not to be deterred in its execution by any notice or protest that may be presented to him by private individuals. For courts to permit marshals or sheriffs to suspend the execution of the law's command every time a private individual might see fit to protest to him, and come back for "instructions," would simply lead to confusion worse confounded.

The rule that he is to be guided in the location of the property by the directions of the plaintiff, where doubt arises in his mind as to such location, which instructions are to be given, however, by the plaintiff at his peril, is based upon both law and sound sense. The facts in this case, purely as an illustration and without expressing any opinion thereon, may be referred to to emphasize this statement. It is admitted that defendant Taylor took possession of and cleared a small parcel of land entirely over on the Steele side of the original Skiles division line of "S. 40° W. 1,500 poles." Suppose plaintiff's purpose had been and was to recover this parcel, without doubt or controversy embraced in his boundary, but Dickenson, misconceiving his purposes, gave the marshal notice to stay off; how can location be pointed out to the officer by any other than the plaintiff whom the law holds responsible for his act? Suppose the marshal had followed the private judgment and advice of an individual not party to the proceeding and refused to execute the writ, could he recourse on such private person for the damages recoverable against him by the plaintiff for his failure to act? But it is insisted, perhaps, that to allow the officer to thus rely upon the instructions of the plaintiff may deprive the true owner of his rightful possession without opportunity to defend himself. Not so. He has immediate right to come, by proper proceeding regularly taken, and defend himself against the ouster, or, if turned out, to recover his possession. He cannot do so by simply serving notice on the marshal and requesting him to apply to the court for "instructions," and then, without being properly a party to the suit (for he cannot become such, it being ended), secure a determination of his rights that will have no binding effect upon him if he desires not to abide by it.

Thus it being clear to me that there is no authority for the marshal to ask for, and this court in this ended law cause, to give instructions as to how he shall perform his duty in the execution of this writ, it is also very clear that this court has no jurisdiction or right, even at the request or upon agreement of the parties, to pass upon the matters in controversy between them. These questions, so far as

this case is concerned, are merely moot ones. As well said in Thomas v. Musical Mutual Protective Union, 121 N. Y. 45, 24 N. E. 24, 8 L. R. A. 175:

"Courts do not sit for the purpose of determining speculative and abstract questions of law, or laying down rules for the future conduct of individuals in their business and social relations; but are confined in their judicial action to real controversies wherein legal rights of parties are necessarily involved, and can be conclusively determined."

And in Taylor v. Mutual, etc., Life Association, 97 Va. 60, 33 S. E. 385–390, 45 L. R. A. 621:

"Whenever a court determines that it has no jurisdiction of a case, it should express no opinion upon the merits of the controversy. The only course which a court can rightfully pursue in such a case is to decline to speak at all where it cannot speak by the law."

It therefore follows that this court will refuse to give any instructions to the marshal, and, believing itself to be without jurisdiction over the parties in this proceeding as it stands, will decline to determine any questions presented upon this motion, such declination being entirely without prejudice to all parties to assert and defend any and all rights they have by any proper proceeding they may institute or in any that may be instituted against them, and this case will be stricken from the docket and ended without further costs to any one.

DULLES v. H. D. CRIPPEN MFG. CO. et al.

(Circuit Court, D. New Jersey. November 15, 1907.)

1. APPEARANCE—WAIVER OF OBJECTIONS—JURISDICTION OF FEDERAL COURT—DISTRICT OF SUIT.

Where the requisite diversity of citizenship exists between both the assignor and assignee of a chose in action, and the defendant sued thereon by the assignee, to give a federal court general jurisdiction of the suit, the objection that such court in the district where the suit is brought, and in which the plaintiff resides, is without jurisdiction, because the assignor could not have sued in that district, is waived by the defendant by entering a general appearance and filing a demurrer which goes in part to the merits.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appearance, §§ 70–75.]

2. ASSIGNMENTS—RIGHTS ASSIGNABLE—PARTIAL ASSIGNMENT OF CHOSE IN ACTION.

The owner of a chose in action may assign a part thereof, and the assignee may enforce his rights under such assignment by a suit in equity in which both the debtor and the assignor are made defendants.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assignments, §§ 55–60.]

In Equity. On demurrer to bill.

Martin Conboy, for complainant.
Marshall Van Winkle, for the defendant William Grace Company.

LANNING, District Judge. By his bill of complaint it appears that the complainant is a citizen of New Jersey; that the defendant H. D. Crippen Manufacturing Company (hereinafter called the Crippen Company) is a corporation and citizen of the state of New York; that the defendant William Grace Company (hereinafter called the Grace Company) is a corporation and citizen of the state of Illinois; that on March 9, 1906, the Crippen Company entered into a contract with the Grace Company, by which the former company agreed to deliver to the latter thirty-two electric drills at a price of $730 each; that nine of these drills were delivered on May 28, 1906; that the purchase price thereof, $6,570, became due in 30 days thereafter; that on June 7, 1906, the Crippen Company assigned to the complainant all its right, title, and interest in the account for the nine drills by a written assignment to which the invoice for the nine drills was attached; and that on or about October 6, 1906, there being then due to the Crippen Company from the Grace Company a balance of over $11,000, the Crippen Company caused to be served upon the Grace Company a notification of the assignment above mentioned. There is a further averment that the Crippen Company, the assignor, would have been competent, as a citizen of the state of New York, to maintain a suit in this court against the Grace Company for the enforcement of the above-mentioned indebtedness if no assignment or transfer thereof had been made. The prayer is that the Grace Company be decreed to pay to the complainant the above-mentioned sum of $6,570, with interest. Though duly served with a subpœna ad respondendum, the Crippen Company has not appeared. On February 4, 1907, the Grace Company entered a general appearance. On March 12, 1907, it filed a demurrer, by which objection is made that the court has no jurisdiction of the case, and also that the bill of complaint is defective for want of equity.

In the first place, it is argued on behalf of the Grace Company that the Crippen Company, a citizen of New York, cannot sue the Grace Company, a citizen of Illinois, in this court, and therefore that the complainant, an assignee of the Crippen Company, cannot do so. This argument is based on the provisions of section 1 of the judiciary act of March 3, 1875 (chapter 137, 18 Stat. 470 [U. S. Comp. St. 1901, p. 508]), which declares that:

"No civil suit shall be brought before either of said (Circuit or District) courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant; nor shall any circuit or district court have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made."

It is clear that, if the citizenship of the Crippen Company and the Grace Company had been in the same state, an assignment by the former company to the complainant could not have enabled this court

to assume jurisdiction, since the assignor, even with the defendant's assent, could not have prosecuted the defendant in this court. Such was the condition in Simons v. Ypsilanti Paper Co. (C. C.) 33 Fed. 193. So, too, where the record of a case fails to disclose affirmatively that the citizenship of the original parties to the contract is such that the action arising therefrom may be prosecuted in a federal court, an assignment of an interest in the contract will not enable the assignee to prosecute his suit in a federal court, even though it appear affirmatively that, as between the assignee and the defendant, there is diverse citizenship. Parker v. Ormsby, 141 U. S. 82, 11 Sup. Ct. 912, 35 L. Ed. 654; Gorman-Wright Co. v. Wright, 134 Fed. 363, 67 C. C. A. 345; Utah-Nevada Co. v. DeLamar, 133 Fed. 113, 66 C. C. A. 179. And in the case of Southern Pacific Co. v. Denton, 146 U. S. 202, 13 Sup. Ct. 44, 36 L. Ed. 942, where the action was brought in the United States Circuit Court for the Western District of Texas, the plaintiff being a citizen of the Eastern District of Texas, and the defendant a citizen of the state of Kentucky, the Supreme Court held that the Circuit Court was without jurisdiction; but the decision was put upon the ground that the defendant obtained leave of the Circuit Court to file an answer or demurrer "for the special purpose, and no other, until the question herein raised is decided, of objecting to the jurisdiction of this court, because it appears that this suit ought, if maintained at all in the state of Texas, to be brought in the district of the residence of the plaintiff, that is to say, in the Eastern district of Texas."

But if there had been no assignment by the Crippen Company to the complainant, the Crippen Company might have maintained an action in this court against the Grace Company provided the Grace Company had not objected to our jurisdiction. The provision of the judiciary act that, where jurisdiction is founded only on the fact that the action is between citizens of different states, the suit shall be brought only in the district in which the plaintiff or the defendant resides, is one that the defendant may waive. Where plaintiff and defendant are citizens of different states, and jurisdiction is founded on such diversity of citizenship, the defendant may be sued in any Circuit or District Court of the United States, provided he does not at the proper time and in a proper manner insist upon his privilege of being sued in the district of which he or the plaintiff is a citizen. By entering a general appearance in any such suit, instead of a special appearance to object to jurisdiction, the defendant waives any objection that the suit has been brought in the wrong district.

In St. Louis, etc., Railway Co. v. McBride, 141 U. S. 127, 11 Sup. Ct. 982, 35 L. Ed. 659, the defendant filed a demurrer to the complaint on three grounds; two denying the jurisdiction of the court for the reason that the suit was not brought in the district of which the defendant was an inhabitant, and the third denying that the complaint stated facts sufficient to constitute a cause of action. The court declared that, as by the demurrer the defendant had raised not alone the question of jurisdiction, but a question concerning the merits of the case, a general appearance had been made, and that all

special privileges as to the particular court in which the suit might be brought had been waived. See, also, Interior Construction Co. v. Gibney, 160 U. S. 217, 16 Sup. Ct. 272, 40 L. Ed. 401; A. L. Wolff & Co. v. Choctaw, O. & G. R. Co. (C. C.) 133 Fed. 601.

In the present case, the defendant the Grace Company entered a general appearance, and also filed a demurrer, which, amongst other things, denied the equity of the bill of complaint. Such a demurrer must be distinguished from the one that was filed in Southern Pacific Co. v. Denton, supra, and must be held, like the one filed in St. Louis, etc., Railway Co. v. McBride, to have waived the objection that the suit has been brought in the wrong district.

It may be added that, if special appearance had been entered for the purpose of objecting to the jurisdiction of this court, it is not clear that the objection would have been deemed valid. In Bolles v. Lehigh Valley Railroad Co. (C. C.) 127 Fed. 884, the action was brought in the United States Circuit Court for the Southern District of New York, the plaintiff was a citizen of that district and assignee of a citizen of West Virginia, and the defendant was a citizen of Pennsylvania. Judge Coxe, on a motion to set aside the summons and dismiss the complaint for want of jurisdiction, refused to do so, holding that the plaintiff was entitled to maintain his action in the district of which he was a citizen. Here, the suit is brought in the United States Circuit Court for the District of New Jersey, the complainant is a citizen of that district and assignee of a citizen of New York, and the defendant is a citizen of Illinois. The jurisdictional facts of the two cases are similar. If Judge Coxe was right in retaining jurisdiction of the case before him, this court should retain jurisdiction of the present case, even though special appearance to object to jurisdiction had been made. The decision of the question concerning jurisdiction in the present case, however, is not based on the authority of Bolles v. Lehigh Valley Railroad Company, for the reason that here the demurrant has entered a general, and not a special appearance, and has thereby waived the right to object to the jurisdiction of this court.

The demurrant's second objection, the one relating to the merits of the case, is that the bill of complaint is void for want of equity. The bill shows that the complainant is an assignee of a part only of a sum of money due from the Grace Company to the Crippen Company, and the Grace Company insists that the assignee of a part of a chose in action cannot maintain a suit in equity to recover the amount due on such an assignment. This point has often been decided adversely to the demurrant's contention. In Fourth Street Bank v. Yardley, 165 U. S. 634, 644, 17 Sup. Ct. 439, 41 L. Ed. 855, it was declared that the owner of a chose in action, or of property in the custody of another, may assign a part of such rights, and that such an assignment will be enforced in equity. The same doctrine was declared in Trist v. Child, 21 Wall. 441, 447, 22 L. Ed. 623, in Lanigan v. Bradley & Currier Co., 50 N. J. Eq. 201, 24 Atl. 505, and in Chambers v. Lancaster, 160 N. Y. 342, 348, 54 N. E. 707.

The complainant has made both his assignor and his assignor's al-

leged debtor, the Grace Company, parties defendant. If there are any equities which should be enforced in behalf of the Grace Company as against the Crippen Company, which may also affect the complainant's right of recovery, there will be no difficulty in setting up such equities as a defense in this case.

The demurrer will be overruled, with costs.

ALASKA BANKING & SAFE DEPOSIT CO. OF NOME, ALASKA, v. MARITIME INS. CO., Limited. SAME v. OCEAN MARINE INS. CO., Limited. WOODIN v. ALLIANZ INS. CO., Limited. SAME v. CHINA TRADERS' INS. CO., Limited. SAME v. MARITIME INS. CO., Limited. SAME v. YANG TSZE INS. ASS'N, Limited. ELLIOTT v. ALLIANZ INS. CO., Limited. SAME v. CHINA TRADERS' INS. CO., Limited.

(District Court, W. D. Washington, N. D. September 11, 1907.)

Nos. 3180–3185, 3195, 3196.

INSURANCE—MARINE INSURANCE—DEFENSES AGAINST LIABILITY — DEVIATION FROM VOYAGE.

Respondents severally insured parts of the cargo of a sailing vessel against sea perils on a voyage from Seattle to Alaskan ports. After reaching the port which was the termination of the voyage, and discharging a part of the cargo for that port, the vessel again went to sea for the purpose of discharging cargo at another port which she had passed without stopping owing to unfavorable weather, and before reaching it was wrecked. *Held*, that the voyage covered by the insurance terminated when the vessel reached her port of final destination, and that respondents were not liable for cargo lost after she had voluntarily left such port.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 329, 379–381.]

In Admiralty. Libels in personam, to collect marine insurance. Decree for respondents.

H. R. Clise, Shepard & Bailey, and Howard Waterman, for libelants.

Kerr & McCord and W. H. Gorham, for respondents.

HANFORD, District Judge. According to the pleadings, each of these suits is based upon a certificate of insurance covering a distinct part of the cargo carried by the bark Coryphene on her last voyage. The loading ports were Comox, B. C., and Seattle, and the ports or places at which the cargo was to have been discharged were Solomon City, Tin City, and the towns on Port Clarence Bay, in Alaska. The vessel sailed from Seattle in June, 1905, under the following sailing order given by the owner to her master:

"Proceed to Solomon, put the Solomon cargo out there, and proceed to Tin City and take the Tin City cargo out; go to Teller and lay there for thirty days."

The last point on the route at which freight was to be discharged is Teller, on Port Clarence Bay. The vessel went to Solomon, and discharged freight there. Off Cape Nome, and while pursuing her voy-

age under full sail, the steamer Corwin came alongside of her, and took part of her cargo of coal. She arrived off Tin City; but, on account of a strong shoreward wind and fog, she was unable to land the freight destined for that place, and she continued onward to Port Clarence, and anchored in the bay, about four miles distant from Teller. While at anchor there, she discharged freight, some of which was lightered ashore and some transferred to the steamer Corwin. After being at anchor three days, and without discharging all of the cargo which was for destination points on that bay, the Coryphene went out to sea again, for the only purpose of delivering freight at Tin City, and she was to have returned, but she was wrecked, and the remainder of the insured cargo became a total loss. It is admitted that the insurance was written; that the premiums were paid; that the property insured was lost as a consequence of a marine disaster; that proofs of the losses were made in due form and timely; and that payment has been refused.

The main ground of defense relied upon in all the cases is alleged deviations from the voyage contemplated and specified. To simplify the controversy, it will be assumed by the court that it was known and agreed to by a general agent representing all of the defendants, before the certificates of insurance were issued, that the Coryphene was, for this voyage, a general freight ship, and that she would make stoppages to deliver freight at intermediate points between Seattle and Port Clarence, and that each and all the respondents are estopped from claiming deviations avoiding the insurance previous to the arrival of the ship at Port Clarence Bay, which is deemed to be the port of final discharge. It must be understood that this assumption is made for convenience only; and with respect to matters assumed this decision is not to be a precedent for future cases.

In the argument it is contended that, on account of the bad weather, the ship passed Tin City, and went into the entrance of Port Clarence Bay for safety; that it was a mere coincidence that this bay happened to be the nearest port of safety, and also the terminus of the voyage; and that it was not a deviation under the circumstances for the ship to run for protection, as she did, and wait for a change of weather. But the facts proved by the evidence are somewhat different. The ship sailed well up into the bay, and anchored near enough to Teller to discharge the freight which she had to deliver there by lightering it. Her owner was landed there, and she opened her hatches, and discharged part of her cargo before attempting to run back to Tin City. The following entries in ship's log under the head of "Remarks" show the arrival of the ship at her destination and the conditions:

"Remarks.

"28th day of July, 1905: Light breeze. Foggy. 4 a. m. Sledge Isl. bore S. W. W. Dist. 3 miles. Hove the lead half hour. 8 a. m. Weather same. Current setting 3½ knots W. Noon. Light breeze. Foggy. Hove the lead every half hour. 7:30 p. m. 24 fathoms wore ship. 12 m. n. 17 fathoms water.

"29th day of July, 1905. 1 a. m. Fog lifted. Sighted Cape York, about 2 miles on the lee beam. Current setting to Westward. 5:30 a. m. Passed in Pt. Spencer. Mod. breeze, foggy. 8:30 a. m. Let go starboard anchor off

Teller. Made fast all sails. Noon. Crew employed making ready for discharging cargo.

"30th. No work, this day being Sunday.

"31st. Light S. W. wind. Fine weather, employed getting water from Reindeer Station.

"Aug. 1st. Discharged 25 tons of coal and delivered it at Reindeer Station. 5 p. m. S. S. Corwin came alongside (commenced giving her coal at 10 p. m. till 12:30 a. m. Donkey broke down, and started again at 3:40 a. m. till 4:20 a. m.

"2nd day of Aug. 11:30 a. m. left Teller for Tin City. Light var. winds. 4 p. m. Passed by Pt. Spencer. 12 m. n. Calm. 2:20 a. m. Anchored near Pt. Spencer. 5 a. m. Light southerly wind. Hove up anchor, steered along the land. Crew empl. sacking coal."

In the testimony and stipulations references are made to a protest, but the document is not listed as an exhibit. I presume that it was not introduced, and I regard the ship's log as the strongest evidence touching this point, and it proves to my satisfaction that the ship did arrive at the terminus of her voyage. The evidence also proves that her departure was not from necessity, either real or apparent, but was for convenience only, to discharge the Tin City freight while retaining part of the cargo for ballast. The Tin City freight was shipped under a contract with the shippers that, if it should be impracticable to land it there, it might be reshipped and forwarded by another vessel, and it was not impracticable to have disposed of it in that manner. The only expected deviations which the insurers could have had in contemplation were stoppages to discharge freight at intermediate places between the last loading port and the terminus on Port Clarence Bay, and, when the vessel was anchored safely in that harbor, the perils of navigation insured against ceased. Therefore I find that venturing out to sea again for the purpose of returning to Tin City, with part of the insured cargo on board, was an unexpected deviation not contemplated when the insurance was written, nor assented to afterwards by the insurers.

In the arguments the respondents are upbraided for making purely technical defenses, as if standing upon the terms of their contracts were skulking, crafty, or culpable conduct, but the court cannot thus contemptuously brush aside legal rights. A technical defense rests upon recognized principles of law which all courts are bound to respect. And I will say, further, that the main defense which the court sustains is meritorious in equity, because the property was insured for only one voyage, and the loss was a consequence of a second exposure to sea perils, the risk of which the respondents did not verbally or otherwise promise to carry. The third section of the Harter act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [3 U. S. Comp. St. 1901, p. 2946]) exempts ships, their owners and charterers from liability for losses under certain conditions, by no possible construction can it be a creator of a liability, and the attempt to find support in that statute for the libelant's position is a complete failure.

The court directs that a decree be entered in each case that the libelant take nothing, and that the suit be dismissed, with costs.

In re LYNDEN MERCANTILE CO.

(District Court, W. D. Washington, N. D. September 30, 1907.)

No. 3,387.

BANKRUPTCY—VALIDITY OF MORTGAGE—BONA FIDES OF LOAN.

A mercantile company when wholly insolvent, and a short time before it was adjudged bankrupt, gave a chattel mortgage on its stock to secure a loan. Before making the loan, the lender consulted a member of a banking firm which was the bankrupt's largest creditor and knew its condition, and such banker was constituted the lender's agent in making the loan. The proceeds of the loan were deposited in his bank, which procured the application of the greater part of the same upon its debt, some of which was not yet due. *Held*, that the mortgage was invalid as against the bankrupt's creditors; the purpose of the loan having clearly been to enable the bank to obtain a preference over other creditors, which fact the lender must be conclusively presumed from the circumstances to have known.

In Bankruptcy. On review of referee's decision on claim of W. M. Frizzell as a preferred creditor.

Gray & Stern and Fairchild & Bruce, for trustee.
Rose & Craven, for mortgagee.

HANFORD, District Judge. It is the opinion of the court that the claim of W. M. Frizzell as a preferred creditor, based upon a promissory note for $4,000, secured by a chattel mortgage on the stock of merchandise constituting practically all the assets of the bankrupt, cannot be sustained as a valid claim.

The bankrupt had been doing business as a mercantile corporation at the town of Lynden, in Whatcom county, and at the time of giving the mortgage it was insolvent and on the verge of collapse. Its largest creditor was a local bank, conducted by a partnership composed of George S. Aldrich and Arthur L. Swim. An application for a loan of $4,000 was made to Mr. Frizzell, by a letter written by an attorney, to which he responded by a letter, stating the terms and conditions on which he would make the loan. This reply appears to have been written after a meeting between Mr. Frizzell and Mr. Swim, at which the application was mentioned and inquiry made as to the financial status of the mercantile company, and it is significant that this letter directed the attorney to make arrangements with the bank and to consult Mr. Swim as to the provisions to be included in the mortgage, and stated that the money would be placed in the bank to be paid when the securities were made satisfactory to him. There is in the negotiations and in the culmination of the transaction a manifest intention to not give any opportunity for other creditors to secure a preference ahead of the bank. The deal was consummated through the bank, as the letter indicated that it should be. Mr. Frizzell gave Mr. Swim a check for $4,000, and instructions as to requirements to be observed in preparing the securities, and authorized him to deliver the check on delivery of the papers conforming to his instructions. Upon execution of the mortgage and promissory note, a check was delivered and indorsed

by the manager of the mercantile corporation, and it was then deposited to the credit of the company in the bank, and from the fund created by that deposit the bank profited by obtaining payment of two promissory notes aggregating $1,300, not then due, and payment of an overdraft amounting to more than $2,000.

This case differs materially from the Macintosh Case (unreported), cited in the argument in behalf of the complainant, in which the court sustained the validity of a chattel mortgage. As stated in the memorandum filed, the court found no evidence to charge Mr. Loggie, the mortgagee, with knowledge of a purpose to create a lien in order to secure funds to prefer a favored creditor. In this case Mr. Frizzell made inquiries as to the financial condition of the borrower of Mr. Swim, a member of the banking firm which was the largest creditor of the insolvent corporation, and Mr. Galbraith, who was its bookkeeper, both being in a position to know that it was in a ruined condition, and both of whom are closely related to him. It is incredible that Mr. Swim, as an agent, would have consummated the loan without apprising his principal of the financial straits of the borrower, and of the benefits to accrue to his firm by having the money loaned placed within control of himself or his bank.

I sustain the findings of the referee, to the effect that the primary object of the transaction was to enable the bank to obtain an unlawful preference over creditors of an insolvent debtor, and that Mr. Frizzell is chargeable with knowledge of all the facts and the purpose of the attempt to create a lien. He is a business man of large experience and mature judgment, and he necessarily knew that he was not making a loan in the regular course of business to enable a going concern to keep going. By giving a chattel mortgage covering its stock of merchandise to secure a demand note, the corporation destroyed its credit, and necessarily terminated its life as an independent business concern. That is a fact of which he cannot pretend to be ignorant. Furthermore, he is chargeable with knowledge of the facts known to Mr. Swim, whom he constituted his agent to make the loan, and a conclusive presumption arises that he acted in the transaction merely for the accommodation of the bank, which received his check and indorsed it before it was cashed.

There are other grounds for questioning the validity of the mortgage. I hold, however, that it should be rejected because the transaction was not bona fide. Let an order be entered confirming the decision of the referee.

In re McFADGEN.

(District Court, E. D. Pennsylvania. October 16, 1907.)

No. 2,505.

BANKRUPTCY—PRIORITY—CLAIM OF LANDLORD FOR RENT.

Where the liquor license, fixtures, and lease of a bankrupt were sold in bulk by a receiver in bankruptcy, the landlords making no objection, and no claim to a lien on the stock or fixtures for past-due rent, to which they were entitled under the Pennsylvania statute, there could be no apportionment of the proceeds, so as to entitle them to priority out of any part of the fund.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 532.]

In Bankruptcy. On certificate of referee concerning landlord's claim to priority.

W. Horace Hepburn, Jr., for trustee.
Albert W. Sanson, for landlords.

J. B. McPHERSON, District Judge. The decision of the learned referee (Joseph Mellors, Esq.) rests upon the following facts, condensed from his opinion:

The landlords of the bankrupt filed a claim for a balance of rent that accrued before the filing of the involuntary petition. Claim is made to priority out of a fund arising from the sale in bulk of the liquor license, stock, fixtures, and lease of the bankrupt estate. The landlords made no objection to the sale in bulk, but gave notice to the purchaser at the time of the sale that they would hold him responsible for the rent in arrears.

Thereupon the referee made the following findings of law:

"The lease contained a clause providing for the forfeiture of the same in the event of the nonpayment of rent; but no attempt was ever made by the landlords to take advantage of this clause, but, on the contrary, they accepted the tenancy of the vendee of the license, stock, fixtures, and lease. In order that a landlord may claim priority out of a fund, the priority of payment should be claimed under section 64b of the bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3448]), which is as follows: 'Debts owing to any person who, by the laws of any state or of the United States, is entitled to priority. * * *' The act of June 16, 1836, of the state of Pennsylvania (P. L. 755), provides as follows:

" 'The goods and chattels being in and upon any messuage, lands or tenements which are or shall be demised for life or years or otherwise, taken by virtue of an execution and liable to the distress of the landlord, shall be liable for the payment of any sums of money due for rent at the time of the taking of such goods in execution.'

"It is clear from the words of this act that priority must be claimed out of goods and chattels levied on. It is well settled that a license cannot be seized and taken in execution; for it is a personal right merely, and transferable only by the court. See the case of Ulrich's License, 6 Pa. Dist. R. 408. A landlord cannot claim priority out of the sale of a license in a bankrupt court.

"The clause in the lease providing for the forfeiture in case of nonpayment of rent does not help the landlords in their claim for priority, because they failed to take advantage of it before the sale, which they were bound to do. This question was decided in the Case of Lewis Ruppel, 3 Am. Bankr. Rep. 233, 97 Fed. 778.

"If the landlords cannot claim priority out of the proceeds of the sale of the license, it becomes necessary for them to designate a particular fund out of which they claim priority. This they cannot do, for the reason that they permitted the trustee to sell the lease, license, stock, and fixtures together, and thereby lost their claim to priority of payment out of the fund realized, because it could not be possible for them to claim priority out of any particular fund, when everything was sold in bulk. This point was decided in Keyser v. Wessel, 12 Am. Bankr. Rep. 126, 128 Fed. 281, 62 C. C. A. 650.

"No objection was made to the sale, nor is there any evidence how much the stock and fixtures brought separate from the license, or how much the lease brought separate from the whole."

In order to make the situation entirely clear, it is perhaps desirable to state a few additional facts, which appear upon the record of the case. The creditors' petition was filed on April 10, 1906, and on May 3d a receiver was appointed, with authority to sell the bankrupt's liquor license, his lease of the premises occupied as a saloon, the fixtures, and all other assets of the estate, upon eight days' notice to creditors. Appraisers were appointed on May 4th, who itemized the value of the fixtures and the personal property, and appraised the license and the lease together as a unit. To this appraisement, no objections were made. On May 12th the license, lease, and fixtures were sold as a whole, and (as the business was still being carried on) it was also agreed between the receiver and the purchaser that the liquors and other merchandise that might still be unsold at the time when the license should be transferred to the purchaser by the court of quarter sessions of Philadelphia county should then be appraised and paid for. This sale was set aside, and a resale was ordered. The second order was similar in its terms to the order of May 3d, and under it the lease, license, and fixtures were sold as a whole on May 29th for $7,000; the liquors and merchandise being subject to valuation when the license should be transferred. This resale was confirmed, and the fund thus produced by the property is now being distributed by the referee. (No valuation of the liquors, etc., was had, as the stock had practically been consumed when the license was transferred.) The landlords had due notice of all the proceedings, but they did not object to the appraisement, to the orders to sell, to the method of sale, or to the return and confirmation, and they accepted the purchaser as a tenant, permitting him to take possession of the premises and occupy them as the bankrupt's successor under the lease.

Under the facts thus stated by the referee and by the court, it seems to me that discussion is unnecessary, in view of the decision by the Court of Appeals of this circuit in Keyser v. Wessel, 128 Fed. 281, 62 C. C. A. 650, 12 Am. Bankr. Rep. 126, from which I am unable to distinguish the present controversy. Upon the authority of that case, therefore, the ruling of the learned referee, declining to sustain the claim of the landlords to priority, must be affirmed.

In re HANSON et al.

(District Court, D. Minnesota, Fourth Division. July 27, 1904.)

No. 900.

1. BANKRUPTCY—APPOINTMENT OF TRUSTEE—REVIEW BY COURT.
Under Bankr. Act July 1, 1898, c. 541, § 38a, 30 Stat. 555 [U. S. Comp. St. 1901, p. 3435], which provides that the action of a referee shall be "subject always to a review by the judge," and rule 13 in bankruptcy (89 Fed. vii; 32 C. C. A. xvii), which provides that the appointment of a trustee by the creditors shall be subject to be approved or disapproved by the referee, the appointment of a trustee by creditors, approved by the referee, is subject to review by the judge.

2. SAME—APPOINTMENT PROCURED BY BANKRUPT.
The appointment of a trustee in bankruptcy brought about by the active interference and procurement of the bankrupt will be disapproved by the court.

In Bankruptcy. On review of order of referee.

John T. Byrnes, for bankrupt.

E. P. Peterson, A. R. Hunt, L. E. Covell, and F. A. Campbell, for creditors.

LOCHREN, District Judge. Adjudication of bankruptcy upon the voluntary petition of the above named bankrupts, filed by John T. Byrnes, their attorney, was had February 12, 1902. At an adjourned session of the first meeting of creditors at the office of the referee on March 18, 1902, Mr. Byrnes appeared as attorney for the bankrupts, and also as attorney for a large number of the creditors, having powers of attorney authorizing him to represent them in making proofs of their claims and in the appointment of trustee. Among the creditors so represented by Mr. Byrnes was Hannah Hanson, the mother of the bankrupts, whose claim was upon a promissory note made to her by the bankrupts jointly July 16, 1901, for $4,893.85, payable on demand, with 8 per cent. interest, on which note was indorsed $2,450, as paid February 7, 1902, one day before the date of the petition in bankruptcy. On the objection of other creditors that it appeared that said Hannah Hanson had received an unlawful preference, proof of her claim was not allowed. On proceeding to the appointment of trustee, Thomas H. Green was nominated by the attorney in fact of certain creditors, and John S. Anderson was nominated by said John T. Byrnes on behalf of the creditors represented by him, although other creditors then objected that said Byrnes, because he was the attorney of record of the bankrupt and then acting as such, was disqualified from participating in the appointment of trustee. Pending the appointment of trustee, the meeting of creditors was adjourned until the next day; and in the interim, by the advice of said Byrnes, and through the active personal exertions of the bankrupts, most of the creditors represented by said Byrnes revoked their powers of attorney to him and executed like powers of attorney to L. E. Covell, with the understanding that said Covell should as their representative vote for said John S. Anderson for trustee. On the next day a majority of the creditors in number and amount, including the creditors so represented

by said Covell, voted for said John S. Anderson, although other creditors objected to the appointment of said Anderson, on the ground that he was the choice of the bankrupts, and that his majority vote was the result of the proxies and powers of attorney procured from creditors by the active interference of the bankrupts and their attorney. Notwithstanding this objection, the referee made an order approving the appointment of John S. Anderson as trustee, and on petition of opposing creditors this action of the referee is certified for review.

1. The power of the creditors to appoint the trustee under the provisions of section 44, Bankr. Act July 1, 1898, c. 541, 30 Stat. 557 [U. S. Comp. St. 1901, p. 3438], is not absolute. Section 30 provides that:

"All necessary rules, forms and orders as to procedure and for carrying this act into effect, shall be prescribed, and may be amended from time to time, by the Supreme Court of the United States."

Rule 13 (89 Fed. vii; 32 C. C. A. xvii) provides that:

"The appointment of a trustee by the creditors shall be subject to be approved or disapproved by the referee or by the judge; and he shall be removable by the judge only."

Section 38 provides that all the acts of the referee are "subject always to a review by the judge."

It follows that the order of the referee approving the appointment of the trustee in this case is subject to such review.

2. As even the objecting creditors freely admit that Mr. Anderson is a man of responsibility, integrity, and high standing, it seems unfortunate that his appointment was brought about by such improper interference on the part of the bankrupts as should have caused it to be disapproved. But it is well settled by all the authorities that the trustee represents the creditors, and not the bankrupt, in the administration of the estate; and that it is improper that the bankrupt shall actively interfere with the matter of his selection and appointment; and that, if he does interfere and the person aided by him is appointed by votes procured by such interference, the appointment should for that reason be disapproved. In re McGill, 106 Fed. 57, 45 C. C. A. 218; In re Rekersdres (D. C.) 108 Fed. 206; In re Henschel (D. C.) 109 Fed. 861.

More cases to the same effect might be cited, and none to the contrary are found. The rule is a salutary one, and based on obviously sound reason. It often happens that it becomes the duty of the trustee to actively antagonize the bankrupt by efforts to discover secreted assets, or to set aside conveyances as fraudulent, or to recover preferences. There should be no color of basis for suspicion of any partiality or sense of obligation on the part of the trustee toward the bankrupt. Hence, however high the character of a proposed trustee may be, the active interference of the bankrupt in favor of his appointment will render him practically ineligible to appointment as trustee in that bankruptcy.

The order of the referee approving the appointment of John S. Anderson as trustee is reversed, and that appointment is disapproved.

In re KETTERER MFG. CO.

(District Court, M. D. Pennsylvania. November 5, 1907.)

No. 964.

BANKRUPTCY—AUCTION SALE BY TRUSTEE—VALIDITY.

An auction sale of property by a trustee in bankruptcy is not invalid because of a private arrangement between the attorney for the purchaser and the auctioneer that the bid of any other person should be raised $50 each time until a sign to stop was given.

In Bankruptcy. On exceptions to confirmation of sale.
See 155 Fed. 987.

Sidney E. Smith and C. E. Ehrehart, for exceptions.
C. J. Delone, opposed.

ARCHBALD, District Judge. The only objection to the trustee's sale is that Mr. Delone, as attorney for Mr. Lebzelter, the purchaser, had a private arrangement with the auctioneer that the bid of any other person was to be raised $50 each time until a sign was given by Mr. Delone to stop. The complaint with regard to this is that it was a discouragement to other bidders to have their bids immediately overtopped by this amount by the auctioneer, without there being any apparent bid by any one present, conveying the impression that the auctioneer was simply puffing the sale. But I see no occasion for setting the sale aside upon that ground. There was nothing underhanded or unfair in the arrangement referred to, nor was it, indeed, out of the ordinary, according to the way in which auction sales are conducted. A bid may be, and often is, conveyed by a mere nod, which no one but the auctioneer sees or understands; this course being taken for the very purpose of keeping it from being known who the bidder is, who without this might have the property run up on him, by puffers, beyond what he otherwise would be compelled to give. It is not required, as argued, that there should be an open and obvious bidder, whom other competitors can see and know, at the time. It is sufficient, if all parties desiring to bid have a fair chance; the announcement by the auctioneer from time to time of the amount bid disclosing to each just how the sale is going, and bids in good faith from responsible parties alone being entertained.

The exceptions are overruled, and the sale confirmed.

In re KETTERER MFG. CO.

(District Court, M. D. Pennsylvania. November 7, 1907.)

No. 964.

1. BANKRUPTCY—EXCEPTIONS—VERIFICATION.

Exceptions to the account of a receiver in bankruptcy should be verified, but the omission of a verification is a defect which is amendable.

2. SAME—RECEIVER—ALLOWANCE OF ATTORNEY'S FEES.
Attorney's fees for services rendered to a receiver in bankruptcy should be allowed from the estate only to the extent that the services were rendered for the direct benefit of the entire estate, and not of any particular creditor.

In Bankruptcy. On exceptions to account of receiver.

C. J. Delone, for exceptions.
Sidney E. Smith and C. E. Ehrehart, opposed.

ARCHBALD, District Judge. The exceptions should have been verified. In re Nathanson (D. C.) 155 Fed. 645. But, as stated at the argument, this was amendable, and, as the exceptions are in part justified, it is proper to allow it.

The only exceptions pressed, however, are those which go to the compensation of the receiver and his counsel, and after due consideration I am inclined to think that the amount claimed in each case is somewhat too high. Economy in the administration of estates is the policy of the present law, and is to be strictly enforced. The duties of the receiver have not been arduous, and they extended over only a few months. At the same time a competent man, having skill in the business, was requisite, and he was compelled to turn aside from his ordinary affairs to take the position and carry it through. All things considered, I will fix his compensation at $1,000.

As to the fees of counsel, no doubt there has been quite a little to do in one way and another. But part of it has been in the interest of the creditors whom they have represented, rather than the receiver or the estate. Only to the extent that they have acted directly in behalf of the estate, or it has been benefited by what they have done, are they entitled to be paid out of it. It seems to me that $1,500 will fully cover this, and that is the amount I will allow.

The exceptions to the compensation of the receiver and the allowance to counsel are sustained, and these items are reduced to $1,000 and $1,500, respectively. The other exceptions are dismissed, and the account, as so modified, is confirmed.

NURNBERGER v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. October 28, 1907.)

No. 2,527.

1. PERJURY—INDICTMENT FOR SUBORNATION—SUFFICIENCY.
An indictment for subornation of perjury in procuring another to make a false oath or affidavit before the receiver of a land office to secure an entry of land, which avers that such oath or affidavit was made in support of "a certain application in writing to enter under the homestead laws of the United States, subject to entry at said land office," certain land described, is sufficient after verdict as showing that the land described was at the time public land of the United States subject to homestead entry at such land office.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Perjury, § 95.]

2. INDICTMENT—OBJECTIONS TO SUFFICIENCY—HOW TAKEN.
Objections to the sufficiency of an indictment cannot be raised by objecting to the introduction of any evidence thereunder.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, § 462.]

3. PERJURY—HOMESTEAD ENTRY—FALSE OATH TO SUPPORT.
To support an indictment for subornation of perjury based on the alleged procurement of the making of a false affidavit or oath before the receiver or register of a land office in support of an application to enter land under the homestead law, it is not essential that the affidavit should have been subscribed as well as sworn to before such officer.

4. SAME—TRIAL—EVIDENCE.
On the trial of such an indictment, the tract book kept by the register of the land office is admissible in evidence to establish the fact that the lands to which the application related were public lands subject to homestead entry at such office, and it is competent for the register as a witness to explain the meaning of abbreviations used therein.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Perjury, §§ 113, 114.]

5. CRIMINAL LAW—EVIDENCE—DEPARTMENT REGULATIONS.
A general regulation promulgated by the General Land Office respecting homestead entries of public land, for the government of the officers of local land offices, pursuant to authority given by Rev. St. § 2478 [U. S. Comp. St. 1901, p. 1586], becomes a part of the body of public laws of which the courts take judicial notice, and, where such a regulation was pertinent to the issue as to the criminal intent of a defendant charged with a criminal offense under the land laws as corroborating his testimony as to his understanding of the requirement of the law, by showing that such understanding was in accordance with that of the Land Department until after the alleged offense, he was entitled to have such regulation placed before the jury as a matter of evidence, and its exclusion was error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 706.

Judicial notice of public laws and regulations, see note to 44 C. C. A. 4.]

6. SAME — APPEAL — REVIEW — DISCRETION OF COURT — PERMITTING LEADING QUESTIONS.
While the permitting of leading questions is a matter resting in the sound discretion of the trial court, allowing a district attorney in a criminal case to ask questions of his own witnesses, who are not unwilling or unfriendly, which are leading and in a form to suggest the answer de-

sired and call for a mere conclusion of the witness, is an abuse of discretion, and is prejudicial error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3064.]

7. PERJURY—TRIAL FOR SUBORNATION—EVIDENCE.

On the trial of a defendant charged with subornation of perjury in procuring homestead entrymen to make the required oath that the entry was not made for the benefit of any other person, when in fact they had agreed to convey the land to defendant for a stipulated price as soon as they obtained title, it was error to refuse to permit defendant to testify that he made no such agreements, but that the agreements actually made, as he understood them, left the conveyance optional with the other parties or to other facts, which tended to show that his act was not willful nor corrupt, as required by the statute to constitute the crime charged.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Perjury, § 115.]

8. SAME—INSTRUCTIONS.

Instructions, given on the trial of a defendant charged with subornation of perjury in procuring homestead entrymen to make false oaths, *held* erroneous and misleading, in that they authorized the jury to convict in case they found that any statement made by affiants in their affidavits was false and was intentionally sworn to, when there was evidence tending to show that some of the recitals in the affidavits respecting the intention to reside on and improve the land as affiants understood the law were not applicable to their entries, and that their act in swearing to the same was not therefore willful and corrupt, as required by Rev. St. § 2291, as amended by Act March 3, 1877, c. 122, § 2, 19 Stat. 404 [U. S. Comp. St. 1901, p. 1391], to constitute the crime of perjury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Perjury, § 135.]

Hook, Circuit Judge, dissenting.

In Error to the District Court of the United States for the District of North Dakota.

Charles E. Wolfe and W. S. Lauder, for plaintiff in error.

B. D. Townsend, Asst. U. S. Atty. (Patrick H. Rourke, U. S. Atty., on the brief).

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

PHILIPS, District Judge. The plaintiff in error (hereinafter for convenience designated the defendant) was a Union soldier who served through the Civil War, and at the time of the indictment and trial he was 67 or 68 years old. After the War he lived at Bowling Green, in the state of Ohio. In 1879 he moved to Richland county, N. D., where he acquired lands from the government under the homestead, timber culture, and pre-emption laws. In 1900 he visited Ward county, N. D., where one of his sons had located in business. There was a large amount of public land in that vicinity where Minot, the local land office, is located. In the spring of 1900 he went to Bowling Green, Ohio, to visit his wife, who had been there some months on account of sickness. While there he met a number of his former comrades of the army, and they discussed the subject of locating homesteads in said Ward county. He obtained a power of attorney from a number of these soldiers to make entries for them under the homestead laws. Being advised that such powers of attorney were not permissible for

such purpose, he consulted with an attorney respecting the legality of contracts with soldiers concerning lands to be acquired under the homestead laws. The trend of this advice was that he could make contracts with them under which he could furnish the money to defray their expenses in making such entries and the necessary improvements on the lands, and that they might or might not, at their pleasure, convey the lands to him after they had obtained the title; but he could not make a contract that they should enter the lands for his use and benefit. He took several parties of these soldiers and the widows of deceased soldiers out to Ward county, where they made affidavits of application for such lands and effected such entries. He paid all the expenses of these trips, and for the entries, and constructed what are called "shacks" on the lands.

In the fall of 1903 he went to Ohio and organized the last party, composed of 12 widows of old soldiers, who made the entries in question. A form of contract was drawn up by a Mr. Comstock, a lawyer and comrade of the defendant, a resident of the locality in Ohio where these homesteaders lived, to be signed by them and the defendant, the substance of which was that the applicant agreed to go to the United States land office at Minot, N. D., and make due and legal entry upon lands selected for them by the defendant under the provisions of the homestead laws, and that the applicant would duly appear and make final proof and perfect title to the land, and when the title was perfected they agreed to sell the land to the defendant for the sum of $200, plus the expenses of one trip to the land office and return to Ohio; the $200 to be paid upon delivery of the deed. The defendant was to select and locate the land and make the improvements on the same before final proofs; the locator agreeing that until such deed was delivered as aforesaid, the defendant should have a prior lien upon the land for improvements so made and for money advanced for traveling expenses. This contract, it is conceded, was nonenforceable. The tenth count of the indictment was based upon an entry made by one Hall in 1902, under a claimed parol understanding with the defendant.

The defendant was indicted May 29, 1905, for subornation of perjury in procuring said entrymen of 1903 to make false affidavits before the register of the land office to secure said locations. The indictment contained 13 counts. Verdicts of guilty were returned on counts numbered 2, 3, 6, 7, 8, 9, and 10, and he was acquitted on the other counts. He was sentenced to the South Dakota penitentiary for a term of one year and to pay a fine of $300.

The first error assigned goes to the sufficiency of the indictment, based on the following objections: (1) That the indictment fails to charge that the land described at the times when the affidavits in question were made were public lands of the United States, over which the register and receiver of the land office at Minot had jurisdiction; (2) that the allegation "subject to entry at said land office" if referable to the lands at all is a mere conclusion of law; and (3) the indictment fails to state a case in which any oath was required or permitted to be administered.

The allegations of the indictment in the particulars assailed, common to all the counts, after laying the venue, are that the defendant in said district within the jurisdiction of the court:

"Then and there unlawfully did willfully and corruptly suborn, instigate and procure one Charles S. Ely to appear in person before the register and receiver of the United States land office at Minot, in the district aforesaid, and then and there, before T. E. Fox, then and there the receiver of the said land office, to make and subscribe, before him, the said T. E. Fox, receiver as aforesaid, a certain oath and affidavit in writing then and there required by the laws of the said United States, in support of a certain application in writing of him, the said Charles S. Ely, then and there made to the register of the said land office; that is to say, a certain application in writing to enter, under the homestead laws of the United States, subject to entry at the said land office (here is set out a description of the land), and by such oath and affidavit, so made in support of said application to enter the said lands, falsely to depose and swear, among other things in substance, and to the effect," etc.

This is followed by a statement of the contents of the affidavit made by the applicant, with allegations as to the falsity of the matters sworn to, the corrupt procurement thereof by the defendant, with averment of the authority of said Fox to administer said oath.

The application in writing, the allegation clearly enough discloses, was to make entry of homestead lands, specifically described, under the homestead laws of the United States subject to entry at the United States land office at Minot, N. D. The clear intendment is that the lands were public lands, and as such were at the time subject to entry at said United States land office. The allegations in this respect were quite as full and specific as those contained in the indictment in Stearns v. United States, 152 Fed. 900, 82 C. C. A. 48, held by this court to be sufficient after verdict. It was there said, in substance, that it is common knowledge that public lands, like post office sites, military reservations, and the like, are not within the ordinary meaning of public lands of the United States and are not subject to entry or sale for any purpose, and therefore they are never understood to be in contemplation when speaking of entries of lands for homestead purposes; that in respect of lands bearing mineral, though nonapplicable to homestead entry, persons may nevertheless compass a fraud upon the government by obtaining possession of them under fraudulent affidavits.

The essential requirement of the law is that the charging part of the indictment shall sufficiently advise the accused, in advance of the trial, of the nature and character of the offense he may be required to come prepared to meet. When it does this, although it may be inartificially drawn or defective in matters of form, yet, if the defendant go to trial without interposing a motion to quash or demurrer, the statute (section 1025, Rev. St. U. S. [U. S. Comp. St. 1901, p. 720]) interposes, which declares that:

"No indictment found and presented by a grand jury in any district or circuit or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant."

So Mr. Justice Brewer, in Dunbar v. United States, 156 U. S. 185, 192, 15 Sup. Ct. 325, 328, 39 L. Ed. 390, said:

"While it may be true that a defendant by waiting until that time (after verdict) does not waive the objection that some substantial element of the crime is omitted, yet he does waive all objections which run to the mere form in which the various elements of the crime are stated, or the fact that the indictment is inartificially drawn. If, for instance, the description of the property does not so clearly identify it as to enable him to prepare his defense, he should raise the question by some preliminary motion, or perhaps by a demand for a bill of particulars; otherwise it may properly be assumed as against him that he is fully informed of the precise property in respect to which he is charged to have violated the law."

The defendant did not, either by motion to quash or demurrer, invite the court's attention to any defect in the indictment; but on the trial objected to the introduction of any evidence by the government because of the claimed defects. This practice is not recognized in criminal procedure. United States v. Harmon (D. C.) 45 Fed. 414.

The rigors of the ancient common law in exacting much particularization in the description of the offense of perjury and subornation of perjury have been greatly modified by sections 5396 and 5397, Rev. St. U. S. [U. S. Comp. St. 1901, p. 3655].

The allegation of the indictment as to the authority of the officer to administer the oath that "he, the said T. E. Fox, then and there being such receiver as aforesaid, and having due and competent authority to administer such oath to the said Charles S. Ely," was clearly sufficient within the provisions of the foregoing sections of the statute.

Error is assigned to the action of the trial court in admitting in evidence the affidavits of the proposed homesteaders, for the procuring of which the charge of subornation of perjury is predicated. The contention of defendant's counsel is that they were not both subscribed and sworn to before the register or receiver of the land office. They were sworn to before the proper officer, but the contention of defendant is that they were not also subscribed before him. The argument in support of this contention is that section 2290, Rev. St. U. S. only required that:

"The person applying for the benefit of the preceding section (that is the section authorizing the entry) shall, upon application to the register of the land office in which he is about to make such entry, make affidavit before the register or receiver," etc.

As this statute did not require that the affidavit should be subscribed before the register or receiver, in consequence thereof it occurred in instances that the application for entry would be signed by a party entitled to file as a homesteader upon certain representations made to him, but would be sworn to by another party presenting himself before the register or receiver. So that in prosecutions for making false affidavits identity between the party signing and the party swearing to it could not be shown.

It is claimed that to obviate this practice and abuse, on March 3, 1891 (Act March 3, 1891, c. 561, 26 Stat. 1097 [U. S. Comp. St. 1901, p. 1389]), Congress amended said section as follows:

"That any person applying to enter land under the preceding section shall first make *and subscribe* (italics the court's) before the proper officer and file in the proper land office an affidavit," etc.

The contention is that before the party was entitled to make the entry he should both make and subscribe to the affidavit before the proper officer; that the making of the subscription before the proper officer is just as essential as that he should make the oath before him; that, as the authority of the register or receiver to administer oaths is limited to matters connected with entries of public lands, they are not authorized to administer oaths for any other purpose or in any other manner; and that the certificate to the affidavit must both state that it was subscribed and sworn to before him.

The statute, however, declares:

"That if the said applicant making such affidavit or oath, swears falsely as to any material matter contained in said proofs, affidavits, or oaths, the said false swearing being willful and corrupt, he shall be deemed guilty of perjury," etc.

While it may be conceded that the purpose of Congress in so amending the statute as to require that the affidavit should be subscribed and sworn to before the officer might be for the purpose of such identification, it is rather evidential in character. The substantive offense denounced by section 5392 of the statute is that:

"Every person who, having taken an oath before a competent tribunal, officer or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, etc., or certificate by him subscribed is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury."

In other words, the corrupting act consists in taking the false oath before a competent tribunal or officer in a case in which a law of the United States authorizes an oath to be administered.

Aside from this, however, the testimony of some of the witnesses, especially that of Mr. Hall, whose affidavits were the predicate of one or more counts on which the defendant was convicted, showed that the witness both subscribed and swore to it before the register of the land office. That is sufficient in this respect to support the verdict on those particular counts.

Error is also assigned of the action of the trial court respecting the use made in evidence of the tract book kept in the land office, and the statements and explanations made by the witness Sanborn, the register of the Minot land office, touching memoranda in this book. In the trial of the case it became necessary for the government to show that the particular land in question was vacant public land, and subject to homestead entry, at the time of the presentation of the preliminary affidavit under investigation. To this end, said Sanborn, the custodian of the tract book in the office, was introduced as a witness, who made explanation respecting certain abbreviated entries therein. Objection was interposed by defendant's counsel against the admission of the book itself, on the ground that it was an unauthorized book, that the entries therein were unintelligible; and objected especially to a notation on some of the tracts to the effect that the entry thereof was under investigation. As the latter matter was withdrawn by the government it need not be considered.

Section 2295, Rev. St. U. S. [U. S. Comp. St. 1901, p. 1398], declares that:

"The register of the land office shall note all applications under the provisions of this chapter, on the tract books and plats of his office, and keep a register of all such entries, and make return thereof to the general land office, together with the proof upon which they have been founded."

The tract book in question was an official register authorized by the statute, and was competent evidence for the purpose for which it was introduced. The notations were in abbreviated form, and the register explained their import. For example, certain portions of a section which had been entered or the entry canceled were indicated by the words and figures "SE¼" and "SW¼," and the like, which he stated meant the southeast quarter or the southwest quarter of the section. The objection to this was that the book, if regarded as a record, must speak for itself. While some courts have held that under special statutes in respect of the assessment and sale of lands for taxes such abbreviations are insufficient, we are of opinion that the common use of such abbreviations on books like those kept in the land offices warranted the court in saying that the knowledge of their import is so universal among the people as not to have required any explanatory testimony, aliunde the record. Some of these abbreviated notations on the face of the books consisted of the letters "F. C.," which the register testified indicated that the final certificates had been issued on the entry; the abbreviation "H. E." meant homestead entry; "S. D. S." meant Soldier's Declaratory Statement; the word "Can." meant canceled entry; "rel." meant relinquished entry.

The statute only requires that the register shall "note" on the tract book applications, and keep a register of such entries. The form and size of such tract book, as every person knows who has had occasion to visit the land office, make it quite impossible that the limited space allotted to each subdivision of land should admit of the notations indicating the history of the acts done respecting the given quarter section being written out in full. Immemorial usage in this respect, so well known to the public, warrants the method. The notations made by the officer are not muniments of title, but merely an indication to him as to the status of the land on his tract book. If, therefore, the necessary abbreviation expressed to the clear understanding of the keeper of the book what that status is, no sensible reason occurs why the register may not by parol explain what the abbreviated notations stood for. In other words, the only purpose of this testimony being to show whether or not the given tract of land was subject to entry when the application to file was made, it is competent for the custodian of the book, familiar therewith, to state that the notations showed the land was open to entry. Furthermore, after the defendant had investigated, as the evidence tends to show, the condition of the land and procured the affiants to make application therefor, as subject to homestead entry, and the entry was so made, it hardly lies in his mouth on trial for procuring false affidavits to gainsay the purport of the words noted on the tract book which were there at the time of the entry. He could not possibly have been prejudiced by the evidence, because he

understood when the entry was made that the lands were subject to entry as and for a homestead.

We are now brought in this discussion to consider questions respecting the action of the court in excluding and admitting certain testimony. It is to be kept in mind throughout this investigation that there was involved under each count of the indictment two pivotal issues. There must have been perjury committed by the designated affiant and the procuring of the affidavit by the defendant. An indispensable element of the first postulate is that the imputed false statement by the affiant must have been willfully and corruptly made; and in the second instance the defendant must have procured the making thereof with knowledge of the fact that the affiant was swearing falsely.

The contention of the defendant, inter alia, is that up to and including the time of the making of the filing affidavits the defendant understood, and so the affiants were given by him to understand, that the construction placed by the land office department on the homestead laws in respect of soldiers and widows of soldiers, such as the entrymen in question, was that they were not required to make actual settlement upon and cultivate in person the land to entitle them to make final proof and obtain a patent; that it was permissible for the defendant to furnish them the money to make such entry and the improvements thereon; and that they might thereafter, at their option, deed him the land at a given price plus the money so advanced by him. Quite different is the crime of perjury as applied to such situation from the instance of a conspiracy to fraudulently obtain the use and title to public lands under simulated homestead entries. In the case at bar the crucial question is the willful, corrupt swearing of the applicant, and the procurement thereto by the defendant with guilty knowledge of the false statement.

To support his contention, in part, the defendant offered in evidence what is known as Exhibit A in the record, designated "Instructions. Department of the Interior. General Land Office. Washington D. C., July 7, 1904. Registers and Receivers, U. S. Land Offices"—which is as follows:

"Sirs: The Department held December 7, 1903, in the Anna Bowes case (32 Land Dec. Dep. Int. 331) as follows:

" 'The widow or minor children of a deceased soldier or sailor, making homestead entry under section 2307 of the Revised Statutes [U. S. Comp. St. 1901, p. 1417], must comply with the requirements of the homestead laws as to residence and cultivation to the same extent as a soldier or sailor making entry under section 2304.

" 'The right to make entry under section 2307 is not transferable, and any contract entered into either before or after entry, which contemplates the sale thereof, is in violation of law.

" 'Directions given that all persons having uncompleted homestead entries made under section 2307 be immediately notified, by registered letter to the last known address of the party making the entry, as shown by the records of the land office, that if they desire to retain such entries they will be required to begin actual residence upon the land within six months from the issuance of such notice, or, if they so elect, they will be permitted to relinquish their entries, without prejudice to their homestead rights, by giving notice of such election within the same time.'

"(1) You are therefore directed to at once notify, by registered letter addressed to the last known address of the entryman as shown by your office

records, each person having an uncompleted homestead entry made under section 2307 of the Revised Statutes:

"(a) That he is required under his existing entry to comply with the requirements of the homestead law as to residence and cultivation to the same extent as is required of a soldier or sailor making entry under section 2304 of the Revised Statutes; that is, for such period as, when added to the military or naval service relied upon, shall equal the required period of five years, with this exception, that where a soldier, whose service is depended upon, died during his term of enlistment, the whole term of his enlistment will be credited upon the period of residence and cultivation required under the homestead laws.

"(b) That the right to make homestead entry under section 2307 of the Revised Statutes is not transferable, and that any contract entered into, prior to the completion of final entry, which contemplates the sale of the land, is in violation of law.

"(c) That under departmental ruling he is allowed six months from date of your letter of notification within which to begin actual residence upon the land heretofore entered, and that should he fail to begin such residence prior to the expiration of such period of six months and thereafter maintain same, his entry will be subject to contest and cancellation for abandonment.

"(d) That should he so elect he will be permitted to relinquish his existing entry without prejudice to his right to make another, provided he shall file in your office, within the above-mentioned period of six months, a relinquishment of all right, title, and interest under his existing entry.

"(2) Upon the filing in your office of such a relinquishment you will immediately cancel the entry and hold the land formerly covered by such entry subject to disposal as in other cases made and provided for.

"(3) Until the expiration of the period of six months no existing entry under section 2307 of the Revised Statutes will be subject to contest upon the ground of abandonment.

"(4) At the expiration of said period of six months you will report each case separately to this office with proof of service of notice as above required upon the entryman, for filing with the papers relating to such case and for such further action as the facts of the case may warrant."

To the admission of this circular the district attorney objected for incompetency, irrelevancy, and immateriality. In that connection he offered:

"To admit upon the record that formerly the opinion prevailed in the local office at Minot, as testified to by some of the witnesses, that residence was unnecessary on the part of widows of soldiers entering lands under the homestead law, and that on July 7th instructions were received from the General Land Office correcting that impression and reversing it, and instructing the local land office to notify all such entrymen to establish a residence within six months, and that such notices were sent out by the local land office to each of the entries of that character involved in this case. Beyond that, we object to the introduction of this exhibit for the reasons stated, and that its contents are hearsay and not admissible under any of the issues involved here."

The court said:

"I think there is matter in this exhibit which would be highly prejudicial if it was received, and, in view of the admission which the government has made, the objection is sustained."

We are inclined to the opinion that this letter of instructions from the land office department was of the nature of a regulatory rule of the Interior Department, under the immediate control of the Commissioner of the General Land Office. Mr. Justice Brewer, in Caha v. United States, 152 U. S. 221, 222, 14 Sup. Ct. 513, 517, 38 L. Ed.

415, speaking of rules and regulations prescribed by the Interior Department not having been formally offered in evidence, said:

"We are of opinion that there was no necessity for a formal introduction in evidence of such rules and regulations. They are matters of which courts of the United States take judicial notice. Questions of a kindred nature have been frequently presented, and it may be laid down as a general rule, deducible from the cases, that wherever, by the express language of an act of Congress, power is intrusted to either of the principal departments of government to prescribe rules and regulations for the transaction of business in which the public is interested, and in respect to which they have a right to participate, and by which they are to be controlled, the rules and regulations prescribed in pursuance of such authority become a mass of that body of public records of which the courts take judicial notice"—citing a number of authorities.

Section 453, Rev. St. U. S. [U. S. Comp. St. 1901, p. 257], provides that:

"The commissioner of the general land office shall perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale of the public lands of the United States, or in any wise respecting such public lands, and, also, such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the government."

Section 2478, Rev. St. U. S. [U. S. Comp. St. 1901, p. 1586], declares that:

"The commissioner of the general land office, under the direction of the Secretary of the Interior, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of this title not otherwise specially provided for."

The document in question was a pronouncement by the General Land Office Department establishing a permanent regulation respecting entries of the public lands pertinent to the entries in question. It is observable that in the statement of Mr. Justice Brewer, supra, he did not say that such a regulation from the department could not formally be introduced in evidence, but that even without such formal presentation the court should take judicial notice thereof. How was the defendant to obtain the benefit of this regulation if it were not placed before the jury? The only way he could get a ruling on its legal effect and competency was to present it to the court as a matter of evidence to go to the jury. The court did not exclude it on the ground that it need not be formally offered in evidence as the court would take judicial cognizance thereof and in its admission or its direction to the jury define and limit its effect; but it was excluded because the district attorney consented that it might go upon record, as an admission that formerly the opinion prevailed in the local office at Minot, etc., thus undertaking to limit the language and purport of the regulation by his own interpretation. The court having thus barred it from the consideration of the jury for any purpose, after it was pressed for consideration, it was neither respectful nor necessary for defendant's counsel to urge it in other manner to secure the benefit of the exception taken to the court's ruling. Long-Bell Lumber Company v. Stump, 86 Fed. 583, 30 C. C. A. 260; Glover v. United States, 147 Fed. 431, 77 C. C. A. 450. The defendant was entitled to have the

jury consider the whole regulation and determine whether or not it was an implied admission by the department of government intrusted with the matter of regulating such entries of the public lands that hitherto, up to the ruling in the Anna Bowes Case, actual settlement and cultivation upon such lands by soldiers and soldiers' widows were not required. It tended to confirm the testimony of the defendant of his understanding of the practice in that respect, and bore directly upon the essential issue of criminal intent.

In all fairness to the defendant, as a corroborating fact of his claimed understanding of the practice aforesaid, this should have been admitted on the sharp conflict between his testimony and that of the witness J. R. Hall. The government was indulged to go back more than three years prior to the finding of the indictment to inquire of said Hall respecting a verbal arrangement between him and the defendant for entering the land in the Minot district, who detailed a conversation claimed to have been had with the defendant about his entry; that he was conscious of committing perjury when he swore to his application; and that he did it in carrying out his understanding with the defendant, to the effect that in consideration of the sum of $200 he was to convey this land to the defendant on making final proof, which the defendant denied; and, further, that he (Hall) did not make actual settlement and improvement thereon. It would be a corroborative circumstance for the defendant to show that it was the common understanding, acquiesced in by the land office department up to that time, that no such actual settlement and cultivation by the entrymen were required; and most certainly it bore upon the question as to whether or not the defendant in that respect was guilty of subornation of perjury in Hall's case.

There are many assignments of error respecting the action of the court in allowing certain questions asked by the prosecution and the disallowance of questions on the part of the defendant. We will only consider such of these errors as are deemed representative.

Mrs. Arnold was one of the persons charged to have made a false affidavit by the procurement of the defendant. She was introduced as a witness by the government, and was by no means an unwilling witness. To show the defendant's conscious sense of irregularity in his action in this matter, this witness testified respecting a conversation had with the defendant after she was advised that the later ruling of the land office department required that she make an actual settlement and cultivation of her homestead, and after she moved on to it. She testified that, after she received a letter from the land office saying it was unlawful for her to take up land under a contract, she saw the defendant in January and February, 1905, when she had a conversation with reference to the land; "and he told me that the law was changed, that I would have to go and prove up the land. I asked him if it was worth proving up, and he said 'Yes,' it was a better piece of land than he thought it was when he took it up, and also said that when it was proved up it would be worth a thousand dollars. When I came back I often saw and spoke to Mr. Nurnberger; that is when I came back to live on the land. I had no conversation in particular that I remember of with Mr. Nurnberger on the subject of this contract that

I made with him." Whereat, the district attorney asked the following question:

"Well, give us the general conversation you had with him then."

To which the defendant interposed objection that it was incompetent because relating to a matter occurring subsequent to the matters alleged in the indictment counting on this entry, and the intent of the defendant not being an essential element, etc. The objection was overruled. The witness answered:

"Why, he spoke about some one getting him in trouble. * * * I have had no conversation with Nurnberger since I came to Fargo, but have talked with him on different things, but not on this since I came to Fargo here as a witness. He told me to tell the truth."

Her answer was not satisfactory to the prosecution, and thereupon the district attorney asked the following question:

"I want to refresh your recollection. Do you remember Mr. Nurnberger saying to you since you came to Fargo that if it were not for his sons that he would let the trial go, and that he told you, 'I said to my sons to get out of the blamed state and let it go?'"

This was objected to as leading and cross-examination of the government's witness. The objection was overruled. The witness answered:

"Why, he said something but I don't remember: I can't remember just what he said."
"Q. State whether or not that was the substance of it."

Objection was again interposed on the ground that it called for a conclusion of the witness. This objection was overruled. The witness answered:

"Yes. I can't repeat the words he said. It was something like that, but I can't remember the words he said. I think it was to that effect."

It must be confessed that this was most obnoxious to the objection of a leading examination of the prosecution's own witness. It not only suggested the matter desired, but put words in the mouth of the witness who could then only say "it was something like that." The government, however, got the full force of the words suggested by the prosecutor.

The same offense was repeated in other instances; strikingly so in the case of Hall, the affiant named in the tenth count of the indictment, on which a conviction was had. He had no written contract with the defendant respecting the land, and testified about conversations he had with the defendant in 1902 respecting the entry. He admitted that he was conscious in making the affidavit that he was swearing to what was not right, that he did not intend to comply with the homestead law in making settlement, cultivation, etc., and that he did not file in good faith. Thereat the district attorney asked the following question:

"Wasn't it the facts under which you came out there and the purposes for which you came out there?"

This was objected to on the ground that it was leading and suggestive. The objection being overruled, the witness answered:

"Yes, sir. I knew at that time about my arrangement with Mr. Nurnberger. There was no other fact or circumstance with reference to my coming out to North Dakota to take up lands which affected my rights in any way to my knowledge except my arrangements with Mr. Nurnberger."

"Q. Any impression that you had that the transaction was wrong, was it based on anything else than your arrangement with Mr. Nurnberger? That is, was that all or was there more?"

This was objected to on the ground that it was leading, suggestive, and argumentative. The objection was overruled, and the witness answered:

"Well, I couldn't take the oath without doing wrong; that is the way I took it. I couldn't fulfill my contract without doing something that I thought was not right."

In the examination of Mrs. Lowell, one of the affiants counted on in the indictment, the prosecution being concerned to show that she made the affidavit reciting that she applied to enter the land for a homestead, not to inure to the benefit of another, and that she was induced thereto by the defendant, the following questions were asked:

"Q. State whether or not the manner in which the business was done and the extent to which it was done by Mr. Nurnberger had anything to do with making you believe that it was proper and lawful?"

Objection thereto being overruled, she answered:

"He didn't say anything about it, whether it was or not."

This being unsatisfactory to the prosecution, it was followed up with the further question:

"What I want to get at is this: State whether or not you was led to believe and did believe that the transaction was proper because it was done openly by so many people there at that time, whether that had anything to do with it."

Objection to this was overruled, and she answered:

"Yes, sir; when the affidavit was read over to me by the lawyer, I heard him say 'that my said application is honestly and in good faith made for the purpose of actual settlement and cultivation and not for the benefit of any other person, persons, or corporation,' but I didn't understand that way. I also heard the lawyer read, 'and that I will faithfully and honestly endeavor to comply with all the requirements of the law as to settlement, residence and cultivation necessary to acquire title to the land applied for,' and 'that I am not acting as agent for any person, corporation or syndicate to give them the benefit of the land entered or any part thereof or of the timber thereon,' and 'that I do not apply to enter the same for the purpose of speculation but in good faith,' etc. But I don't remember him reading 'and that I have not directly or indirectly made and will not make any agreement or contract in any way or manner, with any person, or persons, corporation, etc., by which the title I might acquire from the government should inure in whole or in part to the benefit of any person except myself."

Finney is another entryman counted on in the indictment. He had a written agreement with the defendant respecting the arrangement between them. He was a witness for the government. The district at-

torney, over the objection of the defendant, was permitted to interrogate him as follows:

"What was the agreement between you and Nurnberger, just state it all?"

This was objected to, inter alia, that as the agreement was in writing it spoke for itself, and if verbal the proper way to show what it was was to state the terms thereof. Then the district attorney asked:

"State whether or not you made the trip to North Dakota and filed on the land to carry out your agreement with Nurnberger."

He answered:

"Well, that was about the size of it."

When the defendant was on the witness stand he was asked by his counsel:

"You may state if at any time you made a contract with anybody to locate them on lands under the terms of which you were to have the land at all events when he proved up."

The court sustained objection to this. He was further asked by his counsel:

"State what the terms and conditions of your agreement were when you located her (meaning Mrs. Arnold)."

Remarkably enough, in view of rulings by the court on like objections interposed by the defendant's counsel, the objection to the above question was sustained on the ground that it "called for a conclusion and not a conversation and documents."

The general rule undoubtedly is to leave the propriety of leading questions to the sound discretion of the trial court, the exercise of which is not ordinarily ground of error. The application of the rule obtains where the witness is apparently unwilling, or unfriendly to the questioner, or where the party has been misled by previous assurances to counsel. It must, however, be conceded that the abuse of such discretion would have no corrective if it were rigidly maintained that it is not reviewable. The repeated indulgence to the prosecutor in putting leading questions, and in form to suggest the answer, and calling for the mere conclusion of the witness, was manifestly unfair and prejudicial to the defendant. Many of these witnesses were not unfriendly to the prosecution, or displayed any reluctance to aid it. After the ruling of the land office department, indicated by said Exhibit A, there was some flurry among these entrymen, from apprehension of exposure to a prosecution for perjury. They were visited by an inspector. Some of them voluntarily placed in his hands the agreements between them and the defendant under which he undertook to find the lands. The witnesses, Arnold and Hall, most certainly needed no suggested testimony, or to have put in their mouths words to express it.

It were but affectation to pretend that these witnesses did not testify under the conscious sense that probably they would more certainly secure immunity for themselves by contributing freely to the conviction of the defendant. And in view of the stress under which the affiants testified it was hardly charitable to press them for an answer to

words framed by the prosecution when a failure to respond to his liking might, in their minds, endanger their desired immunity.

Words are at times especially significant. If counsel are permitted to so frame a question put to their own witness as to suggest the answer desired, there is always imminent danger of getting before the jury the phrases and ideas not really those of the witness.

Why should not the defendant have been permitted to testify that he made no contract with any of the affiants in question whereby he was to have the land in any event? It was permissible for him to testify that he did not so understand the arrangement he made with them. It is settled law that a party charged with the commission of a crime or the perpetration of a fraud may testify that he entertained no criminal or fraudulent intent. The very gist of the crime of perjury is made by the statute itself to depend upon the fact that the oath made should not only be false, but the falsehood must have been willfully and corruptly asserted. So if the affidavit made or procured was in ignorance of its contents, or under a misapprehension of its purpose, no matter how culpably negligent in a civil action the party might be, he could not be convicted of perjury, because the act was wanting in the required willfulness and corruption. The witness should have been permitted to answer the question as to whether or not he had ever made any claim to the land entered by Mrs. Arnold, especially in view of the fact that the district attorney, over the objection of his counsel, was permitted to show by the cross-examination of the defendant that in respect of some lands entered by some soldiers as homesteads as far back as 1900–1901, not counted on in the indictment, the defendant had obtained deeds thereto from such soldier soon after the entry, and prior to final proof. If that were permissible against the defendant to show "guilty knowledge," as ruled by the court, why was it not permissible for the defendant to state that as to the land of Mrs. Arnold, who had testified energetically against him, he had made no such claim? It is difficult to escape the impression that the court was either too indulgent to the government or too discriminating against the defendant.

Justice takes delight in according to every human being, charged with the commission of a crime, a fair and impartial trial. Prescribed rules of criminal procedure are the outgrowth of long and sane experience, buttressed by the earnest study and wisdom of jurists and lawgivers. They may be hedged about by some refinements, unjustly stigmatized by overzealous partizans as "mere technicalities," yet judicial, impartial, history attests the fact that often they constitute effective barriers against unreasoning passion and the behests of spasmodic clamor.

Complaint is made of that portion of the charge to the jury in which the court said:

"These affidavits are before you. They will go to the jury room with you. It is conceded in each case that the entrymen swore to the affidavit. That is one fact we start out with. What is the second fact? Did these affidavits contain any statement which was not true?"

The court then said, if the statements were true, that was the end of the case; if they were not true, the jury would proceed to the in-

quiry as to whether the entrymen signed the affidavits knowing that they contained those statements, or any of them, and that any such statement was not true; if they did and intentionally swore to the affidavit, they committed perjury.

The generalization of this direction was calculated to mislead the jury. It apparently, to the mind of the laymen, narrowly directed attention to the effect of the mere recitals of the affidavit. It authorized the jury to find that, if the affiant did not intend to make actual settlement on and cultivation of the land, the oath was criminal; although the affiant may have understood and believed that as applied to his or her condition and privilege, the affiant was not required to make settlement on and cultivate the land; and therefore gave no heed to such recital in the affidavit, regarding it as formal and not material. The oath, under such conditions, would not be willful and corrupt, as it would be wanting in essential criminal intent. The charge should have been so qualified in the immediate connection to avoid the danger of the jury being misled by the stress laid upon the abstract recitals.

Other errors are pressed for consideration, but they are not of sufficient importance to justify the further extension of this prolonged discussion; and the matters complained of may rectify themselves on a second trial.

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

HOOK, Circuit Judge (dissenting). That the defendant was guilty was shown overwhelmingly and beyond every reasonable doubt. Indeed, the proof went to the verge of confession. The matters mentioned in the opinion, even if unexplained in the voluminous record of a long trial, which I think is not the case, contributed nothing to an unjust result. The contention of counsel that the District Attorney was occasionally allowed to ask leading questions is, it seems to me, a fair illustration of the merit of the grounds relied on for reversal.

GRAY v. GRAND TRUNK WESTERN RY. CO.

(Circuit Court of Appeals, Seventh Circuit. May 18, 1907. Rehearing Denied Oct. 22, 1907.)

No. 1,339.

1. LIMITATION OF ACTIONS—PLEADING—DEMURRER RAISING DEFENSE.

Under the common-law practice in force in Illinois, the question of limitation cannot be raised on demurrer to a declaration.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 670–675.

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

2. RECEIVERS—INJURIES RESULTING FROM OPERATION OF PROPERTY—NATURE OF LIABILITY.

It is the settled doctrine of the federal courts that a receiver is not personally liable for injuries arising through negligent operation of the property not due to his personal negligence, but an action against him

for such injuries is in law one against the receivership in which the judgment recovered can be enforced only against the property or funds in his hands, and which cannot be maintained after the receivership has been closed and the receiver discharged.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Receivers, § 322.

Actions by and against receivers of federal courts, see note to J. I. Case Plow Works v. Finks, 25 C. C. A. 49.]

3. SAME—ASSUMPTION OF LIABILITY BY PURCHASER OF PROPERTY—NATURE OF LIABILITY.

Where by the local law the obligation assumed by a successor or purchaser who takes over property or a fund from a receivership, with assumption of liabilities, is one of direct liability, and not merely equitable, for the payment of claims chargeable against the property or fund, such local law fixes the nature of the cause of action for the enforcement of such liability in a federal court, and an action at law may be maintained in such court against the purchaser alone to recover for a personal injury for which the property in the hands of the receiver was chargeable.

4. PLEADING—DECLARATION—DUPLICITY.

A declaration, in an action to recover for a tort committed by railroad receivers, against a purchaser which succeeded to the property, is not bad for duplicity because it alleges as grounds of liability an express assumption of liability for all claims against the receivership, and also that the defendant succeeded to betterments and improvements made by the receivers from earnings of the receivership which were liable for plaintiff's claim.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 134–137.]

In Error to the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois.

This writ of error is from a final judgment against the plaintiff in error, as plaintiff below, upon demurrer sustained to the declaration, as finally amended, and election to stand by such declaration.

The transcript of record shows that the plaintiff in error filed suit in trespass on the case, December 7, 1900, in the superior court of Cook county, against F. C. Austin Manufacturing Company, and E. W. Meddaugh and Henry B. Joy, as receivers of Chicago & Grand Trunk Railway Company; and that in 1903 the Grand Trunk Western Railway Company was impleaded as a defendant therein. Subsequently, after issues joined and trial in that court upon which verdict was set aside, the proceedings resulted in submission to a dismissal as to the defendants Austin Manufacturing Company and the receivers (upon suggestion of the death of one receiver and discharge of the other, and delivery of all the railroad property to the defendant Grand Trunk Western Railway Company), and continuance of the cause with a new trial granted as against the Grand Trunk Western Railway Company. Thereupon, on application of such remaining defendant, the cause was removed to the Circuit Court of the United States, on June 19, 1905. Other proceedings in the Superior Court, which are referred to in the transcript, are not material upon this writ of error. Several amended declarations were filed, resulting in the final amended declaration, upon which this judgment of dismissal rests under demurrer.

This declaration avers that the plaintiff in error was injured on March 5, 1900, in operations of the railroad under receivers named, through negligence in such operation, while he was "in the exercise of due care and caution about his own safety," and that the receivers were appointed and acting under orders of the United States Court for the Eastern District of Michigan, in foreclosure proceedings against the railroad company then owning the road. For recovery thereupon against the defendant in error, subsequent proceedings in that court under a foreclosure decree are averred in the filing of a petition by the defendant in error, as purchaser under the decree, and an order of the court granting the prayer of the petition; each entitled in that cause and reading as follows:

First. "This petition of the Grand Trunk Western Railway Company respectfully shows:

"(1) That it is a corporation existing under and by virtue of the laws of the states of Michigan and Indiana, created as hereinafter stated; that it is now the owner of the entire railroad and property formerly owned by the Chicago & Grand Trunk Railway Company—one of the defendants in the above-entitled cause—which were embraced in and sold under and pursuant to the decree in said cause; and that it derived its said title through the following deeds of conveyance: (a) By separate deeds for each of the states of Michigan, Indiana, and Illinois, of the portion of said railroad and property lying and being in each of said states, by Walter S. Harsha, special master commissioner, to Charles M. Hays and Elijah W. Meddaugh, the purchasers at the sale, made pursuant to said decree, in which deeds said complainant, the Mercantile Trust Company (of New York), trustee, and said defendants, the Chicago & Grand Trunk Railway Company, the Union Trust Company (of Detroit), trustee, and Hugh Paton, trustee, joined. (b) By separate deeds of conveyance, for each of said states, by said Hays and Meddaugh, of that portion of said railroad and property lying and being in the state of Michigan to the Port Huron & Indiana Railway Company; of that portion thereof lying and being in the state of Indiana, to the Indiana & Illinois Railway Company; and of that portion thereof lying and being in the state of Illinois, to the Chicago Lake County Railway Company—each of said railway companies having been organized by said Hays and Meddaugh, pursuant to statutory provisions, for the express purpose of accepting such conveyances.

"(2) That subsequently said Port Huron & Indiana Railway Company and said Indiana & Illinois Railway Company were consolidated, and thereby your petitioner was duly created, pursuant to the statutes of the states of Michigan and Indiana. Afterward your petitioner, having become the owner of the entire capital stock of said Chicago Lake County Railway Company, purchased that part of said railroad and property lying and being in the state of Illinois, and received a deed thereof from said Chicago Lake County Railway Company.

"(3) That by the laws of the states of Michigan and Indiana, under and pursuant to which it was created as aforesaid, your petitioner is expressly made liable for all the debts and obligations of its constituent members, to wit: Said Port Huron & Indiana Railway Company and said Indiana & Illinois Railway Company; and by the laws of the state of Illinois, under and pursuant to which it acquired that part of said railroad and property lying in said state of Illinois as aforesaid, your petitioner is expressly made liable for all the debts and obligations of said Chicago Lake County Railway Company.

"(4) That in each of the several deeds through which your petitioner derived its title to said railroad and property as aforesaid, it is provided, in substance, that the conveyance is expressly made subject to the obligations by said decree imposed upon the purchasers of said railroad and property at said sale thereof by said special master commissioner, and upon their successors and assigns.

"Copies of each of said several deeds of conveyance which constitute petitioner's chain of title to said railroad and property are hereto attached.

"(5) It is provided in said decree, under and by virtue of which said railroad and property were sold to said Hays and Meddaugh as aforesaid, as follows, viz.: 'It is further ordered, adjudged, and decreed that the purchaser or purchasers of said railroad franchises and other property at such sale shall, as part of the consideration and in addition to the price bid, pay and discharge any and all receivers' indebtedness and liabilities that shall not have been paid by the receivers, and any and all claims heretofore filed in this cause, or that may be hereafter filed within four calendar months from the date of entering this decree, but only when and as the court shall allow such claims and adjudge the same to be a lien prior to the mortgage foreclosed in this suit; and shall pay all costs of court, fees of clerks and masters, and any sums awarded by the court to the parties to this suit, and their counsel, or to the receivers in this cause; and, furthermore, shall pay all costs and expenses involved in and incident to the suits instituted in said Circuit Courts of the United States for the District of Indiana and for the Northern District of

Illinois in foreclosure of said mortgage of April 10, 1880, and shall abide by and comply with and perform all other orders and decrees that may be made by this court or by said Circuit Courts of the United States for the District of Indiana and for the Northern District of Illinois, or either of them, in the said cases therein pending. Any such purchaser or purchasers, and his or their successors and assigns, shall have the right to enter his or their appearance in this court, or any other court, and he or they, or any of the parties to this suit, shall have the right to contest any claim, demand, and allowance existing at the time of the sale and then undetermined, and any claim or demand which may arise or be presented thereafter, which would be payable by such purchaser or purchasers, his or their successors or assigns, or which would be chargeable against the property purchased, in addition to the amount bid by such purchaser or purchasers at the sale, and may appeal from any decision relating to any such claim, demand or allowance.'

"(6) Your petitioner hereby admits itself to be the successor and assigns of said Hays and Meddaugh, within the intent and meaning of said decree, and that it is legally liable for all the obligations imposed by said decree upon the purchasers of said railroad and property at the sale thereunder as aforesaid, and is amenable to all orders and decrees of this court, of the Circuit Court of the United States for the District of Indiana, or the Circuit Court of the United States for the Northern District of Illinois, that may be made in respect thereof; and it hereby submits itself to the jurisdiction of this court and of said courts in respect of any such orders or decrees.

"(7) That your petitioner is desirous of securing immediate possession of said railroad and property, and, to that end, prays an order of the court directing the receivers to at once turn over and deliver the same to your petitioner, together with any money balances, credits, etc., growing out of or connected with the operation of said railroad and property by said receivers, that may be in their possession and control; your petitioner hereby signifying its willingness to accept and assume all outstanding obligations and liabilities of said receivers, and hereby undertaking to fully satisfy and discharge the same as they shall from time to time, within the terms of said decree in that behalf, be allowed and ordered paid by this court, by the Circuit Court of the United States for the District of Indiana, or by the Circuit Court of the United States for the Northern District of Illinois. And your petitioner is willing and hereby agrees to accept the full and final accounting of said receivers, as such accounts shall be rendered by them to petitioner, and consents to the final discharge of said receivers and the cancellation of their bonds as such receivers. Your petitioner prays that it may be permitted to enter its appearance, by its solicitor or attorney, in this cause and in the causes pending in the two other courts aforesaid, to the end that it may be heard respecting any claims that may now be pending or may hereafter be presented either against said Chicago & Grand Trunk Railway Company or against said receivers pursuant to the provisions of said decree."

Second. Whereupon the following order was entered:

"The foregoing petition being duly considered, and all parties to the suit, by their respective solicitors of record, consenting, it is hereby ordered: That the prayers of the petition be and hereby are granted. The receivers, E. W. Meddaugh and H. B. Joy, are hereby directed to turn over and deliver to said petitioner, on the 1st day of December, 1900, all of the railroad, property, money, accounts, and effects as prayed, and the said receivers are hereby relieved of any further accounting to this court for the administration of their receivership, and their bonds for the faithful performance of the duties of said receivership are hereby canceled, and the surety on said bonds hereby released."

It is then averred "that in pursuance of said last-mentioned order, entered as aforesaid, said railroad and railroad property and all the improvements and betterments made thereon by said receivers during said receivership, and all money balances, credits, etc., and all other property in the possession of said receivers, as aforesaid, were turned over and delivered to the said defendant, the Grand Trunk Western Railway Company." And that "by means of the premises and the petition, orders and decrees, as aforesaid, the said defendant, the Grand Trunk Western Railway Company, became and still is liable to pay to the plaintiff any and all damages sustained by him through

the negligence, as aforesaid, of said receivers"; that, though often requested, the defendant has not paid his said damages, but refused to pay the same to his damage of $50,000, "and therefore he brings his suit."

The demurrer to this amended declaration is in the form of a general demurrer "for want of a sufficient declaration in this behalf," with seven specifications of cause, which are sufficiently referred to in the opinion.

John A. Brown, for plaintiff in error.

George W. Kretzinger, for defendant in error.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

SEAMAN, Circuit Judge (after stating the facts as above). The declaration avers an injury suffered by the plaintiff in error, while engaged in the service of the receivers, under circumstances which would charge the receivers with liability, upon due proof in a suit against them, prosecuted during the term of receivership. Suit was not commenced, however, until after sale of the res under a foreclosure decree, delivery to the defendant in error through a purchase thereunder, and discharge of the receivers, as averred in the amended declaration in question. The foreclosure proceedings referred to were in the Circuit Court of the United States for the Eastern District of Michigan, where the receivers were appointed, with ancillary proceedings and appointment in the Northern District of Illinois and elsewhere; and the plaintiff in error brought the present action, as trespass on the case, in the superior court of Cook county, Ill., against the receivers so appointed (and acting when the injury occurred), impleaded with T. C. Austin Manufacturing Company and Grand Trunk Railway Company, as defendants. More than two years elapsed before the defendant in error, Grand Trunk Western Railway, was impleaded as defendant; and subsequently there was a discontinuance as to the other defendants, with the defendant in error retained as sole defendant. Removal to the trial court ensued, and the declaration, as finally amended to charge liability thereupon, was challenged by demurrer. The inquiry whether it states a cause of action against the defendant in error is the only serious question for review, and its solution is not free from difficulty under the authorities.

Were the question of liability one arising in equity, in proper forum upon timely application, no difficulty would appear in framing the issues and granting the relief which equity affords upon proof of the facts, unless barred by limitation or laches. Instead of such course, with remedy sought at law, not only is the case governed by the rigid rules of that forum, but it has become complicated through mistakes in procedure and failure to bring in proper parties and charge liability within a period of limitation which may bar redress for the alleged cause of action in any forum. Upon demurrer, however, the question of limitation, for which the defendant in error contends, cannot arise under the common-law rules upheld in Illinois (Gebhart v. Adams, 23 Ill. 397, 76 Am. Dec. 702; Gunton v. Hughes, 181 Ill. 132, 134, 54 N. E. 895, 1 Chitty on Plead. [16th Am. Ed.] 506, 526), and that objection must be disregarded upon review of the ruling against the sufficiency of the declaration.

The matter for which recovery is sought is the injury alleged to be

caused by negligence on the part of the receivers in their operation of the railroad property in custodia legis. As the defendant in error had no part or interest in such operation, nor existing interest even in the property, it was plainly not answerable for the alleged negligence when this cause of action accrued; but liability is predicated upon the further averments of subsequent transactions in the purchase of the property, under decrees in the foreclosure proceedings, whereby it assumed obligations incurred by the receivers. In other words, with a cause of action set up against the receivers—neither acknowledged by them nor sued upon within the terms of receivership—recovery is sought against the purchaser alone, as for an obligation thus assumed through the terms of purchase and circumstances of succession in estate.

The general doctrine which controls the enforcement of remedies in the federal forum has frequently been declared by the Supreme Court, as preserving the distinctions between law and equity, under the constitutional grant of judicial powers, so that "the adoption of the state practice must not be understood as confounding the principles of law and equity, nor as authorizing legal and equitable claims to be blended together in one suit," in conformity with such state practice. Bennett v. Butterworth, 11 How. 669, 674, 13 L. Ed. 859; 5 Notes U. S. Rep. 60; Lindsay v. Shreveport Bank, 156 U. S. 485, 493, 15 Sup. Ct. 472, 39 L. Ed. 505. With no averments to charge direct or personal common-law liability against the defendant in error, these considerations set up for recovery, through purchase and succession to the railroad property—at least aside from the express assumption of receivership obligations—are not legal obligations at the common law; and as equitable obligations alone they are barred from enforcement at law, under the above-stated doctrine. So, in reference to the alleged assumption of liability, without privity between these parties, the general rule upheld in National Bank v. Grand Lodge, 98 U. S. 123, 125, 25 L. Ed. 75, and Keller v. Ashford, 133 U. S. 610, 620, 10 Sup. Ct. 494, 33 L. Ed. 667, would stand in the way of such enforcement, unless the subsequent opinions in Willard v. Wood, 135 U. S. 309, 313, 10 Sup. Ct. 831, 34 L. Ed. 210, and Union Life Insurance Co. v. Hanford, 143 U. S. 187, 190, 12 Sup. Ct. 437, 36 L. Ed. 118, are applicable to modify the rule.

Under the first-mentioned doctrine, it has long been the rule of the federal jurisdiction—both before and since the general enactment of 1872 (Act 1872, c. 255, § 5, 17 Stat. 197; section 914, Rev. St. [1 U. S. Comp. St. 1901, p. 684]), adopting "the practice, pleadings, and forms and modes of proceeding" of the states respectively—in common-law civil cases, that equitable claims and defenses are not enforceable at law in the federal court, notwithstanding such authorization in the courts of the state. Lindsay v. Shreveport Bank, supra. Without plain sanction, either for departure from that rule or for the exercise of jurisdiction at law under conditions and in precedents applicable to these averments, the present suit would not appear to be maintainable, and demurrer to the declaration was rightly sustained. On the other hand, if the later decisions of the Supreme Court establish a rule—whether by way of modification of such doctrine or other-

wise—which authorizes the remedy thus sought, they are to be observed as controlling.

Expressions in the opinions in the above-mentioned cases of Willard v. Wood and Union Life Insurance Co. v. Hanford may not appear in harmony with the view that no claim purely equitable can be enforced at law under the sanction of the state practice. In each of these cases, speaking in reference to the enforcement by a mortgagee of a covenant between his mortgagor and a grantee of the latter for payment of the mortgage indebtedness, it is stated (without qualification) that:

"The question whether the remedy of the mortgagee against the grantee is at law and in his own right, or in equity and in the right of the mortgagor only, is * * * to be determined by the law of the place where the suit is brought."

In neither case, however, can these remarks be accepted as decisive of the present inquiry, under our understanding of the issues there involved. The issue in Willard v. Wood was whether such obligation was enforceable in a suit at law by the mortgagee against the grantee, without privity between the parties; and the denial rests, as stated in the opinion, on the authority of National Bank v. Grand Lodge, supra, and Keller v. Ashford, supra, upholding the common-law rule. The remarks upon remedy, as "governed by the lex fori, the law of the District of Columbia, where the action was brought," were made arguendo, in answer to the contention that the plaintiff was entitled to the benefit of the rule in New York (where the property and conveyance were located), which authorized such suit "either in equity or at law." Whether there was any provision or rule in New York fixing the nature of the obligation was not there considered. That the rule of practice referred to could not fix the form of remedy in another forum was decided in conformity with the citations in the opinion, and the comment must be read in that view. In Union Life Insurance Co. v. Hanford, the suit was in equity for foreclosure of a mortgage, in the federal court, sitting in Illinois, and issue arose upon claim of a deficiency judgment against the mortgagor. The defense was that his personal liability was discharged by an extension of time granted by the mortgagee to a grantee of the mortgagor who had assumed payment of the debt; and, the fact being undisputed, the sole test of liability was whether the grantee became directly and primarily obligated in favor of the mortgagee, so that his relation to the mortgagor became that of principal with the latter as mere surety for the debt. Under the law of Illinois, the opinion states that such was the well-established nature of the liability; and, thus applying the law of the contract, the defense was sustained. By way of premise for this conclusion, the opinion refers to the "remedy of the mortgagee against the grantee" as determined by the law of the place where suit is brought (in the language above quoted), with the remark, "as was adjudged in Willard v. Wood." But the decision, upon our understanding of its import, rests on the interpretation of the agreement in question as creating direct (legal) liability, in conformity with the local law, for which remedy at law was proper.

In the case at bar, however, the equitable features are far more complicated than those involved in either of the above-mentioned decisions. The special nature of the liability incurred for injuries arising through negligent operation, under a receivership, has been fruitful of much discussion in judicial opinions and text-books; but no review of the various theories is needful for the present inquiry, as these propositions are well settled in the federal courts: (a) The receiver is not chargeable with personal liability for such injuries, not due to his personal negligence or conduct, but is chargeable as the representative of the property and funds in his custody within the limits of such property and of his possession or control. (b) "Actions against the receiver are in law actions against the receivership, or the funds in the hands of the receiver, and his contracts, misfeasances, negligences, and liabilities are official, and not personal, and judgments against him as receiver are payable only from the funds in his hands." McNulta v. Lochridge, 141 U. S. 327, 332, 12 Sup. Ct. 11, 35 L. Ed. 796. (c) Prior to the act of Congress of 1887 (Act March 3, 1887, c. 373, 24 Stat. 554, 1 Comp. St. 1901, p. 582), the receiver could not be sued without leave of the court having custody of the res, and all claims were subject to adjudication in such court. Davis v. Gray, 16 Wall. 203, 218, 21 L. Ed. 447; 7 Notes U. S. Rep. 980. In other words, no liability arises which is enforceable at law, except as authorized either under the terms of this statute or by the court administering the property. (d) With the termination of the receivership and transfer of property and funds, as disclosed in the declaration, the suit at law was not maintainable against the receivers. McNulta v. Lochridge, supra, and 12 Notes U. S. Rep. 30; Beach on Receivers (Alderson) §§ 720, 725; Gluch & Becker on Receivers, § 82; 2 Elliott on Railroads, § 587; Archambeau v. Platt, 173 Mass. 249, 251, 53 N. E. 816.

The defendant in error, as purchaser of the property and successor to the fund, having no part in the alleged tort, if chargeable for the damages, is chargeable alone through liability assumed in the purchase and circumstances of succession; and then only, under the facts averred, in conformity with the principles of equity, if governed by the general doctrines above referred to. In such aspect, however, the case is, as we believe, directly within and ruled by the decision of the Supreme Court in Texas & Pacific Railway v. Bloom, 164 U. S. 636, 643, 17 Sup. Ct. 216, 41 L. Ed. 580, supplementing the prior decision in Texas & Pacific Railway v. Johnson, 151 U. S. 81, 99, 14 Sup. Ct. 250, 38 L. Ed. 81. While the earlier case of Johnson arose upon writ of error to the Supreme Court of Texas, and the personal judgment against the corporation succeeding the receivership was affirmed upon the ground that the question of liability was one "of general law and for the state court to pass upon," the Bloom Case arose in the Circuit Court of the United States, and was brought from the Circuit Court of Appeals on error to the Supreme Court. Both cases were identical in the circumstances upon which the liability of the corporation was predicated, and the opinion (151 U. S. 99, 14 Sup. Ct. 250, 38 L. Ed. 81) affirming the Johnson judgment thus summarizes the rule adopted by the state court for charging personal liability:

"In the view of that court, a railway company might be held directly liable when a receiver is appointed in an amicable suit at the instigation of the company and for the company's own purposes, and, these purposes being accomplished, the property is returned to its owner, the rights of no third persons as purchasers intervening, upon the ground that the acts of the receiver might well be regarded as the acts of its own servant, rather than those of an officer of the court, which under such circumstances he would only be sub modo. But as the court did not feel authorized to entertain a conclusion which might carry the implication that this receivership would have been created or continued, although its object had only been to place the property temporarily beyond the reach of creditors until it could be augmented in value by improvements made from earnings under the protection of the court, that rule was not applied in this case. The company was held liable upon the distinct ground that the earnings of the road were subject to the payment of claims for damages, and that as, in this instance, such earnings to an extent far greater than sufficient to pay the plaintiff had been diverted into betterments, of which the company had the benefit, it must respond directly for the claim. This was so by reason of the statute (Laws Tex. 1887, p. 120, c. 131, § 6), and, irrespective of statute, on equitable principles applicable under the facts."

On examination of the statutory provision referred to under the title of "Receivers," which mentions liabilities to be paid by a receiver out of moneys coming into his hands, we find no obligation imposed, either upon receiver or fund, not within the general rules of equity and well recognized as thus chargeable.

The subsequent case of Bloom, brought from the federal court, involved not only the question of liability, upheld in the prior decision when arising in a state court, but the further question of direct enforcement at law in the federal forum. Error was assigned upon the contention that the alleged cause of action was equitable and furnished no support there for a personal judgment at law; and thus presented, as in the present instance, the main question for review. In overruling this assignment, the opinion recognizes both the equitable nature of the liability there charged and the limited scope of the Johnson decision. It recites, however, the above-quoted review in that opinion of the premises and rule of the Texas decisions, and expressly approves and adopts them, as applicable in the federal court there sitting. In reference to the charge for betterments, the opinion is explicit in approval of direct liability, subject to the right of the company to "have the aid of a court of equity to restrict its liability to that amount," upon showing that the claims exceeded the betterments. We understand that the decision, although not expressly so defined, rests upon this view: That the local law establishes the obligation assumed by the successor, who takes over the property and fund from a receivership with assumption of liabilities, to be one of direct liability, and not merely equitable, for payment of claims chargeable against the fund; and that the direct liability so affixed determines the nature of the cause of action in the federal court, and it becomes enforceable there at law. With the adoption of the direct liability rule of Texas, the remedy may be administered at law, within the settled principles of that jurisdiction; and if question is open as to the bearing or effect of the rule when arising in equity jurisprudence, it is not pertinent on this review.

These decisions are applicable, as we believe, both to the equitable state of facts averred in the present declaration—with their effect

strengthened by the special admission on the part of this defendant in error, in paragraph 6 of its petition for possession of the railroad, "that it is legally liable for all the obligations imposed by said decree"—and to the lex fori, as settled by the Illinois decisions.

As before mentioned, it has long been the established law of Illinois that one person who contracts with another to assume an indebtedness of the latter to a third person becomes directly and primarily liable to such third person, who may sue at law upon the promise (Union Life Insurance Co. v. Hanford, supra, and cases cited); and such rule is general, not limited to mortgage indebtedness assumed by a grantee (Eddy v. Roberts, 17 Ill. 505, 508; Thompson v. Dearborn, 107 Ill. 87, 92).

In Bartlett v. Cicero Light Co. (decided in 1898) 177 Ill. 68, 73, 52 N. E. 339, 42 L. R. A. 715, 69 Am. St. Rep. 206, the question of the defendant's liability, in a suit at law, arose under circumstances singularly identical with those stated in the above-cited Texas cases, and the opinion cites and adopts the rulings of the Supreme Court of Texas thereupon, with special reference to Texas & Pacific Ry. Co. v. Johnson, 76 Tex. 421, 13 S. W. 463, 18 Am. St. Rep. 60, which was subsequently affirmed by the Supreme Court of the United States, as above referred to. Not only was direct liability upheld and rested on equitable considerations which would not support such liability under the general doctrine, and in no sense distinguishable in principle from those averred in the present case, but the decision is unmistakably brought within the rulings of the United States Supreme Court in both Texas cases. The opinion is well considered and unanimous. Its doctrine is reaffirmed in subsequent cases (see Knickerbocker v. Benes, 195 Ill. 434, 443, 63 N. E. 174, and its application in Wabash R. R. Co. v. Stewart, 41 Ill. App. 640, to facts like those involved here), and unquestionably settles the law of Illinois, as resting direct and personal liability upon grounds purely equitable under the general rule, and thus establishes the case at bar within the distinction upon which both the Bloom Case and Union Life Insurance Co. v. Hanford, supra, are understood to authorize recovery at law, namely, enforcement of the direct liability created by the state law out of these equities, with no blending of procedure in law and equity thereby recognized.

In Thompson v. Northern Pac. Ry. Co., 93 Fed. 384, 35 C. C. A. 357, like suit at law was upheld against the purchaser alone, upon similar state of facts, with the exception that leave to sue was granted upon the equity side of the court, having ancillary jurisdiction of the foreclosure decree under which the sale was made. It was there contended: (1) That the complaint stated no cause of action at law; and (2) that writ of error did not lie, because in reality an equitable proceeding, "although in form an independent action at law." The opinion, however, overrules both contentions, and expressly states that the proceeding was not equitable, but was an action at law, and was thus maintainable upon the obligation assumed by the purchaser. Whether jurisdiction at law rested on the leave so granted, local rule, or otherwise, is not discussed.

The remaining objection of duplicity, assigned in the demurrer, is untenable. The twofold facts averred as grounds of liability, by way of express assumption, and in succession to improvements and betterments made by the receivers, are connected, not independent, and thus state, or tend to state, a single cause of action under the rules of pleading. 1 Chitty on Plead. (16th Am. Ed.) 249; Stephens on Pleadings (3d Am. Ed.) 248, 249.

The judgment of the Circuit Court is not in conformity with the foregoing view, and is reversed accordingly; and the case is remanded, with direction to set aside the judgment and overrule the demurrer to the amended declaration, for further proceedings in conformity with law.

GOSS v. CARTER.

(Circuit Court of Appeals, Fifth Circuit. October 28, 1907.)

No. 1,617.

1. CORPORATIONS—STOCKHOLDERS' LIABILITY—SUIT BY RECEIVER IN FOREIGN JURISDICTION.

Under Neb. Const. art. 11b, § 7, which provides that every stockholder in a banking corporation shall be individually liable to its creditors over and above the amount of his stock to an amount equal to his stock, which, as construed by the Supreme Court of the state, is self-executing and enforceable only after the assets of the corporation have been exhausted, by means of a suit in equity in behalf of all creditors against the corporation and its stockholders, in which all equities shall be adjusted, the total liabilities of the corporation ascertained, and a receiver or trustee appointed to collect from each stockholder his pro rata share of such liabilities, the amount due from the stockholders when so ascertained constitutes a trust fund, the legal title to which is vested in the receiver or trustee appointed, and he may maintain an action to recover the amount due from a stockholder in a foreign jurisdiction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 2280½.

Stockholders' liability to creditors in equity, see notes to Rickerson Roller-Mill Co. v. Farrell Foundry & Machine Co., 23 C. C. A. 315; Scott v. Latimer, 33 C. C. A. 23.]

2. SAME—SUIT TO ENFORCE STOCKHOLDERS' LIABILITY—CONCLUSIVENESS OF DECREE.

In such an equity suit, each stockholder is represented by the corporation, having contracted with reference thereto, and is bound by the decree therein, although a nonresident of the state and not personally served with process.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 2280½.]

3. SAME—ACTION AGAINST STOCKHOLDER—LIMITATION.

Limitation does not begin to run in favor of a stockholder against an action to enforce an assessment made against him under such constitutional provision until the entry of the decree fixing the amount of such assessment.

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

This is an action brought by Charles A. Goss, a citizen of the state of Nebraska, against O. M. Carter, a citizen of the state of Texas. The plaintiff sued as receiver and trustee to recover from the defendant the amount of an assessment of 25.9 per cent. levied by the District Court of the Fourth Ju-

dicial District of the state of Nebraska upon $101,900 of stock alleged to be owned by the defendant in the American Loan & Trust Company, an insolvent bank organized under the Constitution and laws of Nebraska. In the Circuit Court a general demurrer with special exceptions to the petition was sustained, and the case is brought by the plaintiff to this court on writ of error. The general question presented to this court by the assignments of error is: Did the Circuit Court err in sustaining the demurrer to the plaintiff's petition? This involves three inquiries: (1) Has the plaintiff as a receiver appointed in Nebraska the right to sue in Texas? (2) Is the defendant subject to suit on the decree of the Nebraska court? (3) Is the right of action barred by the Texas statute of limitations of four years?

The allegations of the petition bearing upon the questions raised by the general demurrer and special exceptions to it and by the assignments of error necessary to be decided are substantially as follows:

(1) The American Loan & Trust Company was a banking corporation organized under the laws of the state of Nebraska, and having an issued and fully paid capital stock of $400,000, divided into 4,000 shares of $100 each; and of these shares the defendant Carter owned 1,019. Said company became insolvent, and on May 10, 1894, a receiver was appointed by the Circuit Court of the United States for the District of Nebraska to liquidate its affairs. Such receivership was closed, and the suit wherein it was pending was terminated, September 28, 1898; the assets of the company having been exhausted without paying any portion of its indebtedness. The Circuit Court refused to entertain petitions in intervention offered by some of the five creditors hereinafter mentioned, having for their object the enforcement of the constitutional liability of the shareholders; but they were permitted to prove up their respective claims and to reduce the same to judgments, and they did so.

(2) Immediately upon the termination of the receivership suit in the United States Circuit Court for the District of Nebraska, the five creditors, Hamilton National Bank, Rutland County National Bank, Safety Fund National Bank, Gerard C. Tobey and New York Life Insurance Company, instituted in the District Court of the Fourth Judicial District of Nebraska a suit against American Loan & Trust Company and numerous persons alleged to be the stockholders, including the defendant Carter. By their amended petition filed in the suit October 4, 1898, the plaintiffs prayed that an order be made fixing a time within which other creditors of said American Loan & Trust Company might appear in said suit; that an account be had of the amount due each of said plaintiffs by said American Loan & Trust Company; that the several defendants sued as shareholders of said company be adjudged to be liable to the plaintiffs and to the other creditors of said company, over and above the amount of stock held by them, to a sum equal to the stock so held by them, for all the liabilities of said company accruing while they remained such stockholders; that the dates of the accrual of the debts due the several creditors be ascertained; that the amounts of stock held by the several defendants, and the periods of time during which such amounts were held, be determined; that the entire amount of the indebtedness of said company, in so far as the same might be represented in said suit, and the dates of the accrual thereof, and the names of the several stockholders at such dates, together with the amounts of such holdings, be determined; that the plaintiffs and such other creditors as might join in said suit have judgment against the several defendants to the extent of their liability; that a receiver be appointed to collect from said stockholders, under the authority and direction of the court, by execution or by other proper writ or process or by suit if necessary, or by such other proceedings as might be required fully to realize from said stockholders the amounts so found due said creditors, sufficient funds fully to pay and to satisfy the several amounts due to said creditors, with interest and costs, as well as the amounts due to such other creditors as might join therein; and they prayed for such other and further relief in the premises as might be just and equitable. No other creditors ever joined in said suit, or proved up their claims therein, or in any way became parties thereto.

(3) Process was served upon American Loan & Trust Company and upon several of the individual defendants, and the company and several individual de-

fendants appeared and resisted the suit. A protracted litigation ensued, in which the principal subject of dispute was the question whether the company was such a banking corporation as that under the Constitution of Nebraska the shareholders were liable for the debts of the company over and above the amount invested in their respective holdings of stock. The defendant, Carter, was not served, because not found, and he did not appear in the suit.

(4) In pursuance of a prayer of said amended petition, the plaintiff, Charles A. Goss, was appointed by said court by an interlocutory order made October 5, 1898, to be a temporary receiver in said suit, with authority to take such action as might be necessary to preserve the rights of the creditors against the estate of certain deceased shareholders, but without authority to proceed generally to collect the sums for which shareholders might be liable.

(5) On or about December 22, 1900, a decree was entered by said District Court in favor of the defendants, said court adjudging that no liability existed upon the part of the shareholders of said company. The plaintiff appealed from said decree to the Supreme Court of the state of Nebraska, which, on or about October 22, 1902, reversed the same and remanded the cause to the District Court for further proceedings. Thereafter another trial was had in said District Court, and on or about June 10, 1903, a final decree was entered whereby the shareholders of said company were adjudged to be liable to the creditors thereof for such amount, not exceeding sums equal to their respective holdings of stock, as might be necessary to discharge the indebtedness of said company, together with interest and costs.

(6) By said decree it was judicially ascertained, and such were the facts, that the corporate property of said American Loan & Trust Company had been exhausted before the commencement of said suit, and that after the exhaustion of such corporate property, and at the date of said decree, said company was still liable to the plaintiffs in said suit in certain sums whose several amounts and dates of accrual were duly ascertained. The aggregate of these items of indebtedness was $74,283.84, besides the costs of suit. It was further judicially ascertained by said decree, and such was the fact, that at the date thereof the sums due by American Loan & Trust Company to the five original plaintiffs in said suit constituted the entire indebtedness and liability of said company then outstanding and unpaid.

(7) By said decree, it was further adjudged, and such was the fact, that continuously from a date prior to the accrual of any of the claims of the said five plaintiffs certain named parties defendant in this suit had owned and held certain shares of the stock of American Loan & Trust Company, their aggregate holdings being 4,000 fully paid shares. Among the persons found to have been shareholders during the time of the accrual of all of the claims sued upon was the defendant, O. M. Carter, who was found to have owned during all of said time 1,019 shares, amounting to $101,900. By said decree it was further adjudged, and such was the fact, that American Loan & Trust Company was a duly incorporated banking institution, each of whose stockholders was liable individually to its creditors, over and above the amount of stock by him held, to an amount equal to the stock by him held for all the liabilities of said company accruing while he remained such stockholder.

(8) By said decree it was further adjudged that, in order to satisfy the indebtedness of said corporation, with interest and costs, it was necessary to collect from each of the solvent holders of the stock of said company a sum equal to 38.4 per cent. of his total liability. And it was ordered and decreed that each of the defendant shareholders pay to the said Charles A. Goss, as receiver and trustee, for the use and benefit of said five creditors pro rata, an amount equal to the shares of stock found to have been held by him, or so much thereof as might be required to satisfy the claims of said creditors, with interest and costs. A first assessment of 38.4 per cent. was levied by said decree; but, this assessment having been found to be excessive by reason of an error in computation, afterwards, to wit, on December 17, 1904, it was reduced to 25.9 per cent.

(9) By said decree it was further ordered and decreed that Charles A. Goss, the plaintiff herein, who theretofore had been appointed temporary receiver on October 5, 1898, should be, and thereby was, continued in office with all the powers and authority wherewith he was clothed by said order of October 5,

1898, and that, in addition to such powers and authority, he was further invested as trustee for the said creditors, to wit, for Hamilton National Bank, Rutland County National Bank, Safety Fund National Bank, Gerard C. Tobey, and New York Life Insurance Company, with the ownership of the legal title to all the rights of action under said assessment of 38.4 per cent., and under all other assessments that subsequently might be made by the court, with power, authority, and jurisdiction as such receiver and trustee to collect by execution, or by suit, if necessary, in his own name as receiver and trustee, in any court anywhere, or otherwise, from each of said stockholders the full amount of said assessment and of such other assessment as thereafter might be made by the court, until the full sum found to be due to said creditors, with interest and costs, should be collected and paid, or until the entire liability of each and all of the solvent defendants should be exhausted.

(10) By said decree it was further ordered and decreed that said suit should be, and thereby was, held upon the docket of said court, and that jurisdiction thereof and of the parties thereto should be and was retained for the purpose of entertaining application for the making of such other and further orders and assessments as might be requisite to obtain the full satisfaction and payment of the debts due to the said creditors, with costs.

(11) The plaintiff herein, Charles A. Goss, on June 10, 1903, accepted the appointment made by said decree, and on June 16, 1903, he filed his bond in accordance with the terms of said decree, and duly qualified as receiver and trustee in pursuance thereof.

(12) From the decree rendered by the District Court June 10, 1903, as aforesaid, American Loan & Trust Company and several individual defendants in due season appealed to the Supreme Court of the state of Nebraska. By the Supreme Court said decree was affirmed on or about June 9, 1904. A motion for the rehearing of the cause by the Supreme Court was duly filed by the appellants, and was overruled November 16, 1904, by said court, which issued its mandate to the District Court on or about November 28, 1904. Said mandate was filed in the District Court on or about December 13, 1904.

(13) Said decree was entered at the instance and suit of Hamilton National Bank, Rutland County National Bank, Safety Fund National Bank, Gerard C. Tobey, and New York Life Insurance Company, who were the plaintiffs in said cause, and who at the time of the rendition of said decree were the only creditors of said American Loan & Trust Company, and who as such alone were entitled to the benefit of all the liability imposed by the Constitution of the state of Nebraska upon the owners and holders of stock in said company and of all the liability assumed and undertaken by the owners and holders of stock in said company by virtue of their subscription therefor and of their acceptance of certificates issued therefor by said company. Said decree was entered with the full knowledge and consent of each and all of said creditors, and no one of them made any objection thereto. An appeal was taken from said decree by parties defendant in said suit, and all of said creditors appeared in the Supreme Court of the state of Nebraska, and there maintained the correctness of said decree and procured by their efforts its affirmance by said Supreme Court. Ever since its rendition and affirmance they have ratified said decree with all its terms and conditions, and have taken the benefit thereof. By virtue of the provisions of the Constitution of the state of Nebraska, as construed and applied by the Supreme Court of that state, the liability of the shareholders of said American Loan & Trust Company was constituted trust fund for the benefit of all of the creditors of said company. By virtue of said decree, and of the circumstances under which the same was rendered and affirmed as aforesaid, the plaintiff herein, Charles A. Goss, has been made the trustee to execute the trust and administer the trust funds established as aforesaid, and has been vested with the legal title to all rights of action growing out of the liability of the shareholders of said American Loan & Trust Company and of all assessments made for the enforcement thereof.

(14) After the Supreme Court had affirmed said decree of the District Court, and overruled the motion of the appellant for a rehearing of the cause and had issued its mandate to the District Court, the plaintiffs in said suit filed in the District Court on or about December 8, 1904, a motion wherein they averred that the assessment of 38.4 per cent. levied by said decree upon the stockholders was greater than probably would be needed; the amount of said

assessment having been fixed at 38.4 per cent. by reason of a mistake in computation. By said motion the plaintiffs prayed that the decree be amended and corrected, so that the first assessment should be of 25.9 per cent. of the par value of the shares of stock held by each shareholder, instead of 38.4 per cent. Due notice was given of said motion to all parties who had been served, or had appeared in the case; and upon the hearing thereof on or about December 17, 1904, an order was entered so amending said original decree of June 10, 1903, as to levy upon the par value of the shares of stock held by each shareholder in said American Loan & Trust Company a first assessment of 25.9 per cent., and no more, in lieu of the first assessment of 38.4 per cent. originally levied by said decree.

(15) Thereafter, on or about January 11, 1906, in said District Court of the Fourth Judicial District of the state of Nebraska, the plaintiff herein, Charles A. Goss, filed as receiver and trustee a petition for the construction of said original decree of June 10, 1903, praying that the court interpret said decree, and instruct said receiver and trustee whether the assessment levied upon the shareholders by said decree as amended was levied against each and all of the shareholders of said American Loan & Trust Company, or only against such of said stockholders as were not found in said decree to be insolvent. On or about January 13, 1906, in response to such petition, said decree was interpreted by said District Court, and an order was entered, whereby this plaintiff, as receiver and trustee, was directed to collect from each and all of the stockholders of said American Loan & Trust Company said first assessment of 25.9 per cent. of the par value of the stock by them severally held; such being the true intent and meaning of said original decree.

(16) On or about January 13, 1905, an execution was duly issued by the District Court of the Fourth Judicial District of the state of Nebraska upon said original decree of June 10, 1903, as amended, whereby the sheriff of Douglas county, Neb., was commanded to levy of the goods and chattels in his county of each of the defendants in said suit a sum equal to 25.9 per cent. of the par value of the stock by him held for the satisfaction of the indebtedness of American Loan & Trust Company to the plaintiffs in said suit and of the costs therein incurred. Said execution on or about January 15, 1905, was returned unsatisfied, no property having been found belonging to any of the defendants upon which to levy the same. Thereafter, on December 13, 1905, the present action was begun by the filing of an original petition therein in the Circuit Court of the United States for the Southern District of Texas.

The defendant's demurrer to the petition raised the questions which are stated above and discussed in the opinion.

Maurice E. Locke (James H. McIntosh, John Charles Harris, Edward F. Harris, and Eugene P. Locke, of counsel), for plaintiff in error.

W. G. Love and J. C. Hutcheson, Campbell & Hutcheson, for defendant in error.

Before McCORMICK and SHELBY, Circuit Judges, and NEWMAN, District Judge.

SHELBY, Circuit Judge (after stating the facts as above). The decision which we have determined to make in this case we think is sustained, if not required, by the opinion of the Supreme Court in Bernheimer v. Converse (decided May 27, 1907) 206 U. S. 516, 27 Sup. Ct. 755, 51 L. Ed. 1163, after the learned trial judge had sustained the demurrer to the petition.

1. It is held by the Supreme Court in Booth v. Clark, 17 How. 322, 15 L. Ed. 164, and in later cases, that a chancery receiver, having no other authority than that which arises from his appointment, cannot maintain an action in another jurisdiction. It is contended that the rule established in these cases is applicable to the plaintiff here, and

that, as he is a receiver appointed in Nebraska, he cannot maintain an action in Texas. It is important, therefore, to ascertain whether he is vested by law with other rights than merely those conferred on him as a chancery receiver. The plaintiff was made receiver by the Nebraska court as a part of the procedure to enforce liabilities of stockholders fixed by the Constitution of Nebraska. The sections in question are parts of article 11b, and are as follows:

"Sec. 7. Every stockholder in a banking corporation or institution shall be individually responsible and liable to its creditors over and above the amount of stock by him held to an amount equal to his respective stock or shares so held, for all its liabilities accruing while he remains such stockholder; and all banking corporations shall publish quarterly statements under oath of their assets and liabilities."

"Sec. 4. In all cases of claims against corporations and joint stock associations, the exact amount justly due shall be first ascertained, and after the corporate property shall have been exhausted the original subscribers thereof shall be individually liable to the extent of their unpaid subscription, and the liability for the unpaid subscription shall follow the stock."

These provisions are self-executing. They require no supplementary legislation. The liability imposed by them is a trust fund for the benefit of all creditors of the corporation. The only proper way to enforce the liability is by suit in equity in behalf of all the creditors against the corporation and stockholders, in which suit all equities should be adjusted and a receiver or trustee appointed to collect from each his pro rata share of the total indebtedness of the corporation for the benefit of all the creditors. This constitutional liability of the stockholders cannot be enforced till the indebtedness of the corporation is judicially ascertained and the assets of the corporation exhausted by legal process. The following are among the Nebraska cases which place these constructions on the Nebraska Constitution: Farmers' Loan & Trust Co. v. Funk, 49 Neb. 353, 68 N. W. 520; State v. German Savings Bank, 50 Neb. 734, 70 N. W. 221; German National Bank v. Farmers' & Merchants' Bank, 54 Neb. 593, 74 N. W. 1086; Van Pelt v. Gardner, 54 Neb. 701, 75 N. W. 874; Hastings v. Barnd, 55 Neb. 93, 75 N. W. 49; Brown v. Brink, 57 Neb. 606, 78 N. W. 280;. Hamilton National Bank v. American Loan & Trust Co., 66 Neb. 67, 92 N. W. 190; s. c. on second appeal, 72 Neb. 81, 100 N. W. 202. The plaintiff appointed in such proceeding is not a mere custodian of property, but he is clearly vested with the legal title. The terms of the Nebraska Constitution point out a trust fund in the event of the insolvency of the corporation. The construction placed on the Constitution by the Nebraska courts makes a receiver or trustee necessary to the enforcement and administration of the trust. When appointed, he has the legal title to the trust fund, with the power and charged with the duty to collect it for the creditors of the corporation. He represents all the creditors entitled to share in the fund. In such case the receiver can sue in a foreign jurisdiction. Bernheimer v. Converse, 206 U. S. 516, 27 Sup. Ct. 755, 761, 51 L. Ed. 1163; Howarth v. Lombard, 175 Mass. 570, 579, 56 N. E. 888, 49 L. R. A. 301; King v. Cochran, 76 Vt. 141, 56 Atl. 667, 104 Am. St. Rep. 922; Glenn v. Soule (C. C.) 22 Fed. 417.

2. A question is raised as to the effect of the decree on which this

suit is brought. It may be stated as a general rule that a stockholder is a part of the corporation to the extent that he is privy to the proceedings to which the corporation was a party, and that he is bound by a decree of a court against the corporation in the enforcement of a corporate duty, although not a party as an individual, but only through representation by the company. Sanger v. Upton, 91 U. S. 56, 23 L. Ed. 220. In Hawkins v. Glenn, 131 U. S. 319, 9 Sup. Ct. 739, 33 L. Ed. 184, an assessment ordered by a court which had jurisdiction of the corporation was held binding on the stockholders residing in another state, although not made parties as individuals. The assessment sued on in that case was on a subscription for stock, but the principle involved here is the same. When the defendant became a stockholder in the American Loan & Trust Company, it is presumed that he did so with knowledge of the laws of Nebraska which controlled the company. By those laws, as a stockholder, he became individually responsible and liable to its creditors over and above the amount of stock by him held to an amount equal to the stock so held for all of the company's liabilities accruing while he remains a stockholder. This liability is not only statutory, but it is contractual; the law imposing the liability being a part of the contract of the stockholder with the corporation. The Nebraska Constitution also provides the conditions upon which this liability was to be enforced. It is a liability secondary in its nature, to be enforced only when necessary to protect the corporation's creditors. The exact amount of the claims against the corporation must be first judicially ascertained, the assets of the corporation exhausted, and the amount required by each stockholder necessary to satisfy the company's unpaid debts must be also judicially ascertained. Such is the effect of the sections of the Nebraska Constitution which we have quoted, as construed by the Supreme Court of the state. The defendant, having contracted with reference to these requirements, is bound by them, and in a proceeding to enforce them he is represented by the corporation. He is necessarily bound by all valid proceedings had pursuant to the statute which controls the settlement of the affairs of the corporation. Howarth v. Lombard, 175 Mass. 570, 56 N. E. 888, 49 L. R. A. 301; King v. Cochran, 76 Vt. 141, 56 Atl. 667, 104 Am. St. Rep. 922; Bernheimer v. Converse, 206 U. S. 516, 27 Sup. Ct. 755, 51 L. Ed. 1163.

What we have said on this point is sufficient for the decision of this case; for it is now presented to us on a ruling upon a demurrer to the petition. As to what defenses may be made to a suit on a decree like the one in question is not now to be decided. The main reason for holding the decree making the assessment binding on the stockholder is that his obligation is contractual, and that it contemplates the possibility of an assessment by a court. The defendant would, of course, be allowed to impeach the decree of assessment for fraud, and it has been said that such decree does not cut off defenses personal to the stockholder; that, for example, he may show that he is not a stockholder, or that he is not a stockholder for so large amount as is alleged. But we are of opinion that, as a member of the corporation, the defendant is bound, without personal notice to him, by the decision of the courts of the state where the corporation is organized, made in the

administration of its affairs on its insolvency, determining the amount of its assets and liabilities and the amount of assessment which should be made on its stockholders. Being so bound, a demurrer to the petition because the defendant was not individually served with process in the Nebraska suit should have been overruled.

3. It is contended that the right of action is barred by the statute of limitations of four years. Rev. St. Tex. 1895, § 3356. The stockholder's liability which this suit is brought to enforce is secondary and conditional. It is based on the Nebraska Constitution, which we have quoted, and, while the corporation's creditors are permitted to take steps to settle the affairs of the corporation and fix the exact amount of such secondary liability, they are not permitted individually or in groups to sue for the liability to satisfy their own claims. It appears from the petition that the amount sued for was not decreed against the defendant till June 3, 1903. The suit was brought in the Circuit Court December 13, 1905, which is in less than four years of the date of the decree sued on. The statute of limitations did not begin to run till the decree of assessment was rendered and the receiver appointed. Bernheimer v. Converse, 206 U. S. 516, 27 Sup. Ct. 755, 51 L. Ed. 1163. The petition does not show that the suit is barred by the statute of limitations of four years, and therefore it is not amenable to demurrer on that ground.

The judgment of the Circuit Court is reversed, and the case is remanded, with instructions to overrule the demurrer to the petition and to grant a new trial.

NOYES v. MARLOTT et al.

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

No. 1,438.

1. LOGS AND LOGGING—SALE OF LOGS—TRANSFER OF TITLE AS BETWEEN PARTIES—DELIVERY.

Plaintiffs entered into a contract with defendant to fell, cut, raft, drive, and deliver a certain number of feet of logs of specified dimensions and quality in a slough extending from a river, where defendant agreed to construct a boom for their detention, to remove them to the banks of the river or to the mill, and at the time of such removal to scale the same and pay for each thousand feet so delivered and removed to the banks of the slough or the mill, "and not otherwise." A portion of the logs were so delivered, removed, and paid for; but the remainder, after being delivered into the boom, were carried away by a freshet and lost. *Held* that, plaintiffs having done all that they were to do, complete possession and title to the logs thereupon passed to defendant, and he became liable for the purchase price on proof of the quantity delivered, and that they conformed to the requirements of the contract as to dimensions and quality.

2. SAME—CONSTRUCTION OF CONTRACT.

A provision, in a contract for the sale and delivery of logs to be scaled after delivery, that they shall be of merchantable timber, is not a warranty that all logs delivered thereunder are merchantable, but merely furnishes a description for the identification of such logs as fall within the contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Logs and Logging, § 104.]

3. EVIDENCE—PAROL EVIDENCE TO VARY WRITING—CONTRACT OF SALE.
Where the provisions of a written contract of sale are clear and intelligible, parol evidence of prior conversations between the parties is not admissible to prove an intention inconsistent with the writing.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1787, 1793.]

4. SAME—EXISTENCE OF CUSTOM.
Where the provisions of a written contract of sale are clear and unambiguous, they cannot be changed or affected in meaning by proof of a custom at variance therewith.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1945–1952.]

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

Bion A. Dodge, Louis K. Pratt, and Jacob Samuels, for plaintiff in error.

McGinn & Sullivan, J. C. Campbell, W. H. Metson, Frank C. Drew, C. H. Oatman, and J. A. Mackenzie, for defendants in error.

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

HUNT, District Judge. Defendants in error, Marlott, Melvin, and O'Mealey, brought this suit to recover the contract price of certain logs alleged to have been delivered by them to Noyes, plaintiff in error, in accordance with the provisions of a certain written contract entered into on September 23, 1904. The contract is substantially as follows:

"This agreement made this 23d day of September, 1904, by and between Fred G. Noyes, party of the first part, and Tony O'Mealey, John Melvin, and Arthur Marlott, parties of the second part, witnesseth: (1) That said parties of the second part agree to fell, cut, raft, drive and deliver not less than six hundred thousand (600,000) feet of logs of the approximate dimensions hereinafter described, in the channel or slough of the Chena river, a tributary of the Tanana river, in the district of Alaska, leaving said river, immediately below the unincorporated town or settlement of East Fairbanks, about a quarter of a mile above and opposite the town of Fairbanks, in the district of Alaska, Third Division, and to furnish all necessary provisions, tools, tackle, apparel and booms for the purpose thereof. Two hundred thousand (200,000) feet of such logs shall be so delivered immediately after the clearing of the ice from the said Chena river, and the said slough, in the spring of 1905; and two hundred thousand (200,000) feet more shall be so delivered within thirty (30) days thereafter; and the remainder of two hundred thousand (200,000) feet shall be so delivered within sixty (60) days thereafter. 15 per centum of said logs shall be 12 feet in length. 10 per centum of said logs shall be 14 feet in length. 25 per centum of said logs shall be 16 feet in length. 10 per centum of said logs shall be 18 feet in length. 10 per centum of said logs shall be 20 feet in length. 5 per centum of said logs shall be 22 feet in length. 5 per centum of said logs shall be 24 feet in length. 5 per centum of said logs shall be 26 feet in length. 5 per centum of said logs shall be 30 feet in length. 5 per centum of said logs shall be 36 feet in length. 5 per centum of said logs shall be 40 feet in length. All logs shall not be less than nine (9) inches in diameter at the smaller end, and shall be from three (3) to six (6) inches longer than the above-prescribed lengths; and in all respects shall be cut and trimmed in a workmanlike manner, of good form and of firm, sound and merchantable timber. The said party of the first part shall provide in the slough departing from the Chena river into which said logs shall be diverted, as aforesaid, the necessary boom for the arresting and detention

of said logs, and shall remove them to the banks of said slough or to the mill, for the purpose of manufacturing the same into lumber, and at the time of such removal from said slough, shall scale them by 'Scribner's Rule,' at which time the said party of the first part shall pay to the said parties of the second part the sum of twenty dollars for each and every thousand of the logs so delivered in said boom and pulled therefrom to the banks, as aforesaid, or in the mill, for the purpose of manufacturing, as aforesaid, and not otherwise."

The answer admitted the agreement as set forth in the complaint, set up failure to fulfill the terms of the contract, and pleaded that about June 20, 1905, continuous and unprecedented rainfalls occurred, that extraordinary rise of the waters of the country thereabouts followed, and that the banks of the river and slough were cut away by the torrents of water, and the retaining boom, which had been erected by plaintiff in error, was washed out, and the logs called for by the contract were carried away without fault of the plaintiff in error.

It appears that about June 4, 1905, defendants in error had delivered into the detention boom of the plaintiff in error about 250,000 feet of logs, which were thereafter drawn from the slough by plaintiff in error, and defendants in error were given credit for the amount of feet ascertained. Thereafter, about June 29, 1905, the second drive of logs was made, and about 369,501 feet were put into the boom by defendants in error. On June 30th, the waters of the river began to rise, the boom which had been provided by plaintiff in error for the arrest and detention of the logs gave way, and the logs remaining in the slough were swept down the river and lost. The plaintiff in error had paid upon the contract price of the logs $8,047.40, and, upon trial had before a jury, verdict was rendered in favor of the defendants in error, plaintiff's below, for $5,083.02, balance claimed to be due. Judgment was entered accordingly. Motion for a new trial was denied. Plaintiff in error brings the case to this court by writ of error.

The record discloses that counsel for plaintiff in error tried the case upon the theory that the only feature of the contract to which the jury's attention should be addressed was that of a delivery; that is to say, he stood upon the proposition that the contract was executory, and that title to the logs did not pass until inspection, measurement, and pulling on to the banks. Defendants in error contended that they performed all of the acts required of them in the contract; that they put in the slough and boom designated in the contract the number, kind, and character of logs specified; that nothing was left for them to do; that plaintiff in error was to remove the logs from the slough, and to scale them, but that this was merely a means of determining the amount of compensation due to defendants in error for the logs; and that, as delivery had been made as required, title to the logs passed to plaintiff in error; hence that the peril to which the logs were exposed was plaintiff's.

The question, then, is: What was the effect of the contract of sale? Did the bargain amount to an actual sale, or was it only an executory agreement? If Noyes became the owner of the logs delivered into the channel or slough of the Chena river, where he had erected a boom to arrest and detain them, and they were afterwards lost, he

must be the sufferer. If, on the other hand, Marlott and his associates, whom we will call the loggers, had not parted with title, if they remained the owners of the logs until Noyes had pulled them out to the banks, and had scaled them for manufacturing purposes, then the contract was an executory one, and the loggers must bear the loss of the freshet.

Whether the logs passed or not is dependent upon the intention of the parties to the written contract, and that intention must be gathered from the language of the instrument and the subject-matter. In the ascertainment of the intention of the parties, we should consider, too, certain established legal rules. Thus, in The Elgee Cotton Cases, 22 Wall. 180, 22 L. Ed. 863, the court, in discussing executory and conditional sales, approved Benjamin's text by quoting the following rules laid down by Blackburn on Sales, and added to by Benjamin:

"First. 'When, by the agreement, the vendor is to do anything to the goods for the purpose of putting them into that state in which the purchaser is bound to accept them, or, as it is sometimes worded, into a deliverable state, the performance of those things shall, in the absence of circumstances indicating a contrary intention, be taken to be a condition precedent to the vesting of the property.'

"Second. 'Where anything remains to be done to the goods for the purpose of ascertaining the price, as by weighing, measuring, or testing the goods, where the price is to depend on the quantity or quality of the goods, the performance of these things shall also be a condition precedent to the transfer of the property, although the individual goods be ascertained and they are in the state in which they ought to be accepted.'

"Third. 'Where the buyer is by the contract bound to do anything as a consideration, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer.'"

And later on in the opinion the court distinguished the doctrine of the first and second rules by citing numerous English cases, and saying for itself:

"Of course, when nothing remains for the seller to do, when the weighing or measurement stipulated for is incumbent upon the buyer, or when the parties have provisionally agreed that a certain sum shall be taken for the price, subject to future correction, the contract is not within the rules. Turley v. Bates, 2 Holstone & Coltman, 200, has sometimes been thought a departure from the earlier cases, but we think without reason. It was the case of the sale of an entire heap of fire-clay at two shillings per ton. The buyer was to cart it away and weigh it. He weighed, removed, and paid for a part, and refused the rest. It was held the property of the whole heap had passed to him. But here the seller had nothing to do with the weighing or delivery. He had performed all he was required to do, either for ascertaining the quantity or the price. Besides, the jury had found as a fact that the sale was of the whole heap. The case of Kershaw v. Ogden, 3 Holstone & Coltman, 717, is in substance the same. In each of these cases the contract was in parol, and what it was necessarily for a jury."

Tested by these rules, the contract under consideration passed the ownership of the logs delivered in the slough when the loggers put them there. Hatch v. Oil Co., 100 U. S. 124, 25 L. Ed. 554.

An ascertainment of the amount to be due was contemplated, but the loggers only undertook to deliver the quantity and kind of logs that they proved were put into the slough, as designated in the con-

tract. Referring to the language of the contract, it will be observed that the loggers were "to fell, cut, raft, drive and deliver" logs of certain dimensions and quality as specified. They did all these things and transferred complete title, possession, and control to Noyes. By the contract, the loggers were to furnish merchantable timber, but that provision was not a warranty of the logs on the part of the loggers, but was rather a provision for the benefit of the loggers and Noyes, sellers and purchaser, respectively, furnishing a description of what was bought and sold. When a contract very similar to the one we have before us was examined by the Supreme Court, it was said:

"Merchantable logs only were bought and sold by the parties, but it is a great mistake to regard that provision as a warranty of the logs on the part of the plaintiffs. Unless the parties were destitute of all experience, they must have known that in so large a lot of logs there would be some, and perhaps many, that would not scale as merchantable; and it was doubtless from that consideration that the provision was inserted, that the defendants should take all of that description, and, of course, they were not bound to take any of inferior grades. Regarded in that light, it is evident that the provision was for the benefit of both the seller and purchaser, as it furnished a clear and unmistakable description of what was bought and sold—we say bought and sold, because it is evident from what has already been said that the title to the logs passed to the defendants." Leonard et al. v. Davis et al., 1 Black (U. S.) 476, 17 L. Ed. 222.

Noyes, the buyer, had constructed the boom to detain the logs, as he agreed to do, and from the time of the delivery in the slough he possessed and owned them. Ludwig v. Fuller, 17 Me. 166, 35 Am. Dec. 245. By the contract, Noyes was to remove the logs for manufacturing purposes. He was to remove and scale them, and was then to pay $20 for every thousand of the logs that had been delivered by the loggers into the detention boom. But everything the loggers, as sellers, had to do with the logs, was completed when they delivered into the slough. Leonard v. Davis et al., supra. After delivery, their only interest was in recovering the price agreed upon when the measurement was ascertained by Noyes, the purchaser.

A circumstance in the case to show that there was no condition in the sale is the fact that, after the logs in the first drive had been delivered in the slough, Noyes employed the loggers, defendants in error, to help him pull the logs onto the bank, and paid them daily wages for such service.

Stress is laid by plaintiff in error upon the words "and not otherwise," which conclude the provision of the contract defining the obligation of Noyes. But this phrase only emphasizes the immediately previously fixed and limited method of ascertaining a settlement of accounts. No other method was to be allowed. We do not think it can be regarded as qualifying the sale itself by making it conditional upon Noyes hauling the logs out and scaling them. In trusting to Noyes to ascertain the quantity of logs for which he was to pay, the loggers displayed confidence in him, but the sale was not affected, for the sellers had nothing to do to put the property into deliverable shape. It had been completely delivered. King v. Jarman, 35 Ark. 190, 37 Am. Rep. 11; Albemarle Lumber Co. v. Wilcox, 105 N. C. 34, 10 S. E. 871.

In Macomber v. Parker, 13 Pick (Mass.) 183, it was said:

"Where any operation of weight, measurement, or counting, or the like, remains to be performed, in order to ascertain the price, the quantity or the particular commodity to be delivered, and to put it in a deliverable shape, the contract is incomplete until such operation is performed; but, where the goods or commodities are actually delivered, that shows the intent of the parties to complete the sale by the delivery, and the weighing, measuring, or counting afterwards would not be considered as any part of the contract of sale, but could be taken to refer to the adjustment of the final settlement as to the price."

Plaintiff in error argues that, even if the court finds the contract was not a conditional one, still it was fairly susceptible of two interpretations, and that therefore explanatory evidence was admissible. Relying upon this premise, he has assigned error because the trial court denied an offer to prove conversations that were had between the loggers and Noyes that led up to the execution of the contract, and an offer of proof that when the contract was presented to the loggers for signature they demurred to signing it because it did not provide for delivery in the slough or boom alongside of the bank, whereupon Noyes told them that he would not be responsible for the logs in the slough or until they were pulled from the water, and they could sign the contract or not.

But if the court can ascertain from the language of the writing itself what the parties meant, then evidence of language employed before they expressed their intention in writing is on principle immaterial. United States v. Bethlehem Steel Co., 205 U. S. 105, 27 Sup. Ct. 450, 51 L. Ed. 731. Our duty is to find out the true sense of the written words as the parties have used them, and then, as heretofore held, when that true sense is ascertained, test the writing in the light of established legal rules. If the agreement before us had been incomplete or unintelligible, explanation not inconsistent with its written terms would have been perfectly competent; but, as the writing is complete and intelligible, parol evidence of prior conversations to prove the intention of the parties inconsistent with its ascertained meaning was not proper. We are not losing sight of the necessity for interpretation, according to the subject-matter referred to in a contract, and of surrounding circumstances, and of the admissibility of verbal testimony in order to find out the subject to which a writing refers; but parol evidence to explain the nature of the subject of a written instrument is very different from evidence of verbal communications respecting the contract itself. A familiar illustration is where parol evidence is admitted to show that land in a deed is described as in one locality, while it really lies in another; or, where a factory has been conveyed as a factory, it is permissible to receive verbal testimony to show what part or parcel is passed by the deed. Greenleaf on Evidence, c. 15. Here the instrument does not present ambiguity in the true sense and meaning of the words themselves, or such difficulties as to their application as to have warranted investigation by evidence outside of the paper itself. We must therefore sustain the ruling of the lower court in rejecting the offer made.

Effort was also made by plaintiff in error to prove that a general cus-

tom existed among loggers and sawmill men in the Tanana Valley, whereby logs delivered at a mill are at the risk of the loggers and remain so until pulled from the water and scaled, and the amount determined; but the court sustained the objections of defendants in error and refused to allow such evidence. Plaintiff in error seeks to apply the rule that customary rights and incidents universally attaching to the subject-matter of a contract, where it is made, are annexed by implication to the language and terms of the contract, unless custom is expressly excluded. But the doctrine of evidence of custom cannot prevail over the express provisions of a contract. "Its true and appropriate office is to interpret the otherwise indeterminate intention of the parties, and to ascertain the nature and extent of their contracts arising, not from express stipulations, but from mere implications and presumptions and acts of a doubtful or equivocal character." Bliven et al. v. New England Screw Co., 23 How. 420, 16 L. Ed. 510. It is enough to say that the real meaning of the contract, as interpreted by the words used, provided for a delivery at a particular place, and was not indeterminate, and therefore evidence of custom was irrelevant. Barnard v. Kellogg, 77 U. S. 383, 19 L. Ed. 987.

Other points of a minor character were made by plaintiff in error. They have been examined, and are largely covered by what we have already said. None appear to be well taken.

In conclusion, we believe that the proper construction of the contract is that the parties intended that Noyes should become the owner of the logs when actually delivered into the slough, and that, from the time of delivery so made, he was the owner and could have recovered the property, had it been attached under writ issued in an action brought by a creditor of the loggers. Accident was hardly contemplated; but, when it occurred, by the rules of law the owner must be the sufferer.

The judgment is affirmed.

BIDDLE v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. October 28, 1907.)

No. 1,463.

1. CRIMINAL LAW—JURISDICTION—UNITED STATES COURT FOR CHINA.

The object of Act June 30, 1906, c. 3934, 34 Stat. 814 [U. S. Comp. St. Supp. 1907, p. 797], creating the United States Court for China, and of the treaty under which it was created, in so far as that court is given criminal jurisdiction, was to secure to American citizens residing or sojourning in China and there charged with crime the benefit of the principles of the laws of the United States relating to the trial of persons accused of crime; but the statute at the same time makes such citizens subject to punishment for acts made criminal by any law of the United States or for acts recognized as crimes by the common law.

2. SAME—OFFENSES PUNISHABLE—OBTAINING MONEY BY FALSE PRETENSES.

The provisions of such statute, making the common law applicable to criminal offenses committed by American citizens in China, are to be construed as referring to the common law in force in the several American colonies at the time of their separation from England, and this in-

cluded not only the ancient common or unwritten law, but also statutes which had theretofore been passed amendatory of or in aid of the common law, among which was St. 30 Geo. II, c. 24, enacted in 1757, creating the offense of obtaining money or goods under false pretenses, and the subsequent amendments thereto.

3. SAME.

In view of the legislation of Congress making the obtaining of money or property by false pretenses a crime in Alaska and the District of Columbia and in other territory subject to the criminal jurisdiction of the United States, such act is an offense against the laws of the United States, within the meaning of Act June 30, 1906, c. 3934, 34 Stat. 814 [U. S. Comp. St. Supp. 1907, p. 797], conferring jurisdiction upon the United States Court for China, and an American citizen guilty of the commission of such act in China is subject to trial and punishment therefor by that court.

4. FALSE PRETENSES—ELEMENTS OF OFFENSE—NATURE OF PRETENSES.

To constitute the crime of obtaining money under false pretenses, the alleged false representation must be of some past or existing fact, and an information charging that a defendant obtained money from persons named as rental for a building, by means of false representations that the municipal authorities would permit gambling games to be played therein during a race meeting to be held in the future, is insufficient to charge an offense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, False Pretenses, §§ 5–12.]

Appeal from the United States Court for China.

Edwin H. Lamme and Francis Ellis, for appellant.

Robert T. Devlin, U. S. Atty., and Benjamin L. McKinley, Asst. U. S. Atty.

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

DE HAVEN, District Judge. This is an appeal by the defendant from a judgment of the United States Court for China, by which he was convicted of the crime of obtaining money under false pretenses, and sentenced to imprisonment for the term of one year in the jail at Shanghai.

It is claimed by the appellant: First, that the court below was without jurisdiction to try him for such alleged crime, because the act of obtaining money or goods by false pretenses was not an offense at common law, and is not made a crime by the laws of the United States; and, second, that the evidence was not sufficient to warrant his conviction.

1. The United States Court for China was created by Act June 30, 1906, c. 3934, 34 Stat. pt. 1, p. 814 [U. S. Comp. St. Supp. 1907, p. 797], and by section 1 of that act was given "exclusive jurisdiction in all cases and judicial proceedings whereof jurisdiction may now be exercised by United States consuls and ministers by law and by virtue of treaties between the United States and China, except in so far as the said jurisdiction is qualified by section two of this act." Section 4 of the same act provides:

"The jurisdiction of said United States court, both original and on appeal, in civil and criminal matters, and also the jurisdiction of the consular courts in China, shall in all cases be exercised in conformity with said treaties and

the laws of the United States now in force in reference to the American consular courts in China, and all judgments and decisions of said consular courts, and all decisions, judgments, and decrees of the United States court, shall be enforced in accordance with said treaties and laws. But in all such cases when such laws are deficient in the provisions necessary to give jurisdiction or to furnish suitable remedies, the common law and the law as established by the decisions of the courts of the United States shall be applied by said court in its decisions and shall govern the same subject to the terms of any treaties between the United States and China."

The law in relation to the jurisdiction of consular courts at the date of the passage of the act creating the United States Court for China is found in section 4086 of the Revised Statutes [U. S. Comp. St. 1901, p. 2769], and is as follows:

"Jurisdiction in both civil and criminal matters shall, in all cases, be exercised and enforced in conformity with the laws of the United States, which are hereby, so far as is necessary to execute such treaties, respectively, and so far as they are suitable to carry the same into effect, extended over all citizens of the United States in those countries, and over all others to the extent that the terms of the treaties, respectively, justify or require. But in all cases where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies, the common law and the law of equity and admiralty shall be extended in like manner over such citizens and others in those countries."

The United States, by its treaty with China, acquired extraterritorial jurisdiction in civil controversies between its citizens residing in China, and in respect to all crimes committed by its citizens residing there, and Congress, in the statutes above referred to, provided tribunals to exercise such jurisdiction, "in conformity with the laws of the United States," and when these laws "are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies," then in accordance with the common law. The object of the treaty and the intention of Congress, in creating the United States Court for China, in so far as that court is given criminal jurisdiction, was to throw around American citizens residing or sojourning in China, and there charged with crime, the beneficent principles of the laws of the United States relating to the trial of persons charged with crime—the rules of evidence, the presumption of innocence, the degree of proof necessary to convict, the right of the accused to be confronted with witnesses against him, exemption from being compelled to criminate himself, etc. But, while securing to them these privileges, the statute at the same time, made them subject to punishment for acts made criminal by any law of the United States, or for acts recognized as crimes under the common law.

This brings us to the consideration of the question whether obtaining money or goods by false pretenses is an offense which may be thus punished, if committed by an American citizen in China. This particular kind of cheating was not a crime under the ancient common law. It was first so declared in the year 1757 by St. 30 Geo. II, c. 24. Bishop on Criminal Law (3d Ed.) vol. 2, § 392. "Under this statute for the first time the crime ceased to depend on the particular kind of pretense used; the statute being couched in terms broad enough to include the use of any false pretense whatever, although, as will appear later, the judges, in construing the statute,

excepted certain classes of pretenses from it. It was this statute that created the crime now commonly known as obtaining goods under false pretenses. Several statutes have been enacted in England since the statute of 30 Geo. II to supply defects found therein, but its general provisions, in so far as they defined the crime, remain unchanged." 19 Cyc. 387.

If the statute of 30 Geo. II, and those amendatory of it, which were in force at the date of the separation of the American colonies from the mother country, are to be considered as a part of the common law to which Congress referred in the enactment above quoted, the jurisdiction of the court over the offense of obtaining money under false pretenses would be undoubted; and we are of opinion that in making the common law applicable to offenses committed by American citizens in China, and the other countries with which we have similar treaties, Congress had reference to the common law in force in the several American colonies at the date of the separation from the mother country, and this included not only the ancient common law, the lex non scripta, but also statutes which had theretofore been passed amendatory of or in aid of the common law. Thus Mr. Bishop, in his work on Criminal Law (section 155) says:

"The rule is familiar to the legal profession that colonists to an uninhabited country carry with them the laws of their mother country, as far as applicable to their new situation and circumstances; and that, in their new home, the laws thus taken with them, whether in the mother country they were written or unwritten, are regarded as unwritten, or common law."

And in the second edition of Cooley's Constitutional Limitations, (page 25), the author of that great work says:

"The colonies also had Legislatures of their own, by which laws had been passed which were in force at the time of the separation, and which remained unaffected thereby. When therefore they emerged from the colonial condition into that of independence, the laws which governed them consisted: First, of the common law of England, so far as they had tacitly adopted it as suited to their condition; second, of the statutes of England, or of Great Britain, amendatory of the common law, which they had in like manner adopted; and, third, of the colonial statutes. The first and second constituted the American common law, and by this in great part are rights adjudged and wrongs redressed in the American states to this day."

But in holding that the court below had jurisdiction of the information upon which the defendant was tried, it is not necessary for us to rest our decision entirely upon the proposition that obtaining money or goods under false pretenses is an offense at common law, within the meaning of the statute conferring jurisdiction upon the United States Court for China, as we are clearly of opinion that such an act is a crime under the laws of the United States.

It is true, there is no general statute applicable to every state in the Union, making this an offense against the United States; nor could there be, in view of the fact that under our system of government the right to punish for such acts committed within the political jurisdiction of the state is reserved to the several states. But in legislating for territory over which the United States exercises exclusive legislative jurisdiction, Congress has made the act of obtaining money under false pretenses a crime. Thus, in section 54 of title 1, pt. 1,

of the act passed March 3, 1899 (chapter 429, 30 Stat. 1260), entitled, "An act to define and punish crimes in the district of Alaska and to provide a code of criminal procedure for said district," Congress has enacted that obtaining money or property from another by any false pretense shall constitute a crime, subjecting the offender to punishment by imprisonment in the penitentiary not less than one nor more than five years. So, also, under section 842 of the act of March 3, 1901, entitled "An act to establish a code of law for the District of Columbia," obtaining from any person anything of value by means of false pretenses is made a crime, and, where the value of the property so secured is $35 or upwards, subjects him to imprisonment not less than one year nor more than three years; or, if less than that sum, to a fine not more than $200, or imprisonment for not more than six months, or both. Chapter 854, 31 Stat. 1326.

In addition to these statutes, section 2 of the act of July 7, 1898 (chapter 576, 30 Stat. 717 [U. S. Comp. St. 1901, p. 3652]), which is, in substance, a re-enactment of section 5391, Rev. St., provides:

"That when any offense is committed in any place, jurisdiction over which has been retained by the United States or ceded to it by a state, or which has been purchased with the consent of a state for the erection of a fort, magazine, arsenal, dockyard or other needful building or structure, the punishment for which offense is not provided for by any law of the United States, the person committing such offense shall, upon conviction in a circuit or district court of the United States for the district in which the offense was committed, be liable to and receive the same punishment as the laws of the state in which such place is situated now provide for the like offense when committed within the jurisdiction of such state, and the said courts are hereby vested with jurisdiction for such purposes; and no subsequent repeal of any such state law shall affect any such prosecution."

Under this statute, any act committed in any place under the jurisdiction of the United States, if made an offense by the laws of the state in which such place is situate, when committed elsewhere in the state, is an offense agianst the United States, and punishable as in the state law provided. Sharon v. Hill (C. C.) 24 Fed. 731; U. S. v. Wright, Fed. Cas. No. 16,774; U. S. v. Pridgeon, 153 U. S. 48–53, 14 Sup. Ct. 746, 38 L. Ed. 631.

At the date of the passage of the act of July 7, 1898, just quoted, the act of obtaining money or goods by false pretenses was made a crime by the laws of most of the states of the Union, and is, therefore, under this statute, also made a crime against the United States, in all places over which the United States exercises exclusive legislative jurisdiction, within the several states, having laws providing for the punishment of such an act as a crime.

In view of the legislation of Congress to which we have referred (the acts relating to Alaska and the District of Columbia, and the statute of July 7, 1898), our conclusion is that obtaining money or goods under false pretenses is an offense against the laws of the United States, within the meaning of the statute conferring jurisdiction upon the United States Court for China, and that an American citizen guilty of the commission of such an act in China is subject to trial and punishment therefor by that court.

2. But we are of opinion that the information upon which defend-

ant was convicted does not state facts sufficient to constitute the offense of obtaining money under false pretenses. The information, so far as is necessary to be here set out, charges that the defendant, "on or about the 31st day of October, 1906, in Shanghai, China, unlawfully and knowingly did falsely pretend to Woo Ah Sung, Zung Yu Young, Ng Sih Yiek, and Sz Yung that the municipal authorities of the international settlement of Shanghai, China, would allow and permit in the building known as Nos. 4 and 5 Mohawk Road, Shanghai, China, * * * Chinese gambling games to be played during the autumn race meeting of 1906, in Shanghai, China, which pretenses were false, as the said C. A. Biddle then and there well knew, and by said false pretenses the said C. A. Biddle, with intent to defraud, unlawfully did obtain from the said Woo Ah Sung, Zung Yu Dong, Ng Sih Yiek, and Sz Yung the sum of Tls. 3,000.00 Shanghai Sycee as rent for the said premises to be used for the said gambling games."

It will be noticed that the alleged false pretenses relate wholly to some future action of the municipal authorities of the international settlement of Shanghai in permitting Chinese gambling to be played during the autumn race meeting of 1906, in Shanghai. There is no averment that defendant made any false representation as to any existing fact, or past fact, and without such an averment the charge of obtaining money under false pretenses cannot be sustained. In order to constitute the crime of obtaining money under false pretenses, the alleged false representation must be of some past or existing fact. Says Mr. Bishop (section 401, vol. 2), in his work on Criminal Law (3d Ed.):

"Both in the nature of things, and in actual adjudication, the doctrine is that no representation of a future event, whether in the form of a promise or not, can be a pretense, within the statute, for the pretense must relate either to the past or the present."

This statement is well sustained by decided cases. People v. Miller, 169 N. Y. 339, 62 N. E. 418, 88 Am. St. Rep. 546; Cook v. State, 71 Neb. 243, 98 N. W. 810. Our attention has not been called to any case which holds to the contrary. People v. Wasservogle, 77 Cal. 173, 19 Pac. 270, which is cited by the learned attorney for the United States, is in harmony with the rule as we have stated it. In that case the defendant obtained money upon a draft drawn by him; he falsely stating at the time that he had credit with the firm upon which it was drawn, for the amount of the draft, and that the draft would be honored. In that case it will be perceived there was the false representation of an existing fact, to wit, that the defendant had an existing credit to the amount of the draft with the firm upon which the draft was drawn, and the court, in its decision upholding the conviction in that case, said:

"It is true that, to come within the statute, a representation must be of some fact, past or present; but the statement of the defendant that he had credit with the firm named for the amount of the draft, and that the firm would honor the draft, when he knew that he had no credit with the firm, and that the draft would not be honored or paid, was sufficient."

Passing from the information to a consideration of the evidence: It was wholly insufficient to justify the conviction of defendant. It appears that on May 29, 1906, the defendant in his own name, but in fact acting for the Hotel Metropole Company, Limited, entered into a contract with the firm composed of the Chinese named in the information, whereby the defendant "let during the four days of the autumn race meeting of 1906 the whole of the second floor and verandah of the building Nos. 4 and 5 Mohawk Road, for the purpose of running Chinese tables for the sum of taels six thousand—Tls. 6,000—fifteen hundred taels of which to be paid on the signing of the contract by the said Yik Che as bargain money, the balance to be paid on or before the first day of November, 1906. This contract to be null and void should the municipal authorities prohibit the running of the said building as a Chinese grand stand during said race meeting and the above mentioned fifteen hundred taels bargain money be returned to the said Yik Che."

It is very clearly shown by the evidence that, when the payments were made under this contract, the parties knew that gambling was not then permitted in Shanghai, and would not be during the approaching autumn race meeting of 1906, unless the municipal authorities should in some manner remove the prohibition. There was also some evidence tending to show that the council had refused, before the making of the above lease, to give its consent to the suspension of the ordinance against gambling in Shanghai, and that this fact was known to the defendant and not communicated by him to the lessees; and that he and others were endeavoring to get the council to recede from its position against gambling, during the time the several payments were made under this lease; but there was no evidence that defendant ever made any express or implied representation that the ordinance against gambling had been repealed or suspended. There was no false representation of any existing fact.

The judgment is reversed, with directions to discharge the defendant.

PENNSYLVANIA R. CO. v. INTERNATIONAL COAL MINING CO.

(Circuit Court of Appeals, Third Circuit. November 13, 1907.)

No. 14.

APPEAL AND ERROR—REVIEWABLE ORDERS—REQUIRING PRODUCTION OF DOCUMENTS.

An order made by a Circuit Court under Rev. St. § 724 [U. S. Comp. St. 1901, p. 583], requiring a party to an action at law to produce books or writings at the trial, is an interlocutory and not a final order, and is not reviewable on a writ of error prior to final judgment in the cause.

[Ed. Note.—Orders, decrees, and judgments reviewable. See note to Salmon v. Mills, 13 C. C. A. 374.]

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

For opinion below, see 152 Fed. 557. See, also, 152 Fed. 554.

Francis I. Gowen, for plaintiff in error.
J. W. M. Newlin, for defendant in error.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

GRAY, Circuit Judge. The International Coal Mining Company, the defendant in error, hereinafter called the plaintiff, brought its action in the court below against the Pennsylvania Railroad Company, the plaintiff in error, hereinafter called the defendant, under the interstate commerce act, to recover damages against the defendant, for its alleged violation of certain provisions of that act, by discriminating against the plaintiff in the allowance of freight rates upon coal.

To the statement of claim filed by plaintiff, defendant pleaded the general issue of "not guilty," the statute of limitations, and a special plea, which set up a judicial sale under a special fi. fa., issued in execution of a judgment rendered by a court of common pleas of the state of Pennsylvania, against the said plaintiff, the defendant in said judgment, it being alleged that, by virtue of said sale, the right of action under the interstate commerce act, as alleged in the case at bar, was sold, and plaintiff's title thereto divested, and that that fact was a bar to the further prosecution by the plaintiff of its suit. To this special plea, the plaintiff filed several replications, to which the defendant demurred. These demurrers were overruled, and, after an intervening continuance of the cause, and at that stage of the suit, upon the petition of plaintiff's attorney, the following order was made by the court below:

"And now, January 30, 1907, on the filing of the affidavit of J. Chester Wilson, secretary of the plaintiff and International Coal Mining Company, and on motion of James W. M. Newlin, attorney for the plaintiff, and for Edward D. McLaughlin, Esq., trustee in bankruptcy for plaintiff as an intervener, the court grants a rule on the defendant to show cause why it should not be required to produce on the trial of this cause the papers and writings specified in said affidavit or to satisfy the court why it is not in its power to do so, returnable February 13, 1907, at 10 a. m."

On the return day of the rule, the defendant made answer, suggesting, first, that the plaintiff was not entitled to the orders sought by it, because of the facts averred and set forth in the special plea filed by the defendant, and, second, that no warrant existed under the statutes of the United States for the making of any such order as was sought by the plaintiff in an action of the character of the present one, being an action to recover damages in the nature of penalties. On March 25, 1907, the court below filed an opinion, in which the objections urged in the defendant's answer were overruled, and, asserting the right of the court to make the order, as asked for by the plaintiff, it was said:

"The plaintiff in this case is entitled to the production of such books and papers as are relevant and pertinent to the issues involved; but the court will not make the rule absolute, as the question of the relevancy of whatever books and papers are called for must be passed upon at the trial. It is ordered, therefore, that the defendant be required to produce the books and papers specified in the petition, at the trial of the cause, unless it shows cause at the trial why the same should not be produced."

On April 3, 1907, the court below filed the following opinion and order:

"On March 25, 1907, an order was made on the defendant in this case, to produce books and papers at the trial of the case. A petition had been presented, under section 724 of Revised Statutes [U. S. Comp. St. 1901, p. 583], by the plaintiff for the production of books and papers. The defendant made answer, with other matters, that the action being one for the recovery of damages, in the nature of a penalty under the interstate commerce act, the motion should be denied. The order to produce was not made absolute, but the question of requiring the production was left open for settlement at the trial. In this, I think the order was not in proper form. It was the intention of the court to require the production of the books, for the reason that the action is not for a penalty in a sense to exempt the defendant from the production of books in an action of this kind, and even if it be regarded as a suit for the recovery of damages as a penalty, or in the nature of a penalty, the defendant, being a corporation, is not entitled to the privilege of refusing to produce its books and papers in a suit of this kind. Hale v. Henkel, 201 U. S. 43, 26 Sup. Ct. 370, 50 L. Ed. 652; Nelson v. U. S., 201 U. S. 92, 26 Sup. Ct. 358, 50 L. Ed. 673.

"And now, April 2, 1907, on motion of James W. M. Newlin, for the plaintiff, and the answer, filed by the defendant to the rule returnable February 13, 1907, on the defendant to show cause why it should not produce upon the trial the documentary evidence set forth in the affidavit of J. Chester Wilson, the secretary of the plaintiff, upon which the rule to show cause was granted, having been determined by the court to be insufficient, it is ordered that the defendant shall produce the said documentary evidence at the trial of the cause, and the rule to show cause is made absolute."

Thereupon, April 4, 1907, the defendant filed his petition for a writ of error, which being allowed by the court below, the following assignments of error were duly filed:

"First. The Circuit Court erred in entering the order of March 25th, requiring the plaintiff in error to produce at the trial of the cause the books and papers referred to in said order.

"Second. The Circuit Court erred in entering the order of April 3d, requiring the plaintiff in error to produce at the trial of the cause the books and papers referred to in said order."

The return to the writ of error so sued out, brings before this court the record of the case, as far as it had proceeded in the court below, terminating with the order above referred to, of April 3, 1907, "that the defendant shall produce the said documentary evidence at the trial of the cause."

Prior to the argument on the assignments of error, the defendant in error, by its counsel, moved this court to dismiss the writ of error for want of jurisdiction, on the ground that the orders complained of in said assignments of error are interlocutory orders of the court below, and not final decisions of said court, within the meaning of section 6 of the judiciary act of March 3, 1891 (26 Stat. 1110, c. 566 [U. S. Comp. St. 1901, p. 339]). The plaintiff in error, however, contends that the said orders, one or both, are final, within the ratio decidendi of the judgment rendered by this court in the recent case of Cassatt et al. v. Mitchell Coal & Coke Co., 150 Fed. 32, 81 C. C. A. 80. As both orders cannot be treated as final, we may consider the order of April 3, 1907, modifying that of March 25, 1907, as the order complained of in the assignments of error. This was an order, absolute on its face, to produce the books and papers set

forth in the petition of the plaintiff at the trial of the cause, and is prima facie in accordance with the authority conferred upon the court by section 724 of the Revised Statutes, which is as follows:

"In the trial of actions at law, the courts of the United States may, on motion and due notice thereof, require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery. If a plaintiff fails to comply with such order, the court may, on motion, give the like judgment for the defendant, as in cases of non-suit, and if a defendant fails to comply with such order, the court may, on motion give judgment against him by default."

The extent of the power conferred by this section upon trial courts, was fully considered by this court in the case above referred to, the pertinent facts of which are thus stated in its opinion:

"The defendant filed a plea that it was not guilty. After issue was thus joined, and before the time for the trial of the action, the plaintiff filed in the circuit court a petition, in which, after setting forth the nature of the action at law, and declaring that the defendant and Alexander J. Cassatt, president, John B. Thayer, fourth vice president, and 10 other specifically named officers and employés of the defendant, had in their possession or power certain books and papers containing evidence pertinent to the issue, there was a prayer for an order requiring the defendant, and its said officers and employés, to produce said books and papers at the trial, and also for the inspection of the plaintiff's representatives before trial. The application for the order was based on section 724 of the Revised Statutes. * * *

"With the petition and answer before it, the Circuit Court, on the return of the rule to show cause, 'adjudged, ordered and decreed' that Alexander J. Cassatt, president, John B. Thayer, fourth vice president, and 10 other officers and employés of the defendant, 'produce on the trial of this cause,' the books and papers described in the petition, and also that they produce them before trial at a specified time and place for the inspection of the plaintiff, with leave to the plaintiff to make copies thereof.

"This order is now before us for review on a writ of error sued out by Alexander J. Cassatt, John B. Thayer, and the ten other officers and employés of the defendant company."

It is to be observed that, though the petition was for an order against the defendant and the ten persons named, the order is against those ten persons alone, and not against the defendant.

The plaintiff, the Mitchell Coal & Coke Company, contended that this court had no power to review the order on this writ, and moved for its dismissal, on the ground that it was not a final decision within the meaning of section 6 of the judiciary act of March 3, 1891. The court, however, decided that the plaintiff in error had been subjected to the jurisdiction of the circuit court and made liable to its order in a proceeding collateral to and independent of the action at law, and as the order was a decision of all the matters involved in that proceeding, and left nothing to be done, except the ministerial act of executing it, by producing the books of the defendant company, both before and at the trial of the action, it was, in so far as it required production before the trial, a "final decision," reviewable on a writ of error. It was then decided that the plaintiffs in error were not parties, within the meaning of section 724, and that the order was therefore void for that reason. As this point, however, related to a technical defect in the procedure, that could be corrected by an application to the circuit court for a new order, directed to the defend-

ant company and not to its officers, this court thought it incumbent upon it to consider the question whether the Circuit Court has the power, under section 724, to order a party to produce its books or papers before the time of trial, and concluded, for reasons stated in the opinion of the court, that section 724 does not confer such power. In the course of its opinion, the court said:

"A construction of section 724, which limits the power of the court to an order to produce the books at the trial, leaves the party against whom the order is made in a position where he may take exceptions to the rulings of the court at the trial, requiring obedience to the order, or concerning the admissibility of the books, and thereby secure a record on which a writ of error will operate. But an order to produce before trial, if it be disobeyed, will be wholly nugatory, for the reason that the penalty prescribed by the section—the entry of judgment against the disobedient party—cannot be lawfully imposed."

It will be seen, therefore, that the plaintiff in error has misapprehended the meaning and scope of this court in the case referred to. In the case at bar, the order, which is the subject-matter of the writ of error, was made against a party to the suit, to produce at the trial thereof the books and writings mentioned therein, thus differing in the respects pointed out from the order under consideration in the Cassatt Case.

It is apparent on the face of section 724, that to a certain extent the discretion of the court is appealed to, in asking for the order to produce books and writings; certainly to the extent that the court, upon such an application, must decide that, prima facie, the books and writings mentioned are in the possession or power of the party against whom the order is sought to be made, that the evidence they contain is not clearly irrelevant to the issue, and that the circumstances are such as that the party might be compelled to produce the same by the ordinary rules of proceeding in chancery. The court may exercise this power, therefore, in any form adapted to promote its efficiency and effect the purpose of the act. The order in this case, of March 25, 1907, to show cause at the trial, afterwards modified by the order of April 3, 1907, by making the order to produce absolute in its terms, was an order within the terms and issued within the spirit and meaning of the act. That under the rule to show cause of March 25, 1907, the objections of the defendant to the power and jurisdiction of the court to make the order, were heard and overruled, whether prematurely or not, does not preclude the defendant from taking "exceptions to the rulings of the court at the trial, requiring obedience to the order, or concerning the admissibility of the books." Such exceptions, and the rulings thereon, can clearly be made a part of the record of the case, and subject to the operation of a writ of error sued out on its final decision.

It follows, therefore, that the order of the court below complained of, was one of those subsidiary orders, the legality and propriety of which must be determined at and during the progress of the trial; that it was interlocutory, and not final, and therefore not reviewable by this court on writ of error.

The writ of error is therefore dismissed.

PATTON PAINT CO. v. LLOYD.

(Circuit Court of Appeals, Third Circuit. November 8, 1907.)

No. 61.

CONTRACTS—ACTION FOR BREACH—PROOF OF BREACH.

Defendant and others, as members of a syndicate, contemplating the formation of a corporation to sell an enamel paint, entered into a contract with plaintiff to manufacture the same. The contract recited that it was assumed that the product could be made with the plant and equipment then in use by plaintiff, but provided that, if the development of the business showed that additional equipment and machinery were required, the members of the syndicate should provide satisfactory security for the necessary outlay. After the enamel company was formed and the syndicate merged therein, it was found that a new plant would be required to make the enamel, and plaintiff entered into a contract with the company to erect the plant at the company's cost. *Held*, that the money expended in such erection was not under the syndicate contract, but under that with the corporation, and that defendant could not be held liable therefor.

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

Gordon & Smith, for plaintiff in error.

Lazier & Orr, for defendant in error.

Before GRAY and BUFFINGTON, Circuit Judges, and LANNING, District Judge.

BUFFINGTON, Circuit Judge. This is a writ of error to the Circuit Court for the Western District of Pennsylvania. In that court the Patton Paint Company, hereafter styled "plaintiff," brought suit against William F. Lloyd, to recover some $18,000, alleged to be due it by virtue of a contract it made with Lloyd, the defendant, and four others. The court below gave binding instructions for Lloyd, and, on entry of judgment in his favor, plaintiff sued out this writ.

After careful examination of the case, we are of opinion no error was committed by the court below. The contract of July 24, 1902, between the Patton Paint Company and Lloyd and others, provided for the manufacture by that company of a certain enamel, and it was assumed by all parties it could and would be made in one of the plants of the Patton Paint Company. "It is assumed," the contract provides, "that this product can be manufactured with our present equipment and organization, except as to additional labor to produce the same." The subsequent provision of the contract, viz.—"If the development of the plan indicates that we will require additional facilities and machineries, then the members of the syndicate shall provide satisfactory security or indemnity for such outlay, and shall provide in a satisfactory manner for reimbursement to us for the same"—is to be construed in the light of this assumption and of the fact that the formula for making the paint was not then known to the contracting parties. It was assumed the plaintiff's present plants could make the paint. If this assumption necessitated outlay for additional facilities and machinery to and for the then plants of the company, the expense thereof was to be secured and indemnified by Lloyd and his associates. But the con-

tract made no provision for the contingency that did arise when the formula became known, viz., the necessity of erecting a new factory. The court below we think rightly held the erection of such a new plant was not contemplated by the contract or covered by its provisions. Such being the case, it followed Lloyd could not be held for the price of such plant, unless he bound himself by some other or additional contract than that of July 24, 1902, and such a subsequent contract by Lloyd the plaintiff sought to establish. In its statement of claim it alleged that:

"In or about the months of August or September, 1902, the plaintiff, at the request of said syndicate, commenced the erection of a plant, for the purpose of carrying out said contract, in and upon a certain leasehold acquired by it in the city of Milwaukee and state of Wisconsin, and it was agreed between the plaintiff and the said syndicate, particularly the said William F. Lloyd, one of the members of said syndicate, that the cost and outlay by the plaintiff in the construction and equipment of said plant should be reimbursed by the said syndicate to the plaintiff in each month for the expenditures made during the preceding month."

But on the trial no such alleged understanding by Lloyd was proved. Not only was it shown that the work was done by plaintiff under a written contract with the Van Hoof Enamel Company, a corporation of which this syndicate had become members, but the proof is unquestioned that Lloyd made no contract subsequent to July 24th. In that regard, the testimony was:

"Q. Now, Mr. Patton, did Mr. Lloyd ever promise to pay the expense of constructing that plant? A. Mr. Lloyd? Q. Yes. A. Ever make any promise after the date of this contract? Q. Yes; did they ever at any time in any way make any other agreement with you personally than as appears in the contract of July 24th? A. I don't remember that he ever promised it; no. Q. No other contract with Mr. Lloyd individually than the contract of July 24, 1902? A. That is the only contract I have."

Now, the contract of July 24th contemplated its acceptance by the thereafter to be incorporated Van Hoof Enamel Company. Such incorporation took place on July 28th, all rights under the contract were conveyed to it, and the formula was given to Humphreys, one of its directors, who was not a member of the syndicate. While such transfer did not release the individual members of the syndicate from any liability created by the contract, yet it does show that the syndicate was supplanted by the corporation, and Lloyd testified, without contradiction, that it went out of existence on July 28th, when the contemplated corporation was chartered. There is no testimony that the members of the syndicate as such thereafter met or made any contract. Any meetings at which they were subsequently present were directors' meetings of the Van Hoof Enamel Company. Under these conditions, the directors of that company met on September 10th and authorized the construction by the Patton Paint Company, at a price not to exceed $10,000, of a new plant in which to manufacture enamel. To pay said sum the five men who had constituted the syndicate agreed to each discount a note of the Van Hoof Enamel Company for $2,000. This offer of the Van Hoof Enamel Company for the new plant was accepted in writing by the Patton Paint Company, acting by its vice president, who had been present as a director at the meeting of the

Van Hoof Company noted. The work was proceeded with by the plaintiff under this authorization, and charged as it progressed to the Van Hoof Enamel Company. Under these proofs, facts, and writings —concerning all of which there is practically no dispute—no legal liability on the part of Lloyd existed to pay the expenditures incurred by the plaintiff in erecting the new building at the instance of the Van Hoof Company.

The judgment of the court below is therefore affirmed.

NOTE.—The following is the opinion of Acheson, Circuit Judge, in the court below:

ACHESON, Circuit Judge. At the conclusion of the trial of this case in May, 1904, I was of opinion that the plaintiff, under the uncontradicted evidence and the pleadings, could not recover, and that, for the reasons stated in the charge of the court, the jury should be instructed to return a verdict in favor of the defendant. Since the recent argument of the plaintiff's motion for a new trial I have carefully examined this record, and it is clear to me that the binding instructions for the defendant were correct. In charging the jury, it was my purpose to state the controlling facts which were uncontradicted, as explaining for the benefit of the parties the reasons which actuated the court. Having, then, thus set forth the material facts of the case in the charge of the court, I need not repeat them here, contenting myself with a brief restatement of the reasons why, in my judgment, the instructions to the jury were correct.

(1) Under the plaintiff's own proofs, the contract under which the expenditures sued for were made was a contract between the plaintiff and the Van Hoof Enamel Company, a corporation, and not the contract sued on of July 24, 1902, to which the defendant was a party. The plaintiff itself, also, for some months on its books charged that corporation with the first of these expenditures and rendered bills therefor to that corporation.

(2) The expenditures which are the subject of this suit were for an experimental plant. I find no warrant for any outlay for experimental purposes in the contract of July, 1902. Additional "facilities" and "machinery" were, indeed, contemplated by that contract. But the expenditures in question were not for additional facilities or machinery, but were for a plant purely experimental. Hence, I am unable to perceive how liability therefor can be imposed upon this individual defendant because of his contract with the plaintiff. Moreover, the plaintiff, by its letter of August 15, 1902 (which resulted in the contract with the Van Hoof Enamel Company), evidently did not treat the contract in suit (that of July 24, 1902) as warranting the expenditures proposed by that letter, which expenditures are sought to be recovered of this defendant, but the plaintiff specifically asked for authority for the outlay for the proposed experimental plant. Such authority, indeed, it received, not from the defendant, but from the Van Hoof Enamel Company.

(3) Even if this experimental plant could fairly be treated as an additional facility within the meaning of "Condition First" of the contract in suit, then surely such plant could not be thus regarded as a facility until completed. As long as incomplete, it was anything but a facility. That this experimental plant never was completed the uncontradicted evidence for the plaintiff itself clearly showed. Hence, the outlay by the plaintiff being abortive, there could not arise any liability on the part of the individual signers of the contract of July, 1902, to reimburse the plaintiff. For the same reason, no liability could accrue under "Condition Second" of the contract. The failure as a commercial success of the process of manufacture was a condition precedent to liability to reimburse the plaintiff for loss in connection with the project embodied in the contract in suit. Of course, while this experimental plant remained incomplete and inoperative, the question of success or failure could never be reached. I may add that the plaintiff, realizing the importance of the fact of the completion of this plant as a material element of its right of recovery, alleged completion, but the proofs on both sides were to the contrary.

The motion for a new trial is denied.

STEWART v. BOARD OF TRUSTEES OF PARK COLLEGE et al.*

(Circuit Court of Appeals, Eighth Circuit. October 14, 1907.)

No. 2,490.

JUDGMENT—CONCLUSIVENESS OF ADJUDICATION—MATTERS CONCLUDED.

A final decree of a state court in a suit brought for the cancellation of a mortgage and foreclosure deed on condition of paying the mortgage debt with interest and costs, even though on demurrer, is a bar to a subsequent suit in a federal court for the same purpose against the same defendants or their privies; the grounds relied upon in the pleading being the same in both actions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 987–993, 1513.

Conclusiveness as between federal and state courts, see notes to Kansas City Ft. S. & M. R. Co. v. Morgan, 21 C. C. A. 478; Union & Planters' Bank v. City of Memphis, 49 C. C. A. 468.]

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

C. H. Nearing (Amos Townsend, on the brief), for appellant.

H. L. Alden, for appellee Cemetery Association.

Robert E. Morris (J. E. McFadden, on the brief), for appellee Board of Trustees of Park College.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

ADAMS, Circuit Judge. This was a suit to remove a cloud from Stewart's title to land in Wyandotte county, Kan., claimed to have been caused by a sale under a decree of foreclosure of a mortgage which he had executed to secure a loan made to him by the defendant college.

The college was a corporation of Missouri organized for educational purposes. Having money for investment, it loaned $20,000 to Stewart, and took as security for the payment of a note representing the loan the mortgage in question. Stewart failed to pay the note at its maturity and suit was instituted by the college in the district court of Wyandotte county, Kan., to foreclose the mortgage. Stewart duly appeared to the action and filed his answer, consisting of a general denial and plea of payment. In due course, October, 1900, a decree of foreclosure followed, the land was duly advertised and sold, and the college became the purchaser. In June, 1902, after the expiration of the time within which the mortgagor might redeem under the Kansas statutes, a deed was duly executed conveying the land to the college. In August, 1902, Stewart instituted suit in the same court against the defendant college. In his petition he set up the facts just recited, and further alleged that defendant was a foreign corporation organized as an educational institution under the laws of Missouri, and as such had no power to loan money in Kansas or take real estate mortgage as security for its payment; that it had not complied with certain statutory provisions to entitle it to do business in Kansas; and that it misled and deceived him, and thereby prevented him from exercising his statutory right to redeem the land from the foreclosure sale within the time permitted by law.

*Rehearing denied December 28, 1907.

His prayer was that defendant be required to reconvey the land to him upon his paying the principal and interest of the original loan and the costs and taxes paid by it. He also prayed for general relief. The defendant duly appeared and filed demurrer to the bill for want of equity. The demurrer was sustained and final decree rendered in its favor. From that judgment an appeal was duly prosecuted to the Supreme Court of Kansas, where, in February, 1904, the decree was in all things affirmed. Upon the coming down of the mandate of affirmance Stewart filed a motion for leave to file an amended petition. This was denied, defendant's motion for judgment in accordance with the mandate was sustained, and judgment was accordingly entered. From this order denying him the right to file the amended petition Stewart again appealed to the Supreme Court, where in May, 1905, the action of the district court was again affirmed.

The bill in the present suit instituted in January, 1906, discloses the facts recited in the former suits, and charges misconduct on the part of the board of trustees of the college which misled Stewart to his injury in the matter of redeeming from the foreclosure sale, want of corporate power in the college to acquire or hold property, and failure on the part of the college to comply with the laws of Kansas enabling it to do business in that state. The prayer was that, upon repayment by Stewart of the amount of the original loan with interest and costs, the cloud consisting of the mortgage and foreclosure deed be removed, and that defendants be declared to have no estate or interest in the lands mortgaged. He also again prayed for general relief. To this bill the defendants filed answers, denying all charges of improper or misleading conduct on the part of the board of trustees, affirming the authority and power of the college to make loans, to take a mortgage, and purchase the land in question, and particularly pleaded the decrees in the foreclosure suit and the suit to redeem as estoppels by judgment upon complainant's right of present action. The court below, after a finding of facts by a special master substantially as just stated, entered a decree dismissing the bill. The former decrees were held to be conclusive estoppels and to bar the complainant's right of recovery in this case.

Without stopping to consider the effect of the judgment in the foreclosure case which is claimed by counsel for the college to constitute a complete bar to the present action, we take up a consideration of the second case, the one instituted by Stewart to set aside the deed to the college. That suit was instituted by Stewart against the college and an intermediary, the agent of the syndicate to whom title was conveyed for the purpose of organizing the cemetery association, a defendant in this present case. That case was instituted in a court which had jurisdiction of the subject-matter of the action and of the parties to it. The parties were either the same or in privity with the parties to the present action. The object of the suit or claim sued on was the same as in the present one, namely, to secure a decree setting aside the mortgage and foreclosure deed on condition of paying to the college the amount of the original loan with interest and costs. The grounds of Stewart's alleged right were practically the same in both cases, namely, (1) want of power in

the college to make the original loan and take real estate security for payment; (2) failure by the college to comply with laws of Kansas enabling it to do business in that state; (3) misconduct of the college preventing Stewart from exercising his right to redeem within the statutory period. The judgment in the former suit is undoubtedly a bar to the present action. It was upon the same claim and between the same parties, and the decisive questions raised by the pleadings in this case were the same, and were necessarily decided in that, even though it went off on demurrer. Cromwell v. County of Sac, 94 U. S. 351, 352 (24 L. Ed. 195); Gordon v. Ware Nat. Bank, 65 C. C. A. 580, 132 Fed. 444, 449 (67 L. R. A. 550); Wiggins Ferry Co. v. O. & M. Ry., 142 U. S. 396, 12 Sup. Ct. 188, 35 L. Ed. 1055; Gould v. Evansville, etc., R. Co., 91 U. S. 526, 23 L. Ed. 416. Learned counsel for Stewart earnestly argue that as the mortgage constituted no lien because ultra vires, and as the college could not acquire any interest in the realty in question because of want of power, the former judgment establishing such a mortgage and title acquired under it was beyond the power of the court, and therefore works no estoppel in this case. This argument misinterprets the whole doctrine of res adjudicata. That doctrine rests upon the wisdom and public policy of putting an end to litigation. It jealously secures and guards the right of every person to a day in court—to an opportunity to have his claim adjudicated by a court of competent jurisdiction—but, when that opportunity has been once fully afforded, public policy demands that litigation on the same claim and between the same parties or their privies shall forever cease. The courts of Kansas had a full opportunity to hear and fully heard Stewart's contention that the college acquired no title by its mortgage and foreclosure proceedings and finally decided the question adversely to him. They were courts endowed with jurisdiction to hear and decide the very question submitted to them, and it is not for us or any other court not exercising appellate jurisdiction over them to re-examine between the same parties the question so finally determined.

In view of the clear showing made by the record that the present suit amounts to nothing else than an attempt to relitigate the questions once litigated between the same parties to a final conclusion in the courts of Kansas, we find no occasion to consider the many other interesting questions argued by counsel.

The Circuit Court correctly dismissed the bill, and its judgment is accordingly affirmed.

DAVIS v. CLEVELAND, C., C. & ST. L. RY. CO. et al.

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

No. 2,504.

COURTS—CIRCUIT COURTS OF APPEALS—JURISDICTION.

Where the power of a Circuit Court of the United States to proceed to the trial of an action against a nonresident defendant depends on whether there has been a general appearance by defendant, or, if not, upon the validity of attachments and garnishments of property within the district,

both such questions are jurisdictional, and a decision of the court determining them in favor of the defendant and dismissing the action for want of jurisdiction is reviewable only by the Supreme Court under sections 5 and 6 of the Circuit Court of Appeals act of March 3, 1891 (26 Stat. 827, 828, c. 517 [U. S. Comp. St. 1901, pp. 549, 550]).

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

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

For opinion below, see 146 Fed. 403.

Wilbur Owen and Thomas F. Bevington, for the plaintiff in error.

W. H. Farnsworth (Deloss C. Shull and J. U. Sammis, on the brief), for the defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

HOOK, Circuit Judge. Charles A. Davis, as executor, sued the Cleveland, Cincinnati, Chicago & St. Louis Railway Company in a state court of Iowa upon a cause of action for the death of his testate which occurred in Illinois. The defendant railway company was organized under the laws of Indiana and Ohio, and owned and operated lines of railroad in those states and in Illinois, but it had no lines of road and no agents or agencies in Iowa where the action was brought. So, to obtain jurisdiction, the plaintiff caused an original notice of the commencement of the action containing also an admonition to answer by a specified date to be served on the secretary of defendant at its general offices in Cincinnati, Ohio, and also caused writs of attachment and garnishment to be issued directed for service to sheriffs of counties in Iowa. The writs of garnishment were served upon certain railroad companies doing business in Iowa and having traffic relations with the defendant, and some freight cars of the defendant in the possession of the garnishees were also attached. Notice of the attachments and garnishments was served on defendant in Ohio. The defendant removed the cause to the Circuit Court of the United States for the Northern District of Iowa, and thereupon filed in that court its motion, in which it said that it appeared specially for the purpose of objecting to the jurisdiction of the court over its person and its property, and it moved to quash and set aside the service of the writs of attachment and garnishment. The plaintiff filed a resistance to the motion. Upon hearing the Circuit Court held that defendant's appearance was not a general one, and therefore it had not submitted itself to the jurisdiction of the court; that the service of the notices in Ohio did not confer jurisdiction of the person; that the cars attached in Iowa were temporarily there having been brought by the garnishees into that state from points without; and that, when brought within the state and when attached, they were employed in interstate commerce and in the fulfillment of duties in respect of such commerce imposed on defendant and the garnishees, its connecting carriers, by the laws of the United States; that the credits of defendant in the hands of the garnishees were shifting traffic balances ascertainable and payable at Chicago, Ill., and a part of

and inseparably connected with the commerce mentioned; that the cars were not attachable and the credits not subject to garnishment, and therefore the court had not lawfully secured jurisdiction of any property of defendant. The motion to quash was sustained, and the action was dismissed without prejudice. The plaintiff sued out a writ of error from this court.

It is not claimed by plaintiff that service of the notices in Ohio was effectual to confer jurisdiction over the person of defendant. These are the questions: Was defendant's appearance to contest the validity of the attachments and garnishments a general one? Were the cars and credits of defendant subject to attachment and garnishment? In other words, did the trial court secure such dominion over person or property by appearance or process as authorized it to proceed to trial of the action and render a valid judgment upon the issues involved? The trial court answered them in the negative and dismissed the action for want of jurisdiction. In respect of the essential character of these questions, they are not distinguishable from one of the legality of the service of summons upon a defendant. They do not pertain to the merits of the case, and did not arise during the progress of a trial. They lay at the threshold, and upon an affirmative answer depended the power of the court to hear and decide the cause. In legal phraseology that power is termed "jurisdiction." It is none the less a jurisdictional matter in the case of attachment and garnishment of property of a nonresident because the power of the court to proceed to trial depends in the absence of the defendant upon its lawful seizure of his property. The question of jurisdiction was decided in favor of defendant and the decision disposed of the case. Under the Court of Appeals act of 1891 (Act March 3, 1891, c. 517, §§ 5, 6, 26 Stat. 827, 828 [U. S. Comp. St. 1901, pp. 549, 550]) the Supreme Court alone has power to review such a decision. Board of Trade v. Hammond Elevator Co., 198 U. S. 424, 25 Sup. Ct. 740, 49 L. Ed. 1111; United States v. Jahn, 155 U. S. 109, 15 Sup. Ct. 39, 39 L. Ed. 87; St. Louis Cotton Compress Co. v. American Cotton Co., 125 Fed. 196, 60 C. C. A. 80.

The writ of error is dismissed.

DETRICK & HARVEY MACH. CO. OF BALTIMORE CITY v. AMERICAN FOUNDRY & MACHINE CO.

(Circuit Court, D. Maryland. November 12, 1907.)

PATENTS—INFRINGEMENT—METAL PLANERS.

The Detrick patent, No. 472,804, for a metal planer of the open-side type, and constructed to plane two surfaces of an object at the same time, which describes a machine having a side post with a vertical slideway upon which is adjusted a horizontal arm also having a slideway, and carrying a tool saddle for the tool which planes the horizontal face of the object, while a depending arm constructed integrally with such beam at the end next the post has a slideway upon which is adjusted a tool for planing the vertical face at the same time, *held* infringed by the machine of the Robinson patent, No. 783,223, which as described in the patent has the vertical cutting tool mounted upon a slideway attached to the

side of the post and entirely independent of the horizontal beam carrying the other tool, but in which, as actually constructed, such slideway, when in use, is attached to and dependent on the downwardly depending arm of such beam, without which it would be ineffective, and such construction making it substantially identical in all respects with the Detrick machine.

In Equity. On final hearing.

Chester A. Weed and Randolph Barton, for complainant.

W. W. Dodge, Marbury & Gosnell, and Carroll T. Bond, for defendant.

MORRIS, District Judge. This is a suit in equity, in usual form, for alleged infringement of a patent. The complainant is the owner of United States patent No. 472,804, dated April 12, 1892, granted to Jacob S. Detrick, for improvements in metal planers.

The patentee states:

"My invention relates to improvements in metal planing machines, whereby two surfaces of an object can be planed at the same time, and also the back movement of the platen be much more rapid than the forward, or cutting, movement."

It is only the patented devices by which two surfaces of a piece of metal can be planed at the same time which are in controversy in this suit. This is done by devices which enable the operator to apply one cutting tool to the horizontal surface of the object, and, at the same time, another tool to the vertical side. Neither of these operations was new at the date of the patent in suit, and it is upon the novelty of the combination of the devices that the patentability must rest. An expired patent to Detrick, No. 278,618, dated May 29, 1883, which became public property May 29, 1900, described an open-side metal planing machine, the object of which was to provide a planer adapted to plane pieces of work of greater width than will pass between the two sides uprights or posts of an ordinary planer. This machine of the expired patent had a single upright post of a construction which gave it great rigidity and stiffness. To the post a cross-beam was adjusted, so as to move up and down on a vertical slide on the face of the post. The cross-beam carried a tool saddle furnished with a planing tool movable horizontally on a similar slide on the face of the cross-beam. This planer of the expired patent had no second tool arranged to plane the vertical side of the object at the same time that the tool on the cross-beam was planing the horizontal surface. But it was provided that the slide on the face of the post and the slide on the cross-beam should be of the same size and shape, so that, if desired, the cross-beam could be removed and the tool saddle placed on the vertical slide on the face of the post, and could be operated so as to plane the vertical side surface of the piece of work without removing it from the platen. But the removal of the cross-beam was laborious and expensive, as it is a large and massive casting, weighing, in the larger machines, as much as 4,000 pounds. The result to be obtained by Detrick's patent of 1892, now in suit, which was applied for and granted to Detrick after the expiration of his first patent, was to avoid the necessity of removing the cross-beam when it was desired to use a vertical side tool,

and to permit a side tool being used simultaneously with the tool on the horizontal cross-beam. This he accomplished, as explained by the specification of the patent in suit, by extending from the cross-beam, at the point where it is adjusted to the post, a downwardly extending arm, and placing on the front of this extension a vertical slideway, and mounting on it another tool saddle, intended to hold the tool to do the planing on the vertical side surface of the work.

This construction is thus described in the specification of the patent in suit:

"The letter, E, designates the cross-beam, which is provided with a horizontal slideway, (c), and is vertically adjustable on the vertical slide of the rigid post. Integral with one end of this cross-beam, is a downwardly-extending part, e', having in its back a dove-tailed groove, (f), fitting the said slideway, (f), on the post, and on its front is provided with a vertical slideway, (e), * * * that is, the cross-beam, R, and the downwardly extending slideway are one solid piece and form a right angle, the said downwardly-projecting part serving to brace and sustain the cross-beam and insuring that the latter will preserve a true horizontal position when vertically adjusted."

It will be seen that the difference between the cross-beam of the expired Detrick patent and the patent now in suit consists in the downwardly-extending arm of the cross-beam, fitted to the post by the slideway at its back, and the slideway fixed upon its outer face for the purpose of a second tool as described. The infringement charged against the defendant is that its construction is the equivalent in operation of the downwardly-extending arm extending at right angles to the cross-beam, and made in one solid piece with it, and provided with a vertical slideway for a tool head. The defendant's metal planing machine is constructed in accordance with patent No. 783,223, dated February 21, 1905, granted to Hanson Robinson, president of the defendant company, and formerly a draftsman in the employ of the complainant. In its general construction it is identical with the machine of the expired Detrick patent; the difference being in the addition of a second saddle and tool intended for vertical planing. The saddle and tool have a vertical movement on a slideway attached to the upright post, but not attached directly to a downwardly projecting arm of the cross-beam. The present controversy resolves itself into the question whether the slideway on which the second saddle or tool head in defendant's machine is carried is the mechanical equivalent of the slideway on the downwardly-depending arm of the complainant's patent as claimed therein.

Robinson, in the specification of defendant's patent, states:

"The invention pertains to that class or type of metal-planing machines known in the trade as 'open-wide planers,' wherein the horizontal beam overhanging the bed and carrying the tool head is sustained wholly at one end and from one side of the bed. The present improvements are directed to a secondary or supplemental tool head, carried upon the main post or standard and wholly independent of the overhanging beam and of the tool head carried thereby. * * * In planers of this class, it is desirable that any and all adjustments of the beams and its tool head may be made without disturbing or affecting the position or adjustment of the supplemental or secondary tool head, and that each tool head shall be adjustable independently of the beam. With this primary object in view, I adopt the construction illustrated in the drawings, and which I shall now explain with the aid thereof."

The specification then describes the general construction of the horizontal planer, viz., a post or standard and the cross-beam, with its tool head or saddle, and the devices for lowering and raising the beam or guideway and for operating the tool, which are not materially different from the usual gear employed for that purpose. The specification then proceeds to describe the construction of the second tool head, intended for vertical planing, and its mechanism, and to differentiate its construction from that of the complainant's machine. The specification states:

"H indicates a vertical guide-bar, or supplemental post or standard, spaced out or set away from the main standard, C, but connected therewith, at or near its upper or lower ends. It is of a form similar to the guideway, (a), and is designed to receive, support and guide a secondary tool head, I, of the same character as tool head, E."

The specification then describes the mechanical appliances by which the tool head, I, can be made to rise or fall upward or downward on its guideway upon the face of the standard or post, C, and continues:

"Under the construction thus set forth, the beam may be raised and lowered and the tool head, E, may be shifted laterally or turned to any angle required, all without, in any manner, disturbing or affecting the tool head, I, and its tool stock and tools. Conversely, the tool head, I, its tool stock and tools, may be adjusted as desired, wholly regardless of the beam and of the parts carried thereby. In this, the present is advantageous over prior open-side planer constructions; under which the secondary tool head, I, being carried by the downwardly-extending guiding portion of the beam, necessarily partook of all movements of the beam and hence had to be adjusted whenever the beam was moved. It will be observed, too, that the beam may be wholly removed from the column or standard without disturbing the secondary tool head, I. When the beam is thus removed, the tool head, I, may be carried higher than would otherwise be possible. In other words, it may be adjusted to the top of its guide-bar, or a distance equal to the vertical measurement of the beam proper above the highest point it can reach, when the beam is in position. This is a material advantage in working upon the sides or vertical faces of an object carried by the bed or table, and it is a capability not possessed by a tool head carried upon the depending guiding portion of the beam, as has heretofore been done. A further advantage is found in the greater stability of the independent guide, H, which, being wholly independent of the beam, frees the tool head, I, from any play or vibration incident to chattering of the tools carried by tool head, E, or to other causes. * * *

"In the practical and continued use of machines of this sort—that is to say, open-side planers—in which the beam is supported wholly from one side or end, the wear upon the vertical guideway is uneven, and in time there is a tendency of the beam to drop or sag at its outer end. This necessitates 'truing up,' which is commonly done by dressing or truing the guideway of the post and setting up the gib or gibs of the guiding portion of the beam. In order to render open-side planers capable of employing a side head and tool and permitting such tool to be adjusted to a point close beneath the horizontal position of the beam proper, two plans have heretofore been adopted. According to one of these plans, the beam is constructed with an upwardly-extending guiding portion but with little or no depending portion, and the side tool head or saddle is placed directly upon the front of the post or standard, as has for many years been done with the common two-post planers. Under the other plan, the beam is cast with a long downwardly-extending guiding portion, integral with the beam proper, fitted to the guides or ways in the front of the post or standard and in turn having formed upon the front or outer face or second guideway, to receive the side tool head or saddle. This latter construction is objectionable in that the wear of one vertical guideway throws it out of parallel or alignment with the other vertical guideway.

It is further objectionable because the chattering or vibration of either tool is transmitted through the integral beam to the other tool; but it is especially objectionable because it is impossible to adjust the beam vertically without thereby moving the side head and, assuming it to be properly adjusted, destroying the adjustment thereof. By making the guide-bar or supplemental post, H, separate from the main post, and wholly independent of the beam, each vertical guideway is rendered independent of the other, and, in the event of it becoming necessary to redress or true either the other is not thereby affected. Again, being independent, it is comparatively easy to true and fit each separately, the supplemental post or guideway, H, being capable of adjustment relatively to the main post and the beam. To permit this to be done, clearance is left between the supplemental post or guideway, H, and the beam, and its depending portion. * * * By the use of the supplemental post or standard, the beam-sustaining effect of the depending guiding portion thereof is retained and availed of, while the disadvantages of having the side tool head mounted upon the beam or any portion thereof are completely overcome. A larger amount of work can be performed, in a given time, with a machine constructed as here set forth, because of the independence of adjustment of the beam and the side tool head, permitting the side tool to continue cutting while the beam is being adjusted, and permitting the upper tool to continue cutting while the side tool head is being adjusted, there being no interference of one with the other."

The claims of the Detrick patent now in suit involved in this controversy are:

"1. In a metal planer, the combination of the base or frame, a reciprocating platen, a post fixed rigidly at the side of the platen and having a vertical slideway, f, and a cross-beam, E, having at one end a downwardly-projecting part, E', which fits the said vertical slideway of the post, as and for the purpose set forth.

"2. In a metal planer, a cross-beam provided with a horizontal slideway and having at one end a downwardly-projecting part provided with a vertical slideway for a tool head, as set forth.

"3. In a metal planer, the combination of a cross-beam provided with a horizontal slideway and having at one end a downwardly-projecting part provided with a vertical slideway, a movable head, I, on the said horizontal slideway, and a movable head, I', on the vertical slideway, as set forth.

"4. In a metal planer, the combination of a cross-beam provided with a horizontal slideway and having at one end a downwardly-projecting part provided with a vertical slideway, a movable head, I, on the said horizontal slideway and a movable head, I', on the vertical slideway, screw-shafts on the cross-beam and a vertical screw on the downward-projecting part, said vertical screw having a miter-pinion, o', a horizontal shaft, p, also having a miter-pinion, and a vertical rack, H, which imparts motion, as described, to the screw-shafts on the cross-beam and also the vertical screw on the downwardly-projecting part."

It thus appears that an essential feature of the construction described and claimed in the complainant's patent is a downwardly-projecting arm of the cross-beam, made in one solid piece, on the front of which is placed a vertical guideway for the side tool head, while in the defendant's patent the guideway is affixed to a separate supplemental standard, fastened to the top and bottom of the main standard, and having no direct connection with the downwardly-projecting part of the cross-beam.

We must start with the concession that the original Detrick patent had expired and his construction of an open-side planer had become public property. The object of both complainant and defendant was to add to the planer of the expired patent a supplementary side tool

adjustable to plane the vertical edge of an object which was being planed by the main tool on its horizontal surface. The use of a downwardly-extending arm, constructed merely to brace and sustain the cross-beam and to insure its maintaining a true horizontal position when adjusted, would not, considering the state of the art, have required invention. Some increase of width of the cross-beam, at the point of its bearing on the post, to secure its holding its place when subjected to the great strain of a deep cut by the tool into the iron to be surfaced, appears in other similar planers, and in the Detrick machine of his expired patent, in which, the testimony discloses, the increase in the width of the cross-beam was as much as 13 inches, at its bearing on the post. I do not find that the increase in the length of the arm merely to give more bearing on the post required invention; and, if the first claim of the patent in suit is construed to that restricted meaning, I should not hold it to be valid. But in the patent in suit the downwardly-depending arm is much longer than any previous structure and longer than required for rigidity when operated without a side tool, and the substance of the real invention disclosed by the patent in suit is the use of the downwardly-depending member for carrying a slideway for a side tool. By this method of mounting the side tool, the tool had its bearing upon the downwardly-projecting arm, and the downwardly-projecting arm had its bearing on the post, so that the side tool was rigidly braced against vibration when in operation. In metal planers, the first consideration must be that the tool which does the cutting shall be so rigidly held and braced that it will not vibrate and chatter under the enormous strain of driving the cutting tool through a cut in the metal object being surfaced. If the defendant accomplishes the same result as is accomplished by the patent in suit, and in precisely the same way, then he has taken the substance of complainant's invention. The two machines are substantially identical up to the point where the slideway of the side tool is constructed. In the patent in suit the slideway is affixed directly in front of the downwardly-depending arm. In the defendant's machine the slideway is affixed in front of the downwardly-depending arm fastened to the post at the top and bottom, and in defendant's patent specification is said to be spaced out from the post so as to allow a clearance to be left between the guideway and the downwardly-extending arm of the cross-beam. The fact as to whether or not such a space or clearance exists when the defendant's machine is in operation, and whether or not the practical operation of defendant's machine requires that it shall not exist, are very vital matters in this case.

I find from the testimony that the defendant's machine, as constructed, is made with the surfaces of the post and slideway, which are next each other smoothly surfaced so as to admit of a tight engagement, and when not in operation the clearance between was not greater than fifteen ten thousandths of an inch (.0015). I find that it was demonstrated, by careful experiment, that when in operation, as constructed, the guideway of the side tool of defendant's machine takes a firm and direct bearing on the downwardly-depending arm of the cross-beam, and was clamped to it in all respects as thoroughly and effectively as if the guideway was affixed directly upon the face of the

arm. This I find to have been further demonstrated by the fact that if the cross-beam, with its downwardly-depending arm, was removed, so that the guideway did not have the arm to bear against, it vibrated so badly that the machine was not effective for the purposes for which it was built, and further by the fact that if the depending arm was present, and the top and bottom fastenings to the post were released, the guideway, by reason of its tight engagement with the post, acted as well as when it was tightly affixed to the post at the top and bottom. These carefully made tests and experiments show that the efficiency of defendant's machine, as constructed, depends on the fact that the guideway of the side tool bears against the depending arm of the cross-beam, and is constructed so as to bear against it, and in operation becomes firmly clamped to it, and that without that bearing it would be ineffective and without practical value for the purposes for which it is designed. I find from these facts that the side tool guideway of the defendant's machine, although in the specification of defendant's patent it is described as being separated from the depending arm of the cross-beam by a clearance, is not so made, but is made so as to bear on the downwardly-depending arm and be clamped with it, and therefore is in effect mounted on the depending arm itself. The intervention of any number of layers of metal between the guideway and the depending arm would not constitute a noninfringing construction, provided the guideway was, in effect, mounted upon the depending arm, and was in firm and tight contact with it when in operation. The clearance which is shown in actual construction to be only a few thousandths of an inch, was not mentioned in the original specification filed with the application for defendant's patent, but was made as an amendment, after testimony for the complainant was taken in this suit. It would appear, therefore, that it was inserted to distinguish defendant's device from complainant's, but in actual construction and operation there is practically no clearance, but a tight, firm bearing of one part upon the other.

I am not called upon in this suit to determine whether or not the device of the defendant's patent, by which the side tool head is unaffected by the raising or lowering of the cross-beam and the side tool head can be raised or lowered independently of the downwardly-projecting arm of the cross-beam, is a patentable improvement upon the complainant's patented machine, and I have not considered that question.

I am of opinion that the complainant's patent is infringed by the defendant's machine as to claims 2, 3, and 4, and, as to the first claim, it is infringed in so far as defendant uses the downwardly-projecting arm of the cross-beam as a bearing for the guideway of the side tool head.

AMERICAN CAN CO. v. McGINNIS et al.

(Circuit Court, D. Maryland. October 14, 1907.)

1. PATENTS—INFRINGEMENT—COMBINATION OF OLD ELEMENTS.
Where a patent is not for a pioneer invention, but for a combination of old elements, the range of infringing equivalents is restricted to those which perform the same functions in the same way.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 386.]

2. SAME—CAN-HEADING MACHINE.
The Wheaton patent, No. 477,584, for a can-heading machine, is for a combination of old elements, and each claim has as an essential element, either expressly or by necessary reference to the specification and drawings, a mold made in two parts, one for each end of the can, and each part having two jaws, one of which opens, to receive the can body and heads, by turning on an axis which is at right angles to the axial line of the jaws. As so construed, it is not infringed by the machine of the McGinnis patent, No. 796,928.

In Equity. On final hearing.

John P. Poe & Sons and Munday, Evarts & Adcocke, for complainants.

Gans & Haman, for defendants.

MORRIS, District Judge. This is a bill in equity, filed by the American Can Company against the defendants, praying an injunction and an account for the alleged infringement of a patent. The complainant's patent is No. 477,584, June 21, 1892, granted to M. A. Wheaton, of San Francisco, for an improvement in can-heading machines.

It is claimed for the Wheaton machine that it was the first practical and successful machine which would head cans with a continuous movement, and not with a stop and start movement to enable the operator to insert the can and bottom and top in the machine, during the heading operation. In the Wheaton machine, the molds for conforming the cylindrical body of the can to a true circle are mounted, to the number of ten or more, on a revolving disk, which brings them under a chute by which the can bodies and the tops and bottoms are fed continuously into the revolving molds. The molds consist of a set of two pairs of jaws, interiorly of a circular shape of the size of the can. Each pair of jaws is carried on a rod, which is parallel with the axis of rotation, while the outer jaw of each set opens, by turning back on a hinge, through a half circle so as to open the mold to receive the can body and heads, and to clear itself out of the way of the chute which delivers the can body and heads into the mold. When the can body and heads are in place, the outer jaw returns again by turning a half circle on its hinge, and by closing the mold accurately sizes the can body, and brings the heads into line with it. Then the two sets of closed jaws, one at each end of the can, are moved towards each other sufficiently to force the can body into the flanges of the heads, and complete the heading. The outer jaw then turns back on its hinge and opens the mold so that the can is dropped out of the mold. The mechanism by which these automatic and reciprocating movements are accomplished is not necessarily involved

in the present litigation, and no description of it will be attempted. It is sufficient to say the devices operate rapidly and continuously, with the result that, with the Wheaton machine as now made and operated, it will head 130 cans a minute, which is twice the result obtained from any previous machines.

Although the Wheaton machine has attained this great success, it cannot be maintained that it embodies a pioneer invention. The use of a mold to cause the can body to assume a true cylindrical shape, with an annular space between the mold and the can body at its ends to receive the flange of the can head, and a device for forcing the can head into the annular space, and thereby applying the head outside the can body, is the invention claimed in the first claim of the Norton patent, No. 267,014, November 7, 1882, and that patent was held not to cover a pioneer invention. Wheaton v. Norton, 70 Fed. 833, 17 C. C. A. 447. Not being a pioneer invention, but a combination of elements already in use, the range of infringing equivalents is restricted to those which perform the same functions, in the same way. The success of the Wheaton machine is accomplished very largely by the fact that the set of molds was opened to receive the can body and heads, as it passed under the chute, in such a way as to clear the chute, so as to allow the ten sets of molds to pass rapidly under the chute, and each mold to receive its can body and heads. This, as Wheaton in his specification sets forth, is done by having the mold made in two parts, one for each end of the can, and each part with two jaws, a lower one which does not turn over out of the way, and an upper or outside one, which does turn over out of the way on an axis which is transverse to the axial line of the two sets of jaws and of the can body.

In his specification, explaining Figure 5 of the drawings, Wheaton says:

"In this view, the jaws are open, the outside jaw, N, being turned over on its hinge bolt, h, one-half of a revolution."

He says, further, in his specification:

"In my machine the outside jaw of each set of jaws opens away from the inside jaw of the set about an axis which is transverse to a line passing through the centers of the two sets of jaws, and, incidentally, through the central axial line of each can body when it is in place between the jaws."

The defendant's machine, which is complained of as an infringement, is made under patent No. 796,928, to James McGinnis, August 8, 1905. In his specification, McGinnis states:

"The invention consists, broadly, of can holding or clamping molds, each comprising two jaws, one jaw adapted to slide upon the other, to grip or release a can; said can holders oppositely arranged, and mounted upon revolving frames or wheels; and means to operate each set of jaws, to close one jaw upon the other, and move the jaws, when closed, towards the opposite set of jaws."

The difference between the Wheaton and the McGinnis machines is, substantially, that, in the Wheaton machine, the outside jaw opens away from the mold, and out of the way of the chute, by turning on an axis transverse to the axial line of the set of jaws; while, in the

McGinnis machine, the outside jaw opens the mold and is moved out of the way of the chute by sliding upon the inner jaw, rearwardly, by a slidable connection with it.

The first claim of the McGinnis patent is:

"A machine of the character described, having a mold, comprising two jaws, one jaw having an oblique, rearwardly extending surface, and the other jaw having slidable connection with said oblique surface of the first jaw, and means to actuate said slidable jaw to close the same upon the other jaw."

The proceedings in the Patent Office, during the pendency of Wheaton's application, as shown by the file wrapper and contents, indicate that it was by reason of the novelty of the device for opening the mold by turning the outer jaw of the mold on an axis which is at right angles to the jaws and getting it out of the way of the chute in the manner described, that the claims which were allowed were granted.

All the claims (except the third and fourth) alleged to be infringed by defendant's machine contain substantially the same language which appears in the first claim, viz., "with an outside movable jaw, opening about an axis, transverse to the central line of the closed jaws," or, as stated in the second claim, "in which the outside jaw of each such set opens by moving around an axis, that is transverse to said central axis." As this device is an essential element of the combination, and as all the separate elements are old, the substitution of a different element, which is not equivalent in the sense of the patent law, avoids the charge of infringement. It does not seem to me that, in view of the present state of the art, and the rejections of the Patent Office, in which Wheaton acquiesced, it can be successfully contended that the slidable incline, on which the outer jaw in defendant's combination is withdrawn from the mold, is the equivalent of the device of complainant's combination, by which the outer jaw is withdrawn by revolving on a hinge, the axis of which is at right angles to the molds.

Claims 3 and 4 of the Wheaton patent do not contain the language restricting the opening device to a movable jaw opening about an axis transverse to the central axis, but are much more general. They are as follows:

"Claim 3. In a can-heading machine, the combination of a set of jaws, which are carried around a central axis without changing their position radially from such axis, in combination with mechanism for moving such set of jaws towards another set of similar jaws, substantially as and for the purposes herein set forth.

"Claim 4. In a can-heading machine, two sets of jaws, facing each other, and carried around an axis, without changing their position radially from such axis, in combination with mechanism by which the jaws are opened and closed, mechanism for forcing the jaws towards each other, for putting the can heads on the can body, and mechanism, substantially as described, for moving the sets of jaws farther from each other, after the heads have been placed upon the can body."

These claims 3 and 4 are so vague and general that they cannot be given any meaning except by direct reference to the specification and the drawings, and, so far as the device for opening the outer jaw of the mold is concerned, no device is described, shown, or suggested by the specification or by drawings, other than that hinged on an axis

transverse to the central axis; and it is to a set of jaws of this description that claims 3 and 4 must refer as an element of the combination claimed, and the claims must be limited to the devices shown by the inventor. Computing Scale Co. v. Automatic Scale Co., 204 U. S. 609, 27 Sup. Ct. 307, 51 L. Ed. 645.

Claims 3 and 4 appear to be addressed, more particularly, to the mechanism for moving the sets of jaws to and from each other with a reciprocating movement as an element in the combination. The idea of providing cams to produce this result was not new with Wheaton, but appears in other can-heading machines, so that it could be only the peculiar form and construction of cam contrivance, described and shown in Wheaton's specification and drawings which claims 3 and 4 could properly cover. Thus restricted, it is found that the McGinnis cam contrivance does materially differ from that of the Wheaton patent.

The conclusion I have arrived at is that the infringement has not been established, and that complainant's bill should be dismissed.

BOSTON WOVEN HOSE & RUBBER CO. v. PENNSYLVANIA RUBBER CO.

(Circuit Court, D. Massachusetts. November 14, 1907.)

No. 269.

PATENTS—INFRINGEMENT—WHEEL TIRES.

The Schrader patent, No. 466,577, for improvements in wheel tires, has for its essential feature an internal clamping device for securing a U-shaped tire to the rim of the wheel whether used as a cushion tire, or as inclosing an inflated tube making it pneumatic, and is not infringed by the modern form of "clincher tire," in which the shoe or U-shaped outer tire is held in place by the pressure caused by the inflation of the inner tube, although such method is supplemented by stay-bolts or lugs.

In Equity. On final hearing.

Frederick P. Fish, W. Orison Underwood, and Johnson, Clapp & Underwood, for complainant.

Christy & Christy and Matthews, Thompson & Spring, for defendant.

BROWN, District Judge. Infringement is charged of claim 2 of letters patent No. 466,577, granted January 5, 1892, to Frederick Schrader, for improvements in wheel tires:

"(2) The combination of the U-shaped tire, the felly, an inflated tube confined by said tire, and an internal clamping device, between which and the felly the U-shaped tire is secured, substantially as set forth."

Schrader, the patentee, testifies that he never made a tire such as is described in the patent. The drawings and specification fully represent Schrader's contribution to the art—a conception or project not supported by experience or experiment. The patent describes both cushion tires and pneumatic tires, and the means for holding the tire to the rim are the same whether the complete tire contains an inflated

inner tube, making it pneumatic, or omits the inner tube, making it a cushion tire. The specification states:

"The object of my invention is to provide a wheel with a flexible tire that can be readily and securely fastened to the wheel; and the further object of my invention is to use said flexible tire to retain an inflated section, or what is now commonly called an 'inflated tire,' dispensing with the usual cumbersome and complicated devices usually employed for retaining the inflated section on the wheel."

The specification is principally devoted to an explanation of a mechanical clamp designed to engage slots in the inner lower edges of the U-shaped tire. This metallic clamp or band encircles the wheel, and is arch-shaped in cross-section, both edges acting mechanically to press the ends of the U-shaped tire into grooves in the rim and hold the ends in position. The only description of a pneumatic feature is the following:

"The tire may be inflated by simply forcing air under pressure into the space between the band and the tire; or, which is preferable, I place within this space a tubular inflated section E, Fig. 6, which may be a single annular tube or may be tube-sections, or in some instances a series of balls may be used, the tire, B, then acting as a retainer for the inflated section or sections."

The suggestion of inflating the U-shaped tire by forcing air under pressure into the space between the band and the tire is conceded to be impractical. The character of the inflated section can be inferred only from the language "an inflated section, or what is now commonly called 'an inflated tire,'" "a single annular tube," and from the drawings. The patent fails to disclose that the patentee relied in any degree upon other than mechanical means to retain the U-shaped cover upon the rim. The distinguishing feature of both the cushion and the pneumatic tires of Schrader's patent is the mechanical clamping of the ends of the U-shaped tire to grooves in the rim by a band which encircles the wheel.

The defendant is charged with infringement in the making or furnishing of parts for use in the modern "clincher tire," so-called. A fundamental feature of the clincher tire is the use of pneumatic pressure to attach the outer cover or "shoe" to the rim.

The shoe serves both to protect and to retain the inflated tube on the rim. The inner tube, by its inflation to a high pressure, serves to attach the outer shoe firmly to the rim. The problem of attaching an inflated tube to a wheel rim is solved by making the expansion of the tube which is to be confined the efficient means of securing to the rim the shoe which is to confine the inflatable tube. The part to be held serves to attach the part which holds it. Clearly the Schrader patent does not disclose this idea. Schrader shows no conception of using the modern soft inflatable tube which may be so expanded as to exert a clamping force. It is contended by the complainant, however, that inflation of Schrader's tube might exert a downward pressure on Schrader's mechanical clamp, depressing the arch, and thereby increasing the mechanical grip of the edges of the band on the ends of the U-shaped tire. There is no reason to believe that this idea ever occurred to Schrader, and, if it did, the idea of using pneumatic pressure to depress the arch of the clamp, and thereby increase its mechanical

pressure, is radically different from the idea of making the inner tube itself an efficient clamp. If Schrader intended to augment the force of his clamp by pneumatic pressure upon its arch, this idea is not present in a device which contains no arched clamp whose mechanical pressure is so augmented.

The details of the structure of all parts of the defendant's tire are governed by the principle that pneumatic pressure is to be the efficient means of attaching the shoe to the rim. The rim itself is given a sharp recurve. The defendant's "U-shaped tire" is more properly described as ring-shaped or as a split tube of horseshoe form in cross-section, having "heels" which make a dovetailed joint with the clincher rim and "toes" which rest in a central position on the rim. The only suggestion in Schrader of such a dovetailing of rim and shoe as the defendant has is in the drawing of figure 10. This has a slight pictorial resemblance to the defendant's structure, but it seems substantially different in principle. The "heel" of Schrader is not a permanently molded structure which can be pushed laterally into the clincher rim, but it is formed by extending the edge of the clamp into the groove and bending a flexible strip by the action of the clamping band. The patentee says:

"In Fig. 10. I have shown a flexible strip, B', acting as a retainer for the inflated section in place of the formed tire, the strip acting to hold the section in place, at the same time shielding it."

No one of the rims for Schrader's molded U-shaped tires can properly be described as a clincher rim, and the only partial approximation to the clincher rim is shown in figure 10, for use with a flexible strip. The combination consisting of a true clincher rim, a rigid molded shoe with laterally projecting heels suitable to engage a clincher rim, and a pneumatic tube which, by expansion, serves as a pneumatic clamp to press the heels into the clincher rim, is entirely absent from the Schrader patent. Such a combination is readily detachable. The deflation of the tube, and an inward pressure to release the heels from the clincher rim, is all that is necessary. It is conceded that such a combination does not infringe the Schrader patent, since it does not have the element, "an internal clamping device."

In using such a combination, however, it is considered desirable to further fortify the attachment of the shoe to the tire by the use of stay-bolts or lugs. These stay-bolts do not interfere with or affect the pneumatic clincher feature. They are not used instead of pneumatic pressure, but in addition to it. As used they are in themselves entirely insufficient to do what Schrader intended to do with his internal clamping device. The complainant nevertheless, while conceding the full right of the defendant to use the pneumatic clincher tire without stay-bolts, contends that, when it does use them, it is using the Schrader combination of claim 2. This contention is unsound, in that it ignores the novel and most important feature, pneumatic pressure, which makes the defendant's device a different combination of different elements even when lugs or stay-bolts are used. The co-operative relation of the parts, as well as the character of the parts, is en-

tirely different from anything described or suggested in the Schrader patent.

The testimony of complainant's expert, Mr. Livermore, as to what he miscalls "modifications in form," is sufficient to show the substantial differences from Schrader, and that these differences are due to a distinct inventive idea:

"These modifications in form have been in the way of emphasizing or increasing the interlock of the edge of the shoe with the inturned edge of the rim so that the air pressure on the shoe itself without the intervention of the clamping device is sufficient to retain the engagement and withstand the pressure when the tire is inflated, and this admits of the shortening of the mechanical clamp, which need clamp the shoe to the rim only from point to point around the periphery thereof, so that the short T-bolt construction of internal clamping member exemplified in Fig. 4 of the Whiton patent, and in the Stephenson British patent as used upon solid tires, has been adopted properly modified to make it a double clamp to clamp the two edges of the U-shaped shoe between it and the rim lying at the outside of the two edges, as a substitute for the continuous band circumferentially contracting device that was devised for use with solid tires as exemplified in the Wietlisbach patent in 1874, which was taken by Schrader and adapted to serve as an internal clamp member for clamping the two edges of the U-shaped shoe of his mechanically fastened pneumatic tire between it and the rim lying at the outside of said edges."

I am of the opinion that the holding of the shoe in place by the pneumatic pressure of the inflated tube, aided by the mechanical grip of the stay-bolts upon the "toes" of the shoe, presents not only the very important difference between pneumatic and mechanical clamping, but a substantially different way of effecting a mechanical clamping. The defendant's mechanical clamps are applied not within the groove of the rim, but centrally, overlapping and holding fast, and at a few points, the "toes" of the shoe. The stay-bolts are so constructed and so applied for the reason that they have only a special and limited work to perform in conjunction with a pneumatic clamp. Because of their relation to the pneumatic clamp, they need not do work equivalent to that of Schrader's clamping band. They need not co-operate with the ends of the U-shaped rim in the same way, and they may be differently located, and may co-operate with a part of the shoe, to wit, the "toe," which has no counterpart in Schrader's device.

It seems very clear that the defendant is not using an invention made by Schrader, and that the stay-bolts are not in any proper sense an equivalent for "an internal clamping device," "substantially as set forth" in the Schrader patent. Surely, after Thompson's patent of 1847, no one can have a patent for attaching a pneumatic tube to a wheel by bolting on an outer covering which serves both to attach and to protect the inner tube, even if such covering may be unbolted.

Some stress is laid upon the fact that Schrader was first to make a tire that was detachable. The detachability of Schrader's tire is due to the fact that all parts of his mechanical clamp can be released at once, and this may have been an improvement upon Thompson's or Campbell's use of bolts to attach the outer covering. In the use of bolts the defendant follows Thompson and Campbell; and, if the defendant's stay-bolts may be unscrewed, this is also the case with the bolts of Thompson and of Campbell, and with screw bolts generally.

The defendant's tire is detachable in so far as it is not attached mechanically, but is attached by pneumatic pressure. The stay-bolts are an obstacle to detachment—not a serious obstacle because few in number, and because they serve to attach only a few points. If bolts were substituted to do the work of Schrader's clamp, so many bolts would be necessary that the tire would be hardly more detachable than Thompson's.

In the brief of the complainant, Schrader's "inflated tube" is referred to as an inflatable tube. While an inflated tube, in one sense, may be said to be an inflatable tube, the annular inflated tube of Schrader is not an inflatable tube in the sense in which that term is used in conjunction with the modern pneumatic clincher tire. There the term means a tube which is expansible for the purpose of confining the shoe to the rim.

After a careful examination of the Schrader patent, I am thoroughly satisfied that Schrader did not appreciate in any degree the principle of the modern pneumatic clincher tire, and that it would amount to an absurdity to prevent the defendant from using stay-bolts as an auxiliary to pneumatic pressure. The only plausibility of the complainant's case results from the very broad terms of claim 2, and from the superficial resemblance between figure 10 and the defendant's structure; but upon every sound, practical, and theoretical view what Schrader put down upon paper fails to represent what extended experience in tire construction has taught. It would be, in my opinion, a perversion of the purpose of the patent laws if the Schrader patent should be given such extraordinary liberality of construction as the complainant invokes for it. Upon a proper construction of claim 2 there is no infringement.

The bill will be dismissed.

LEONARD v. CUTLER-HAMMER MFG. CO. et al.

(Circuit Court, S. D. New York. November 1, 1907.)

PATENTS—INVENTION—CONTROLLERS FOR ELECTRIC MOTORS.

The three claims of the Cutler patent, No. 668,140, and claims 1, 6, and 11 of the Leonard patent, No. 673,274, both for circuit controllers for electric motors, are substantially identical, and such claims, as well as claims 7 and 10 of the Leonard patent, are too broad, and, in view of the prior art, are void for lack of invention.

In Equity. On final hearing.

See 154 Fed. 920.

Kenyon & Kenyon (William Houston Kenyon and Alan D. Kenyon, of counsel), for complainant.

Seward Davis (Charles Neave, W. Clyde Jones, and Robert Lewis Ames, of counsel), for defendants.

HOLT, District Judge. This is a suit in equity to restrain the alleged infringement of two United States patents, Nos. 668,140 and 673,274, issued to the complainant, for improvements in controllers for electric motors. The first patent was applied for by H. B. Cutter, and

the second by H. Ward Leonard, the complainant. While both applications were pending in the Patent Office, an interference was declared between them. Thereupon Leonard bought Cutter's rights in his invention, and made default in the interference, and afterwards both patents were issued to Leonard. The complainant, by stipulation on the record, relies only on the three claims of the Cutter patent, and upon claims 1, 6, 7, 10, and 11 of the Leonard patent. The defense is a denial of invention by Cutter or the complainant and a denial of infringement by the defendants.

In my opinion, claims 1, 6, and 11 of the Leonard patent are substantially identical with the three claims of the Cutter patent. Assuming that these claims show patentable invention, obviously the first invention anticipated the other. I cannot see that it is important, so far as the questions involved in this case are concerned, to determine which invention was prior. Leonard owns both patents. The claims of one are anticipated by those of the other, which are similar. The Cutter patent was applied for first, and was granted first; but the evidence tends to show that Leonard was the first inventor of the combination claimed. The respondents' counsel argues that as Leonard purchased the invention from Cutter, abandoned the pending interference, and had the Cutter patent first issued to him, he is estopped from denying that the Cutter patent has priority; but, in my opinion, although the facts that the Cutter patent was applied for before the Leonard patent and was granted before the Leonard patent raise a presumption that the Cutter patent was the first invention, the presumption is not conclusive, and, notwithstanding the fact that Leonard took out both patents, I think it was still open to proof in this case that the Leonard patent was the prior invention. I will assume, therefore, that the Cutter patent was invalid, although, in my opinion, it is immaterial in this case to determine which patent anticipated the other.

Claims 1, 6, and 11 of the Leonard patent are as follows:

"1. In a circuit-controller, the combination of two independently-movable switch-levers, an electroresponsive device for controlling one of said levers and responding to failure or abnormal decrease of current to release said lever, means for moving said lever when released to affect the circuit, an electroresponsive device for controlling the other lever and responding to abnormal increases of current to release said second lever, and means for moving said lever when released to affect the circuit."

"6. In a circuit-controller, the combination of two movable switch members for controlling the same circuit, and two electroresponsive devices for controlling said switch members, each switch member and its electroresponsive device operating automatically and independently of the other to affect the same circuit, one when excessive current flows and the other upon failure or abnormal decrease of current."

"11. In a circuit-controller, the combination of two movable switch members for controlling the same circuit, said members being adapted to be held in a normal operative position and operating respectively to affect the circuit upon the occurrence of overload and underload currents, and overload and underload electroresponsive devices functionally connected with said switch members and operating independently of each other to release the overload and underload switch members respectively."

The use, in a circuit-controller, of an overload circuit-breaker, with an electroresponsive device for controlling it, operating automatically, and in the same manner as shown in the Leonard patent, was old and

well known before Leonard's patent. It is shown in the Wurts and in the Harrington patents. The underload circuit-breaker with an electroresponsive device, shown in the Leonard patent, is also old. It is shown in the Blades, the Barriett, and the Henshaw patents. It would, of course, have involved no invention to have applied both the overload circuit-breaker, with its attendant electroresponsive device, and the underload circuit-breaker, with its electroresponsive device, without any connection between them, to the same rheostat. That is what is suggested in the article in the Electrical World for February, 1897, in evidence, and seems to me a perfectly obvious thing to do. The first, sixth, and eleventh claims, therefore, are, in my opinion, invalid for lack of invention, unless the term "combination," as used in those claims, means something more than connecting them to the same apparatus. But such an application of underload and overload circuit-breakers to the same rheostat is, in a broad sense, a combination of them, and therefore, in my opinion, the first, sixth, and eleventh claims are too broad, and are invalid.

Claims 7 and 10 of the Leonard patent are as follows:

"7. In a circuit-controller, the combination of two levers pivotally connected, a spring constantly tending to move said levers, a latch for holding one of said levers in its normal position, an electroresponsive device for releasing said lever, and the other lever carrying a keeper and normally held by an electro-magnet."

"10. In a circuit-controller, the combination of an overload-switch, a latch for holding said switch, a solenoid-magnet in the main current having a moving core for releasing said switch, and an underload-switch functionally connected with the overload-lever and normally held against a spring by a second magnet."

It will be seen that claim 7 is for substantially the same combinations as those claimed in claims 1, 6, and 11, with the specific claim added for two levers pivotally connected, and a spring constantly tending to move said levers. Claim 10 is for substantially the same combinations, with the specific claim added for an underload lever functionally connected with an overload lever. In short, one claim is for the pivotal and the other for the functional connection of the switches. But both of these connections are shown in the previous Leonard patent, No. 368,008, and in the Gibbs patent, so that, in my opinion, claims 7 and 10 are too broad. I cannot see any invention in having both switches placed upon one pivot, instead of being upon two separate pivots; but at all events the patents cited show that it was not new in the art. I think that the Leonard patent is probably valid for the particular arrangement of the levers which is shown in it, and which is particularly described in some of the claims not relied on in this suit. The valuable feature of this device consists in such an arrangement of the levers that the underload circuit-breaker is brought to the starting point before the overload circuit-breaker is closed. This is important to prevent injury to the armature from a full current being suddenly turned on. This result is accomplished in the Leonard patent by having the underload switch carry with it the overload switch as it is moved over towards the starting point, and by having a handle affixed to the underload switch

only, with the result that the underload switch is moved around to the starting point while pushing the overload circuit-breaker down to its closed position. As there is no handle on the overload switch, the operator naturally takes hold of the handle of the underload switch to move the overload switch to its closed position. But, in fact, it is possible, with the Leonard device, to bring the overload switch back by the hand to its closed position while leaving the underload switch at the point of least resistance; whereas, in the defendants' device, by means of a latch interlocking the two switches, the overload switch cannot be moved back into its closed position until the underload switch is moved over to the point of full resistance.

The idea of arranging the switches so that the overload switch could not be brought back to its closed position until the underload switch is carried over to the starting point was old. It is shown in the Hill and in the Dunn patents. I think that the particular method in which the result is accomplished in the Leonard patent was patentable; but, in my opinion, the claims of the patent which can be upheld at all are for a very narrow invention, and the patentee's rights under it must be confined to instruments substantially using the same device. The defendants had a right to accomplish the same result by appropriate means not infringing the particular device adopted by the complainant. Whether the defendants' device infringes those claims in the complainant's patent which include the arrangement for moving the overload switch to its normal position by the underload switch, before the latter assumes its normal position, it is unnecessary to determine in this case. The complainant relies only on claims 1, 6, 7, 10, and 11, and, in my opinion, all of those claims are invalid for the reasons stated.

A very great amount of testimony has been taken in this case, and the records and briefs submitted are extremely voluminous. A great deal of the testimony relates to the subject of prior use; but as, in my opinion, the prior patents and publications offered in evidence are decisive in the case, it is unnecessary to consider in detail the questions arising upon the evidence as to prior use.

My conclusion is that the complainant's bill should be dismissed on the merits, with costs.

In re EDWARDS.

(District Court. S. D. Alabama. November 1, 1907.)

No. 489.

BANKRUPTCY—JURISDICTION OF COURT—PROPERTY CLAIMED AS EXEMPT.

Where a creditor of a bankrupt prior to the filing of the petition in bankruptcy obtained a judgment against him on a note waiving exemptions, and after the filing of such petition levied on and sold property claimed by the bankrupt therein as exempt and received the proceeds thereof, the court of bankruptcy cannot adjudicate his right thereto at the instance of the trustee subsequently appointed, even though the bankrupt, after the sale, attempted to waive his claim of exemption with respect

to such property; the claim of the creditor in any event being adverse to the trustee, and one which can only be determined in a plenary suit.

[Ed. Note.—Jurisdiction of federal courts in suits relating to bankruptcy, see note to Bailey v. Mosher, 11 C. C. A. 313.]

In Bankruptcy. On review of decision of referee.

McMillan & Grayson, for creditor.
Leo M. Brown, for bankrupt.

TOULMIN, District Judge. The facts of this case shown by the record are, in substance, as follows: On June 28, 1907, Kohlman Mercantile Company, a creditor of the bankrupt, sued out an attachment against him, which was levied on certain personal property which was claimed by the bankrupt as exempt. The suit was founded on a promissory note made by the defendant, in which he waived all claim of exemption. Kohlman Company, the plaintiff in the suit, on July 1, 1907, recovered a judgment in the suit for $90, with a waiver of exemption. On July 18, 1907, the constable who levied the writ sold part of the property levied on and paid over to Kohlman Company the sum of $90, net proceeds of the sale, in satisfaction of said judgment. On the 2d of July, 1907, the defendant, W. H. Edwards, filed his petition in bankruptcy, and at the same time filed a schedule of his assets, which included the property levied on, and at the same time claimed an exemption of personal property, including the property levied on, estimated in value at $954.42. No contest of defendant's claim of exemption was made. On the 19th July the bankrupt moved to amend his schedule so as to waive his claim of exemption to the stock of goods levied on. On July 22, 1907, John E. Mitchell was appointed trustee of the estate of said bankrupt. On July 25, 1907, said trustee reported that he had set apart to said bankrupt as exempt certain accounts aggregating $248.68. The stock of goods levied on, a part of which was sold, and claimed as exempt by the bankrupt, was valued in the schedule at $600. On said 25th July the trustee petitioned the court to cite said Kohlman Company to appear before the court, and show cause, if any, why the proceeds of the sale of the property levied on, and paid to them, should not be paid over by them to him, said trustee, as a part of the assets of the estate of said bankrupt. On the hearing of the petition, the referee ordered the Kohlman Mercantile Company to pay over to the said trustee the sum of $90 as the net proceeds of the sale of said property. From this order Kohlman Company have appealed, and ask the judgment of the court thereon.

The title to exempt property does not pass to or vest in the trustee, but remains in the bankrupt. Beyond setting it aside, the trustee has no concern with it. Brandenburg's Bkr. § 185; Loveland on Bk. § 179; In re Seabolt (D. C.) 113 Fed. 766; In re Wells (D. C.) 105 Fed. 762; Lockwood v. Bank, 190 U. S. 294, 23 Sup. Ct. 751, 47 L. Ed. 1061. Exempt property never becomes assets in the bankruptcy court for administration. In re Hill, 2 Am. Bankr. Rep. 798, 96 Fed. 185; authorities, supra. In Re Bass, 3 Woods, 382, Fed. Cas. No. 1,091, the court said "that exempted property constitutes no part of the assets in bankruptcy, and that the assignee acquires no title to

the exempted property." In Re Seydel (D. C.) 118 Fed. 208, it is said:

"As property which is set apart and delivered to the bankrupt as exempt, or which, being exempt, is never taken possession of by the trustee, is not within the actual possession or control of the court, and, as the title thereto does not vest in the trustee, it is difficult to see upon what ground it can be claimed that the trustee can assert any title or right to the possession of the property in question."

"A trustee in bankruptcy is not entitled to the bankrupt's exemption of property against a creditor who has attached the same by an attachment execution issued and served within four months prior to the bankruptcy on a judgment waiving exemption." Sharp v. Woolslare, 12 Am. Bankr. Rep. 396; Lockwood v. Exchange Bank, 190 U. S. 294, 23 Sup. Ct. 751, 47 L. Ed. 1061.

"Where property claimed to be exempt is attached in a state court, such property may be held under the attachment until it is determined in bankruptcy proceedings what part of the attached property has passed to the trustee, freed from the claim of exemption." "Where the undisputed evidence shows that a creditor prosecuting a suit, in which property claimed by the bankrupt as exempt has been attached, holds a waiver contract of the bankrupt's rights of exemption, the bankrupt court has no jurisdiction to enjoin the suit, nor to determine whether or not the bankrupt could avoid such waiver contract." Roden Grocery Co. v. Bacon, 13 Am. Bankr. Rep. 251, 133 Fed. 515, 66 C. C. A. 677.

Since the title to property claimed as exempt does not pass to or invest in the trustee, the bankrupt court has no control or jurisdiction over the same other than to set it apart, leaving the person holding a waiver to resort to the state court to enforce this right. Brandenburg, Bkcy. § 189; Collier, Bkcy. p. 96. The bankrupt's general waiver of exemption on July 19, 1907, subsequent to his claim of exemption made when his schedule was filed, as required by the bankrupt act, and subsequent to the special waiver of exemption in favor of Kohlman Company, which had been made effective by a judgment, valid at the time rendered, and under which the $90 now claimed by the trustee was paid over to them, would not and ought not in any way affect the right of Kohlman Company thus secured and obtained. If before the money had been paid over to Kohlman Company and the property or proceeds of its sale were in the hands of the constable, the bankrupt or any of his creditors, in the absence of a trustee, may have enjoined the constable from disposing of the property, or, having done so, from paying over the proceeds until the rights of Kohlman Company could have been ascertained and adjudicated. This was not done, but subsequent to the sale of the property and the paying over the net proceeds thereof the bankrupt attempts to waive generally his claim of exemptions to specific property, some of which—that in question—had passed beyond his possession and control.

Moreover, it appears without dispute that Kohlman Company was a creditor of the bankrupt, holding his promissory note with a waiver of exemption, and that the money paid over to them on their debt was realized from the sale of property claimed and included in the exemption claimed by the bankrupt in his schedule. It is clear then that

Kohlman Company hold said money adversely to the bankrupt, and to the trustee in bankruptcy. Where property is claimed by the trustee as assets of the bankrupt's estate to be administered by the bankrupt court for the benefit of the bankrupt's creditors, and such property is adversely held by a third person under a claim of right and title to it, the trustee may bring suit to recover such property; but the recovery, if any, must be by a plenary suit. Unless there is some benefit to be gained for the creditors of the estate, it is not necessary for the trustee to move in the matter. It is well settled that a suit cannot be maintained by the trustee for the benefit of the bankrupt. I think that a plenary suit by the trustee in this case would be an unnecessary expense and one fruitless in its results.

From my view of the case, my opinion is that the referee erred in the order complained of, and it is therefore overruled.

HILL et al. v. EMPIRE STATE-IDAHO MINING & DEVELOPING CO.

MATHESON v. SAME.

(Circuit Court, D. Idaho, N. D. July, 1907.)

1. CORPORATIONS—FOREIGN CORPORATIONS—VALIDITY OF SERVICE.

While it is the general rule that a corporation can be sued and served with process in a state other than that of its incorporation only when it is doing business in such state, it is within the power of a state to provide by statute that before any foreign corporation shall transact business within its borders such corporation shall designate an agent in the state or consent that the incumbent of a certain office within the state shall be its agent upon whom process may be served in any suit in the courts of the state involving a controversy growing out of the business transacted by the corporation therein, whether such suit be brought before or after it has ceased to do business within the state; and a corporation having assented to such statutory provisions and designated an agent must respond to process served upon him in the mode prescribed by law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 2507, 2515.

Service of process on foreign corporations, see notes to Eldred v. American Palace Car Co., 45 C. C. A. 3; Cella Commission Co. v. Bohlinger, 78 C. C. A. 473.]

2. SAME—IDAHO STATUTE.

Act Idaho March 10, 1903 (Laws 1903, p. 49), relating to foreign corporations, inter alia requires such a corporation before doing business in the state to designate some person in the county in which it has its principal place of business in the state upon whom process may be served, and to file such designation with the Secretary of State and the clerk of the district court for such county. It further provides that such designation of an agent "shall run from the time of filing same as herein provided until his successor is appointed by such filing or said office becomes vacant by resignation filed by such agent in the office in which his appointment is filed or by his death or removal from such county, and in case of such vacancy said corporation shall within sixty days thereafter refile said office as herein provided." *Held* that, where a foreign corporation had complied with the act and appointed an agent which appointment had neither been resigned nor revoked, valid service of process might be made on such agent in suits against the corporation growing out of its business in the state, even though it had ceased such business and sold

its property, and the agent was no longer connected with it aside from such agency.

On Motion to Set Aside and Quash Service of Summons.

A. G. Kerns, for plaintiffs.

John P. Gray, A. H. Conner, and Albert Allen, for defendant.

DIETRICH, District Judge. Each of these cases was commenced in the state district court for Shoshone county, and upon petition of the defendant was removed to this court, upon the ground of diversity of citizenship; the plaintiffs being residents and citizens of the state of Idaho and the defendant being a corporation organized under the laws of the state of New York. Upon the removal, the defendant, appearing specially, moves to set aside and quash the service of summons upon the ground that the defendant is a foreign corporation and that it did not, at the time of the commencement of this action or the attempted service of summons, own any property within the state of Idaho, and that it was not engaged in business in Idaho, and that it had no designated or other agent upon whom process could be lawfully served.

The complaint in each case alleges that the plaintiff was at the time of the commencement of the action, and for many years prior thereto had been, the owner and entitled to the possession of certain lands in Shoshone county, Idaho; that the defendant during the period from the year 1898 to the year 1903 operated certain mining claims and reduction works on the stream and the tributaries of the stream along which these lands are situated; that in the course of its operation of its mining claims and reduction works the defendant polluted this stream and its tributaries in such a manner and to such an extent as to injure plaintiff's lands and the trees and vegetation growing thereon; and that by such means and in such manner the plaintiff was damaged in a large sum, for which judgment is demanded. Summons was regularly issued, and the same, together with a copy of the complaint, was by the sheriff of Shoshone county served upon one W. H. North on the 12th day of January, 1907; it being recited in the sheriff's return that North was at the time of the service the designated agent of the defendant. The service was regular, if North was at that time, in contemplation of law, an "agent" of the defendant upon whom process could be served.

As disclosed by the record upon which the motion is made, the defendant, being engaged in mining business in Shoshone county, Idaho, and owning property there, at some date between the 10th day of March, 1903, and the 1st day of September, 1903, pursuant to and in compliance with the provisions of an act of the Legislature of the state of Idaho, approved March 10, 1903 (Laws 1903, p. 49), relating to foreign corporations, and specifying the conditions upon which foreign corporations could own property and transact business in the state of Idaho, appointed North, a resident of Wallace, in Shoshone county, Idaho, as its designated agent under said act of the Legislature upon whom process issued by authority of and under any law of the state of Idaho might be served. Inferentially it appears that at the time of such designation, and for some time prior thereto, and for

some time thereafter, North was in the employ of the defendant company in connection with its mining business. It also appears that on or about the 1st day of September, 1903, the defendant sold and disposed of all of the property owned by it in the state, and thereupon it closed its offices and ceased to transact any business in the state, and that it has not owned any property or transacted any business in the state since that time. While the affidavit of W. H. North filed in support of the motion states that on or about the 1st day of September, 1903, his employment by the defendant company ceased, and that since said date he has had nothing to do with the company as agent or otherwise, and has been in no manner in the employ of the company, and that he has never considered himself the agent of the company since he severed his connection with it, it is not claimed, as I understand, that any affirmative action was ever taken, either by Mr. North or the defendant, relative to the termination of the statutory agency involved in his designation or appointment as the person upon whom process against the defendant could be served. In other words, I do not understand that it is claimed upon behalf of the defendant that there ever was any express revocation of North's agency for the service of process, or that he ever formally or expressly resigned such agency; it being stated by counsel for the defendant at the time of the oral argument that it is immaterial whether or not any such action was taken. It is perhaps to be regretted that the record is not entirely clear and certain upon this point; but, in view of the construction given to the record at the time of the oral argument, I must assume, for the purposes of this decision, that the facts are that the defendant, on or about the 1st day of September, 1903, sold all of its property in Idaho, and ceased to transact any business in the state, and dismissed from its service all of its employés, but that no affirmative action was taken, either by it or by North, relative to the statutory agency. It is expressly stipulated that at the time of his appointment as such agent North was, and ever since has been, a resident of Shoshone county, and that no revocation of his appointment as such resident agent has ever been filed in any public office in the state, and no other designated agent in Idaho has ever been appointed by the defendant.

The act pursuant to the provisions of which North was appointed as the agent of the defendant provides that:

"Every corporation not created under the laws of this state must before doing business in this state, and every such corporation now doing business in this state must within three months after the taking effect of this act, file with the county recorder of the county in this state, in which is designated its principal place of business in this state, a copy of the articles of incorporation of said corporation, duly certified to by the Secretary of State of the state in which said corporation was organized, and a copy of such articles of incorporation duly certified by such county recorder, with the Secretary of State, paying to the latter the same fees as are provided by law to be paid for filing original articles of incorporation, and must within three months after the passage of this act or from the time of commencement to do business in this state, designate some person in the county in which the principal place of business of such corporation in the state is conducted upon whom process issue by authority of or under any law of this state, may be served, and within the time aforesaid must file such designation in the office of the Secretary

of State, and in the office of the clerk of the district court for such county, and a copy of such designation certified by either of said officers, must be evidence of such appointment; and it is lawful to serve on such persons so designated any process issued as aforesaid, and such service must be deemed a valid service thereof, such notice and designation of agent on whom process may be served, shall run from the time of filing same as herein provided, until his successor is appointed by such filing, or said office becomes vacant by resignation filed by such agent in the office in which his appointment is filed, or by his death, or removal from such county, and in case of such vacancy said corporation shall within sixty days thereafter refile said office as herein provided."

Thereupon it is provided that contracts and deeds made or taken by such corporation while in default shall be void, and other penalties are prescribed, and the act closes thus:

"Provided, further, that such foreign corporations complying with the provisions of this section shall have all the rights and privileges of like domestic corporations, including the right to exercise the right of eminent domain and shall be subject to the laws of the state applicable to like domestic corporations."

The position of the defendant is that, before a court can exercise jurisdiction over a corporation organized under the laws of a foreign state, it must appear that such corporation as a matter of fact is carrying on business in the district in which the federal court is sitting, and that such business is transacted by some agent or officer appointed by and representing the corporation in that district, or at least in that state. As a general proposition it may be conceded that the rule as thus stated is well supported by authority, if not familiar law, and, were it not for the above provisions of the Idaho statutes, the motion to quash would be granted without hesitation. But in practically all, if not all, of the controlling cases cited by counsel for the defendant, which announce and follow this rule, there was not involved the construction or effect of a statute making it a condition precedent to the right of a foreign corporation to do business in a state that it designate some one in the state upon whom process could be lawfully served.

It is unnecessary to enter upon an elaborate account of the growth and expansion of the law relating to the rights and obligations of corporations transacting business beyond the jurisdiction of the sovereignty where they were created. The recognition by comity of the right of a corporation to enter into contracts and to transact business in a state other than that of its origin, without at the same time holding it amenable to the process and subjecting it to the jurisdiction of the courts of such foreign state, naturally and inevitably led to unfairness and great hardship. Under modern industrial conditions corporations have multiplied with great rapidity; many of them having for their object the transaction of business upon a large scale and in a territory of wide extent. And it is obvious that if persons dealing with such corporations in a distant state cannot, in case of controversy, bring suit against such corporation in the district where the business is transacted, but must go to the state where such corporations are organized, not only intolerable inconvenience, but great injustice, will ensue. The courts, therefore, have adopted the view that when a foreign corporation sends into another state its officers and agents, and there opens

up offices and carries on business, such officers and agents represent it just as much in such foreign state as in the state of its creation. It being permitted to carry on business and to sue in the courts of a foreign state, it is only fair that it should respond to the process of the courts in such state when there are called into question the obligations and liabilities there incurred by it; and it is accordingly held that the jurisdiction of the courts of such state can be exercised over foreign corporations doing business therein whenever service can be made upon their officers or agents in the state in accordance with the laws thereof, and this is the general principle upon which counsel for the defendant relies.

But in actual experience it has been found that this principle is, in view of the wide prevalence of corporate business, susceptible of great abuse. In its application there are always two questions to be decided before the merits of a controversy can be reached, namely: Was the foreign corporation, who is made defendant, within the state where it is sued—that is, actually transacting business in such state—at the time of service of process? and, second, has the process been served upon a proper representative of the corporation in accordance with the provisions of the law of the particular jurisdiction? Corporations could come into a state, transact business, and incur obligations, and before process could be served upon them they could withdraw from the state, leaving unsatisfied their obligations; and a citizen in favor of whom, and in the state where, the obligation was incurred, would be compelled to seek the courts of the state where the corporation was organized, however inconvenient or inaccessible such courts might be. Moreover, under the general principle relied upon by defendant, it was often difficult to determine just what officer or agent, or person transacting business upon behalf of the foreign corporation, was a proper person upon whom to serve process. In comparatively recent years, therefore, many of the states have enacted statutes making provision for bringing into the courts of such states foreign corporations who are transacting or who have transacted business in such states, and compelling them there to litigate controversies growing out of such business transactions. These statutory provisions are diverse; some of them making detailed and comprehensive provision and imposing severe penalties, and others being of a less radical character. The tendency, however, has been and is to provide such laws as will make it possible to compel a foreign corporation, when sued, to litigate in the courts of the state where it transacts or has transacted business all controversies growing out of such business.

It is familiar law that a state may entirely exclude from its borders a corporation organized under the laws of another state, and it follows that, if it may entirely exclude, it may impose such conditions as it sees fit upon such corporation before permitting it to transact any business within its territory; and each state, therefore, has the right to prescribe any proper mode of service of process upon foreign corporations as a condition of their doing business, provided, always, that the mode so prescribed is not unreasonable or contrary to the principles of justice. Many of the states have accordingly provided that, before a corporation can do business within their territory, the corporations

seeking admission must designate some person upon whom process against it may be served. Sometimes the choice of such person is left to the corporation, and sometimes it is required to designate the incumbent of a certain permanent official position in the state. The right of the state to require a foreign corporation to designate and maintain an agent in the state upon whom process against it may be lawfully served while it is actually engaged in business in the state is, as I understand, conceded by defendant; but it is contended that this power of the state is limited to the period or time during which the corporation is actually transacting business in the state. In other words, whatever may be the legislation upon the subject, "in order that the court [using the express language of counsel] may acquire jurisdiction of a foreign corporation by service of process on an officer or agent of the corporation within the state where the court is held, it must appear, from some part of the record or by the return, that the corporation is doing business in such state." As I have already indicated, this may be conceded to be a correct statement of the law, in the absence of statutory provisions accepted or assented to by the foreign corporation. But in my view this principle is not to be regarded as a limitation upon the power of a state to enact legislation by which provision is made for the service of process upon a corporation after it has ceased to transact business in such a state, in suits involving controversies growing out of such business. Nor do I construe the authorities cited by counsel, especially those from the Supreme Court of the United States, as supporting the contention of the defendant in this respect.

If, as is conceded, a state may entirely exclude from its territory a corporation, or may impose upon it conditions precedent to its admission, upon principle what reason can be given for denying to the state the power to require a corporation, before transacting any business within the state, to designate an agent upon whom process may be served after such corporation withdraws from the state, as well as during the time it is actually transacting business in the state, in suits involving controversies arising out of the transaction of such business? If the contention of the defendant, as I understand it, be correct, a state has no power to protect its citizens against the great inconvenience, if not injustice, of a foreign corporation coming into a state, and transacting business, and incurring numerous obligations, and then, before the obligations mature, so that they can be enforced, ceasing to transact business, and thus compelling citizens of the state to resort to the courts of the jurisdiction where the corporation was created, however distant and inaccessible they may be. What fundamental principle of justice is violated by a statute which says to a foreign corporation, "You can come into this state, and transact and carry on your business, and here have the same rights and obligations as a domestic corporation, provided that, before you commence to transact such business, you will consent that, as to any matter or controversy growing out of your business operations in the state, the process of the courts of the state in a suit against you by a citizen of the state may be served upon a person to be designated by you, whether such process be served before or after you cease to do business?"

The policy of such a law would be for the legislative branch of the government to consider; but could the courts say that such a requirement, if enacted, would be unreasonable or contrary to the principles of natural justice, or in violation of any constitutional rights of the corporation?

In their reply brief, counsel for the defendant have cited the very recent case of Peterson v. Railroad Company, 205 U. S. 364, 27 Sup. Ct. 513, where the Supreme Court of the United States uses the following language:

"It is settled by the decisions of this court that foreign corporations can be served with process within the state only when doing business therein, and such service must be upon an agent who represents the corporation in its business."

But this general language must, I think, be construed as a statement only of the general rule repeatedly announced by that court and other courts. When it used this language the court was not considering the meaning or validity of a state law imposing conditions upon foreign corporations doing business in the state where the action was commenced; and hence this general language must be read in the light of the facts of that case.

The statutes of Ohio provided that service of process upon a resident agent of a foreign corporation authorized to contract for insurance should be as effectual as though the same were served upon the principal, the insurance company. In Lafayette Insurance Co. v. French et al., 18 How. 404, 15 L. Ed. 451, the insurance company was a corporation organized under the laws of the state of Indiana, and through one of its agents it entered into an insurance contract with French in the state of Ohio by which it insured his property situated in that state. The property having been consumed by fire, an action was brought upon the contract of insurance in a court in the state of Ohio, and process was served upon an agent of the insurance company in that state. In the course of its opinion the Supreme Court says:

"A corporation may sue in a foreign state by its attorney there, and, if it fails in the suit, be subject to a judgment for costs. And so if a corporation, though in Indiana, should appoint an attorney to appear in an action brought in Ohio, and the attorney should appear, the court would have jurisdiction to render a judgment in all respects as obligatory as if the defendant were within the state. The inquiry is, not whether the defendant was personally within the state, but whether he, or some one authorized to act for him in reference to the suit, had notice and appeared; or, if he did not appear, whether he was bound to appear or suffer a judgment by default."

And again the court says:

"We consider this foreign corporation, entering into contracts made and to be performed in Ohio, was under an obligation to attend, by its duly authorized attorney, on the courts of that state, in suits founded on such contracts, whereof notice should be given by due process of law, served on the agent of the corporation resident in Ohio, and qualified by the law of Ohio and the presumed assent of the corporation to receive and act on such notice; that this obligation is well founded in policy and morals, and not inconsistent with any principle of public law; and that, when so sued on such contracts in Ohio, the corporation was personally amenable to that jurisdiction; and we hold such a judgment, recovered after such notice, to be as valid as if the cor-

poration had had its habitat within the state—that is, entitled to the same faith and credit in Indiana as in Ohio, under the Constitution and laws of the United States."

In Railroad Co. v. Harris, 12 Wall. 65, 20 L. Ed. 354, the court, speaking of a corporation, says:

"It cannot migrate, but may exercise its authority in a foreign territory upon such conditions as may be prescribed by the laws of the place. One of these conditions may be that it shall consent to be sued there. If it do business there, it will be presumed to have assented, and will be bound accordingly."

And again the court says:

"When this suit was commenced, if the theory maintained by the counsel for plaintiff in error be correct, however large or small the cause of action, and whether it were a proper one for legal or equitable cognizance, there could be no legal redress short of the seat of the company in another state. In many instances the cost of the remedy would have largely exceeded the value of its fruits. In suits local in their character, both at law and in equity, there could be no relief. The result would be to a large extent immunity from all legal responsibility."

In St. Clair v. Cox, 106 U. S. 350, 27 L. Ed. 222, the court says:

"All there is in the legal residence of a corporation in the state of its creation consists in the fact that by its laws the corporators are associated together and allowed to exercise as a body certain functions, with a right of succession in its members. Its officers and agents constitute all that is visible of its existence; and they may be authorized to act for it, without as well as within the state. There would seem, therefore, to be no sound reason why, to the extent of their agency, they should not be equally deemed to represent it in the states for which they are respectively appointed, when it is called to legal responsibility for their transactions. The case is unlike that of suits against individuals. They can act by themselves, and upon them process can be directly served; but a corporation can only act and be reached through agents. Serving process on its agents in other states, for matters within the sphere of their agency, is, in effect, serving process on it, as much so as if such agents resided in the state where it was created."

And again the court says:

"The state may, therefore, impose as a condition upon which a foreign corporation shall be permitted to do business within her limits that it shall stipulate that in any litigation arising out of its transaction in the state it will accept as sufficient the service of process on its agents or persons specially designated; and the condition would be eminently fit and just."

This does not limit the power of the state to prescribe a mode of service confined to the time when the corporation is actually engaged in business or to the agents of the corporation; but it does confine the service to "litigation arising out of its transactions in the state," and to its agents, "or persons especially designated."

In Insurance Co. v. Spratley, 172 U. S. 602, 19 Sup. Ct. 308, 43 L. Ed. 569, the court says:

"A vast mass of business is now done throughout the country by corporations which are chartered by states other than those in which they are transacting part of their business, and justice requires that some fair and reasonable means should exist for bringing such corporations within the jurisdiction of the courts of the state where the business was done out of which the dispute arises."

It is true that in some, if not all, of these decisions the general principle relied upon by counsel is stated in various forms; but the court was not considering a case where, "as a condition upon which a foreign corporation shall be permitted to do business," the corporation should stipulate "that in any litigation arising out of its transactions in the state" it would "accept as sufficient the service of process on" a person "specially designated." Perhaps in no other case decided by the Supreme Court is there a more satisfactory expression upon the point under consideration than is found in Mutual Reserve Fund Life Association v. Phelps et al., 190 U. S. 147, 23 Sup. Ct. 707, 47 L. Ed. 987.

In the state of Kentucky it was provided by statute that before any foreign insurance company could transact insurance business in that state it should file a written consent that service of process upon any agent of the company in the state, or upon the state insurance commissioner, in any action brought or pending in the state, should be a valid service upon the company. In Home Benefit Society v. Muehl, 59 S. W. 520, 109 Ky. 479, the plaintiff, Muehl, brought suit upon a policy, issued by the defendant while it was doing business in Kentucky; but the action was not commenced until after it had ceased to do business in that state and had withdrawn all of its agents therefrom. The sufficiency of the service upon the insurance commissioner and the jurisdiction of the court were attacked, as here, because the defendant was not at the time of the attempted service transacting business within the state. In commenting upon this contention the Court of Appeals of Kentucky used the following language:

"The words of the later statute express no limitation. Whatever limitation shall be applied to it must be by implication, and when we consider the purpose of the act it becomes clear that it would be frustrated by the construction contended for. There is no need of the right to serve process upon the insurance commissioner so long as the company has agents in the state, and we think the purpose of the section was to provide a means of obtaining service of process upon foreign companies which no longer had agents in the state upon whom process might be served in suits upon contracts made in this state, whatever may be held as to suits upon contracts entered into elsewhere."

In Germania Insurance Company v. Ashby, 65 S. W. 611, 112 Ky. 303, 99 Am. St. Rep. 295, the Court of Appeals of Kentucky had under consideration substantially the same question. The court says:

"It is conceded that, when appellant was admitted to do business in this state, it filed its written consent that service upon the insurance commissioner should be sufficient to notify it of all proceedings and actions that might be instituted. It stands admitted (by not being denied) that at the date of the service the appellant had withdrawn from the state."

And, after quoting the Kentucky statute upon the subject, the court, continuing, says:

"There is no provision in the law limiting this consent to such time as the insurance company shall do business in this state. The object and purpose of the statute (supra) was to provide a mode of service to citizens who should desire to sue upon contracts of the insurance company, rather than compel them to go to the state of the corporation for redress. If this consent is to be withdrawn as soon as the company withdraws, the provision, so far as the insurance company is concerned, would be a useless provision."

And the court reaffirms the rule laid down in the Muehl Case.

In the Phelps Case the Supreme Court, after quoting the Kentucky statute above referred to, and after referring to the Muehl Case and quoting therefrom the extract above set forth, and also referring to the Ashby Case, supra, uses the following language:

"Such decision of the highest court of Kentucky, construing one of its own statutes, if not controlling upon this court, is very persuasive, and it certainly is controlling, unless it be held to be merely an interpretation of a contract created by the statute. As an original question, and independently of any expression on the part of the Court of Appeals, we are of the opinion that such is the true construction. This and other kindred statutes enacted in various states indicate the purpose of the state that a foreign corporation engaging in business within its limits shall submit the controversies growing out of that business to its courts, and not compel a citizen having such controversy to seek the state in which the corporation has its home for the purpose of enforcing his claims. Many of those statutes simply provided that the foreign corporation should name some person or persons upon whom service of process could be made. The insufficiency of such provision is evident, for the death or removal of the agent from the state leaves the corporation without any person upon whom process can be served. In order to remedy this defect some states, Kentucky among the number, have passed statutes, like the one before us, providing that the corporation shall consent that service may be made upon a permanent official of the state, so that the death, removal, or change of officer will not put the corporation beyond the reach of the process of the courts. It would obviously thwart this purpose if this association, having made, as the testimony shows it had made, a multitude of contracts with citizens of Kentucky, should be enabled, by simply withdrawing the authority it had given to the insurance commissioner, to compel all these parties to seek the courts of New York for the enforcement of their claims. It is true in this case the association did not voluntarily withdraw from the state, but was in effect by the state prevented from engaging in any new business. Why this was done is not shown. It must be presumed to have been for some good and sufficient reason, and it would be a harsh construction of the statute that, because the state had been constrained to compel the association to desist from engaging in any further business, it also deprived its citizens who had dealt with the association of the right to obtain relief in its courts. We conclude, therefore, that the service of summons on the insurance commissioner was sufficient to bring the association into the state court, and, there being nothing else to impeach the judgment, it must be considered as valid."

While it is true that in this Phelps Case the court incidentally remarks that the record shows that the insurance company was doing business in the state of Kentucky at the time of the service of process, I construe the decision as holding, not that such fact was necessary to the conclusion reached, but that the Kentucky statute, as construed by the Court of Appeals was a valid legislative act.

In Groel v. United Electric Co., 60 Atl. 822, 69 N. J. Eq. 397, may be found a very elaborate discussion, with copious citations, of the questions here involved. The court, in referring to the Phelps Case, says:

"The defendant, however, insists that service upon a designated agent, excepting while the corporation is actually engaged in business in the state or after its withdrawal from business in the state, is not due process of law, and that the Supreme Court of the United States would therefore condemn a statute which authorized such service. A consideration of the reasoning of that court upon the subject-matter makes it difficult to see how this contention can be sustained; and I think that its decisions likewise indicate that

it has already decided the contrary, or has intimated that it will so decide when called upon so to do."

And thereupon an extract is quoted from the Phelps Case, supra.

See, also, Davis v. K. & T. Coal Co. (C. C.) 129 Fed. 149; Hadley v. Standard Oil, 91 S. W. 1066, 194 Mo. 124; Forrest v. Bridge Co., 116 Fed. 357, 53 C. C. A. 577.

My conclusion upon this phase of the case is that it is within the power of a state to provide by statute that before any corporation shall transact business within its borders such corporation shall designate an agent in the state, or consent that the incumbent of a certain office within the state shall be its agent, for the service of process in any suit in the courts of such state involving a controversy growing out of the business transacted by such corporation within the borders of such state, whether such suit be brought before or after the corporation ceases to do business, and that a corporation, having assented to such statutory provisions and designated an agent, must respond to process served upon such agent in the mode prescribed by law.

There still remains to be considered the question whether or not the act of the Idaho Legislature, in compliance with which North was appointed, contemplates that a valid service may be made upon the designated agent after the corporation has ceased to do business in the state. It is unfortunate that, in this respect, the act has not received an interpretation by the Supreme Court of Idaho, whose construction I would be inclined, if not required, to follow. It is doubtless possible to construe the act so as to confine the authority of the agent to the period during which the corporation transacts business; but it must be conceded that such a limitation is not found in the language of the act and must be read into it by implication. The act expressly provides that:

"Such notice and designation of agent on whom process may be served shall run from the time of filing same, as herein provided, until his successor is appointed by such filing or such office becomes vacant by resignation filed by such agent in the office in which his appointment is filed or by his death or removal from such county."

Under the express terms of the law, therefore, North was at the time of the service in question apparently the duly authorized statutory agent of the defendant, and only by construing the act to be limited to the period during which a corporation is actually "doing business" in the state can the defendant be relieved of the effect of a legal service. The language of the Kentucky statute involved in the Muehl Case, supra, is, in my judgment, more readily susceptible of such construction than is the language now under consideration; but the Court of Appeals of that state expressly held, in the case above cited, that service after the corporation had ceased to do business in the state was valid, and in the Phelps Case, cited supra, the Supreme Court of the United States approved of this construction in the following language:

"As an original question, and independently of any expression on the part of the Court of Appeals, we are of the opinion that such is the true construction. This and other kindred statutes enacted in various states indicate the

purpose of the state that foreign corporations engaging in business within its limits shall submit the controversies growing out of that business to its courts, and not compel a citizen having such a controversy to seek the state in which the corporation has its home for the purpose of enforcing his claims."

It is doubtless true that the defendant, without great difficulty, could have so arranged its affairs when it ceased to do business in the state that valid service could not have been made upon North; for the act under consideration does not make adequate or comprehensive provision for all contingencies. But it does not necessarily follow that, because inadequate provision was made, it was not intended to make any provision at all. The general purpose of the act is obvious. It is to enable persons transacting business with a foreign corporation in this state to compel such corporation to litigate, in the courts of this state, controversies growing out of such business. If this right to sue virtually ceases the moment the corporation terminates its active business operations in the state, the purpose of the act is substantially frustrated. So long as the corporation is actively carrying on business in the state, it can be "found" in the persons of its business agents, upon whom process may therefore be served; and the function of an agent appointed under the statute solely for the service of process does not become highly important to persons who have dealt with the corporation until it has ceased to do business in the state.

And what reason, in justice, can be given why I should reject the literal meaning, and seek for a construction of the act which would render a service like this ineffective? Whether the cause of action grow out of a contract or be on account of a tort, presumably, as a rule, it can be litigated with less expense and inconvenience and with more equality in the territory where the transactions took place than in a distant state. In the present case the conditions are not extreme or extraordinary; but, if I adopt a construction of the act under consideration favorable to the defendant's contention, the plaintiff, in order to assert his claim, must institute suit in the state of New York, thousands of miles away from the jurisdiction in which the cause of action accrued. And it is difficult to imagine what benefit would thus accrue to the defendant, other than that arising from the disadvantage to the plaintiff, which would necessarily ensue and which has no relation to the merits of the case. The physical conditions out of which the cause of action grew are here, and they can be more easily and economically reproduced in a court in Idaho than in a court in New York. If there is any presumption at all, it is that more witnesses for either party are in reach of the process of the courts in Idaho than of the courts in New York; and certainly it would not be contended that in general the courts of a foreign jurisdiction would have any advantage over the courts where the cause of action arose in properly construing and applying the local laws and customs to a correct adjudication of the controversy upon its merits.

Moreover, while with a literal construction the practical application of the law is not entirely free from embarrassment, its efficient administration, if it be construed as contemplating service of process only while the foreign corporation is engaged in business, will be rendered extremely difficult, if not, in a great many cases, wholly impossible.

As the court records disclose, it is often a matter of extreme nicety to determine whether or not, at the time of service, a corporation was, in contemplation of law, "doing business" within the state; and under such interpretation the sufficiency of the attempted service upon a designated agent would not infrequently be more difficult of adjudication than the merits of the controversy, for the moment a foreign corporation ceased in fact to "do business," however extensive its operations may have theretofore been, it would cease to be amenable to the process of the courts in Idaho, notwithstanding that through the public records of the state it continued to proclaim the authority of its designated agent. And if "doing business" in the state implies, as some courts have held, "corporate continuity of conduct in that respect," a foreign corporation might comply with the requirements of the act by filing its articles of incorporation and designating an agent, so as to have the advantage of that provision which confers upon it like privileges with domestic corporation, and yet flit into the state and out again in such a way that it would be almost impossible successfully to serve process upon it.

I have therefore concluded to hold that this act contemplates that where a foreign corporation, in order to acquire the privilege or franchise thereby conferred of transacting business and holding property in Idaho, has complied with the terms of the act, and has filed articles of incorporation and designated an agent, and has thereupon transacted business in the state, valid service of process in a suit against such corporation involving a controversy arising out of such business may be made upon its agent so designated, whether the service be made before or after the corporation ceases to transact business in the state.

It follows that the motion in each case must be denied, and it is so ordered.

ROCKY MOUNTAIN BELL TELEPHONE CO. v. MONTANA FEDERATION OF LABOR et al.

(Circuit Court, D. Montana. August 7, 1907.)

No. 838.

1. INJUNCTION—PARTIES.

In a suit for an injunction to restrain certain voluntary labor organizations and officers and members of the same from interfering with the business of complainant, where it is alleged in the bill that the acts complained of were committed pursuant to a conspiracy entered into between the members of such organizations, it is not essential that all of such members be made parties.

2. COURTS—JURISDICTION OF FEDERAL COURTS—AMOUNT IN DISPUTE.

In such a suit the amount in dispute for the purpose of determining the jurisdiction of a federal court is the value of complainant's right to conduct its business, and an allegation in the bill that complainant will be damaged by the acts of defendants in a sum exceeding $2,000 is sufficient to confer jurisdiction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, §§ 890, 897.]

3. INJUNCTION — GROUNDS — UNLAWFUL INTERFERENCE WITH COMPLAINANT'S BUSINESS.

During a strike of the local employés of complainant telephone company, the members of certain labor organizations, defendant, by concerted action, issued and distributed and posted different circulars for the expressed purpose of inducing patrons of complainant to withdraw their patronage, and of preventing persons from entering its employ, unless it would accede to the demands of the strikers. Such circulars characterized complainant as "unfair," as a "legalized highwayman," and its employés as "scabs." They exhorted people not to patronize it, and stated that the members of the organizations had voted to give their patronage only to certain firms because others had refused to stop using complainant's telephones. *Held*, that such acts established an unlawful conspiracy to interfere with and destroy the lawful business of complainant, and that complainant was entitled to an injunction to restrain defendants prosecuting the object of the conspiracy by such methods.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, §§ 108, 109, 174, 175.]

In Equity. On motion for temporary restraining order.

This is an application for a restraining order, to restrain the respondents, and each of them, and their officers, servants, and employés, and all persons acting through or under them, from interfering with or obstructing the transaction of the business of the complainant, the Rocky Mountain Bell Telephone Company, in Livingston, Mont., or from persuading others so to interfere, or from interfering with any person who may desire to enter the employ of the telephone company, either by threats, personal violence, abuse, intimidation, or any other means calculated or intended to interfere with the business of the complainant, or from inducing any person to leave the employ of the company in the city of Livingston; from boycotting the telephone company by the circulation of banners, or the posting or distributing of handbills or circulars containing opprobrious or injurious epithets against complainant; from interfering with, intimidating, boycotting, molesting, or threatening in any manner the patrons and customers of complainant, or any other person or persons, with the purpose of inducing them not to do business with the complainant; from giving directions to committees, associations, or otherwise, for the performance of any act or threat mentioned, or in any manner obstructing or interfering with the regular operations and conduct of the business of the complainant; and for such other and further relief as shall be equitable and right.

Complainant is a telephone company doing business throughout Montana. It is alleged that respondents are voluntary unincorporated associations of persons, and that Fairgrieve, Smith, Thorpe, and others mentioned are officers of the respective respondent associations. The bill alleges that the telephone company employs many operators in Livingston, and that about March 1, 1907, many of the employés demanded higher wages, and that, when the company refused to comply with the demand, many of the employés left the service of the complainant and refused to work for it. It is alleged that the Montana Federation of Labor, Livingston Trades & Labor Council, and Telephone Operators' Union No. 42 are voluntary associations, and that their proceedings are secret; and that in March, 1907, they conspired, co-operated, and combined to compel complainant to accede to the demands of its employés, and that, in pursuance of such conspiracy and combination, and for the purpose of boycotting the complainant and its business, and with the unlawful design of inducing the patrons and customers of complainant to withdraw from it their custom and patronage, and to interfere with and ruin the business of the complainant, they caused to be printed handbills or circulars, the substance of which is hereinafter referred to. It is alleged that, by solicitation and persuasion and intimidation and threats, many of the patrons of the complainant were compelled to stop using the Rocky Mountain Bell telephones, and that the respondents are attempting to persuade and compel employés to leave the service of complainant, and that, by reason of the acts of the respondents, great damage and injury have been done to the complainant; and that respondents

threaten to continue to do the unlawful acts complained of unless enjoined by the court.

A number of affidavits were filed by complainant supporting the allegations of its bill, and certain affidavits were filed by the defendants denying the facts alleged in the bill. The matter came on for hearing, and, after the defendant Thorpe had testified in his own behalf, the court ordered the action dismissed as to him, but granted a restraining order as to all other defendants.

H. G. McIntire and S. H. McIntire, for complainant.
T. J. Walsh, C. B. Nolan, and W. T. Pigott, for defendants.

HUNT, District Judge (orally, after stating the facts as above). While I have looked at the books that were cited yesterday by both sides, I do not at this time pretend to enter elaborately into the question that is presented by the application and the questions that were argued, as I have really not had time to do so, as much as I should like to have taken it, and I am considering the matter only with a view to the exercise of the discretion that rests in the court to grant a temporary restraining order. The whole question relates to the power of a court of equity to restrain defendants, who are charged with interfering with the business of a corporation, with regard to the right of molestation and of boycott.

Incidentally, counsel raised a question as to the citizenship of some of the parties, and I find that, in the case of Hopkins et al. v. Oxley Stave Co., 83 Fed. 912, 28 C. C. A. 99, which is analogous to this, the question of jurisdiction was considered in awarding an injunction, and, when the point was raised, Judge Thayer answered it in this way:

"The first proposition contended for by the appellants is that the trial court acted without jurisdiction in awarding an injunction. The ground for this contention consists in the fact that in the bill, as originally filed, two persons were named as defendants who were citizens and residents of the state of Missouri, under whose laws the Oxley Stave Company was incorporated. But as the case was dismissed as to these defendants and as to the two voluntary unincorporated associations, and as to all the members thereof who were not specifically named as defendants in the bill of complaint, before an injunction was awarded, and as the bill was retained only as against persons concerned in the alleged conspiracy who were citizens and residents of the state of Kansas, the objection to the jurisdiction of the court is, in our opinion, without merit."

There was a suggestion made as to indispensable parties, to which I listened with a great deal of interest, and I find that Judge Thayer discussed that matter in the same case, saying:

"It is further urged that the trial court had no right to proceed with the hearing of the case in the absence of any of the persons who were members of the two voluntary organizations, to wit, the Coopers' Union, No. 18, and the Trades Assembly of Kansas City, Kan., because all the members of those organizations were parties to the alleged conspiracy. This contention seems to be based on the assumption that every member of the two organizations had the right to call upon every other member for aid and assistance, in carrying out the alleged conspiracy, and that an injunction restraining a part of the members from rendering such aid and assistance would necessarily operate to the prejudice of those members who had not been made parties to the suit. In other words, the argument is that certain indispensable parties to the suit have not been made parties, and that full relief, consistent with equity, can-

not be administered without their presence upon the record. We do not dispute the existence of the rule which the defendants invoke, but it is apparent, we think, that it has no application to the case in hand. The present suit proceeds upon the theory—without which no relief can be afforded—that the agreement entered into between the members of the two voluntary associations aforesaid is an unlawful conspiracy to oppress and injure the plaintiff company; that no right whatsoever can be predicated upon, or have its origin in, such an agreement; and that the members of the two organizations are jointly and severally liable for whatever injury would be done to the plaintiff company by carrying out the object of the alleged agreement. The rule is as well settled in equity as it is at law that, where the right of action arises ex delicto, the tort may be treated as joint or several, at the election of the injured party, and that he may, at his option, sue either one or more of the joint wrongdoers. * * * We perceive no reason, therefore, why the case was not properly proceeded with against the appellants, although numerous other persons were concerned in the alleged combination or conspiracy."

The point was also made, incidentally, as to the amount involved. I find that the Court of Appeals of this circuit touched upon that matter in the case of Evenson et al. v. Spaulding et al. (C. C. A.) 150 Fed. 517, which was an appeal from an order granting an injunction pendente lite in a matter relating to a boycott and interference. The case was argued before Judges Gilbert, Ross, and Morrow; and Judge Gilbert, speaking for the court, said:

"It is earnestly contended that the court had no jurisdiction of the cause, for the reason that it did not appear from the bill that the requisite amount in controversy was involved. As we read the allegation of the amount in controversy, it is that the value of the matter in dispute exceeds $25,000, and that, in addition thereto, the appellees have been injured by the acts of the appellants in excess of the sum of $25,000. The statement of the amount involved is made under oath. It is not denied either by plea, answer, or by any affidavit. It is true that the bill does not set up the value of the appellees' business, or specifically allege the extent to which it will be damaged by the acts of the appellants; but it is clear from the averments of the bill that the matter in dispute, the value of which in the complaint is laid at more than $25,000, is the right of the appellees to conduct their business in the state of Washington. The bill sets forth the damages which have been sustained by the appellees within the few weeks prior to the commencement of the suit, and presents facts showing the extent of their business in the state of Washington which has been interfered with, and which will be interfered with in the future unless protected by injunction. A case in point is Butchers' & Drovers' Stockyards Co. v. Louisville & N. R. Co., 67 Fed. 35, 14 C. C. A. 290, in which Judge Taft, speaking for the Circuit Court of Appeals, said: 'The averment of the bill is that the injury and damage done to its business by the refusal of the railroad company to afford to it such transportation and shipping facilities is irreparable, and largely exceeds the amount of the sum of $2,000. The damage done by the refusal is to be estimated by the value of the right denied, and therefore the allegation that the damage largely exceeds $2,000 is inferentially a statement that the value of the right denied is largely in excess of $2,000. Even if this averment refers, as claimed by counsel, to damages sustained by complainant before the filing of the bill, it gives rise to the necessary implication that the subsequent permanent injury, unless enjoined, will exceed in pecuniary amount that already suffered, because the past damages only covered a period between the demand and the filing of the bill.' Other cases in point are Pennsylvania Co. v. Bay et al. (C. C.) 138 Fed. 203; Board of Trade of the City of Chicago v. Cella Com. Co., 145 Fed. 28, 76 C. C. A. 28."

I cite these cases merely as bearing upon some questions that were incidentally touched on yesterday. Now, we come to the merits of the matter. The averments of the bill make out a strong case against these defendants of an attempt to injure the business of complainant,

to interfere with others who desire to transact business with it, and to induce persons not to have business relations with it. It is charged in the bill of complaint that:

"For the purpose of boycotting your orator and its said business, and with the unlawful design and intention to induce the patrons and customers of your orator to withdraw from it their custom and patronage, and to interfere with and ruin the business of your orator, caused to be printed handbills or circulars, wherein the term 'unfair' and other opprobrious and injurious epithets were applied to your orator, copies of which said handbills or circulars are as follows, to wit:

"'Don't Patronize

"'The Bell Telephone Company. It is unfair to Montana Federation of Labor.

"'The girls are on strike for living wages in the following places: Billings, Red Lodge, Livingston, Bozeman, Lewistown, and Great Falls.

"'The company is offering inducements to "scabs" advertising in the papers to pay board and room in addition to wages.

"'Don't disgrace your sex. Keep away. We will win, or put the corporation out of business. We ask your help in this fight. Humanity demands it.'"

It cannot be successfully contended that that does not carry with it a threat to ruin the business of the corporation unless it yields to the demands made upon it for the payment of additional wages to certain of its employés. I believe it was intentionally and designedly framed to warn girls who might be desirous of entering the employ of the Bell Telephone Company from seeking employment with or accepting employment from it. I believe that it was intended to intimidate, that it was calculated to intimidate, and that it would intimidate any girl of ordinary moral force. An extraordinary girl of unusual nerve, and of unusual pluck, might say that she would not care for that kind of a circular, and would not care whether she would be held up as a disgrace to her "sex," and would not care whether she would be declared "unfair" by an association, but that she would go to work.

Another of the circulars reads as follows:

"Attention!
"Citizens of Livingston and Vicinity!
"Patronize Home Industry!

"A dollar spent with a Home Institution is a dollar saved to the community. Don't send your money to foreign stockholders by patronizing a foreign corporation. The Home Telephone Company believe in paying wages to its employés, therefore it has agreed to pay to all girls in its exchange in Livingston $50 and $60 per month, a closed shop and 9 hours work. Don't be held up by legalized highwaymen."

I believe that is an express warning to persons not to permit themselves to become patrons of a foreign corporation, characterized here as a "legalized highwayman."

Another circular reads as follows:

"To the Citizens of Livingston:

"Any person, persons, or firm, using the Rocky Mountain Bell Telephone, local or long distance, or patronizing them in any way, will thereby forfeit the patronage and support of organized labor of the city of Livingston."

That, of course, is intended to dissuade persons from transacting business with the Rocky Mountain Bell Telephone Company. It is

intended to frighten persons from carrying on business with that company; and it is a part of an apparent systematic attempt to coerce people into refraining from giving their patronage to the complainant.

Another circular reads:

"To Organized Labor and All Sympathizers:

"The Business Men's Association has organized for the purpose of fighting organized labor of the city of Livingston and vicinity, and also refuse to stop using the Bell long distance telephone."

That, of course, is but confirmatory, so far, of the only construction that can be put upon the circular just heretofore read. The circular continues as follows:

"Therefore, we, the members of Trades and Labor Council and all affiliated unions in the city and vicinity have seen fit to take the following action to further the interests of organized labor, such action as follows: That we throw all of our patronage to the following firms only," etc.

The defendants did not undertake to say that they would throw their patronage to the following firms, but to the following firms only, thus discriminating invidiously against those firms that continued to use the Bell long distance telephone. The more that one reads these circulars, the more the conclusion becomes irresistible that they were prepared in the interest of an association of persons whose purpose at that time was to boycott the telephone company, and to coerce it, in so far as possible, into the payment of certain wages to certain of its employés, and to frighten persons from accepting employment with it.

The affidavit of Mr. Fairgrieve does not deny that these posters were circulated. He says, however, that they were posted with no intent other than to "compel or induce, by persuasion in the shape of oral communications, and written and printed handbills and 'dodgers,' said company to pay to the women and linemen in its employ at Livingston, and in the vicinity of that town, such wages as would permit said women and linemen to live without becoming county charges or paupers, and that the purpose and intent of defendants was, and has been, and is now, to adopt and pursue all lawful means, to the end that said company shall pay to such women and linemen a living wage, to wit, a wage equal to that paid by said company to its women and linemen at Helena and in the vicinity of that city." The affidavit further states that the defendants, "without any malicious design or intent, proceeded to persuade and induce persons generally from becoming operators or linemen in Livingston and vicinity." Observe that there is impliedly an admission that the purpose of the circulars was to prevent persons from entering into the employ of the telephone company. Continuing, the affidavit reads that the defendants "attempted, by means which the defendants believed to be lawful"—that is just where the fundamental error lies—"to induce others to desist from patronizing or having business relations with complainant at Livingston, or with any other person or company patronizing complainant at Livingston; that some of the defendants, in pursuance of its said purpose, posted, or caused to be posted and circulated, the handbills or 'dodgers' mentioned in the bill of complaint, and affiant states that the matters contained in said handbills or 'dodgers' were

and are true, and stated the conditions existing." That is to say, that the complainant company is a "legalized highwayman," that it is employing those whom defendants designate as "scabs," and that it is "unfair," and that it should not be patronized by persons in Livingston who are in sympathy with the association, of which Mr. Fairgieve is an officer and member. Continuing, the affidavit reads:

"That the defendants at no time used any force or fraud in the effort to accomplish the purposes stated; that as soon as complainant shall pay to its operators and linemen in Livingston and vicinity the wages which it should pay, as hereinbefore stated, defendants will cease any opposition to complainant, and withdraw its dodgers and ask all the friends of labor to resume business relations with it at Livingston and vicinity; that the sole purpose and intent on the part of defendants, or any of them, in circulating and posting said 'dodgers,' was to advance, as far as they could, in good faith, the cause of the laboring men and women of organized labor."

So that, taking the affidavit of Mr. Fairgrieve, and the other corroborative affidavits, which are only material in so far as they affirm the view taken by Mr. Fairgrieve, it puts the case in a position where it is admitted that these circulars were posted; that defendants' intention was to dissuade people from entering into the employ of the complainant company, and to compel, so far as they could, the payment of certain wages to the operatives, and it is stated, further, that, if the company will consent to pay the wages demanded, then opposition will be withdrawn. Thus we have a combination, an admitted combination, or association of individuals existing and moving towards an end, which, as I have indicated before, is the interference with the business of the complainant company by preventing patrons from patronizing it, or operatives from entering into its employ, and holding it up to opprobrium as a "legalized highwayman."

It is now necessary to look into the question whether such a combination is forbidden by the law, and whether or not a court of equity will reach out and prevent a continuance of such methods by serving an injunction process against persons guilty of the acts. One of the most interesting cases I have been able to find in the few hours I have devoted to the study of the case is that of Callan v. Wilson, 127 U. S. 540, 8 Sup. Ct. 1301, 32 L. Ed. 223, decided by Justice Harlan 20 years ago. Callan was charged with conspiracy, and he was taken before a police magistrate in the District of Columbia, and committed to jail. He applied for a writ of habeas corpus, upon the ground that he was unlawfully deprived of his liberty in violation of his constitutional rights; the principal point being that a conspiracy was an offense of so high a nature that he had a right to trial by jury, and that the police court exceeded its jurisdiction when it imposed a fine upon him. This is the language of Justice Harlan:

"The information showed that one Franz Krause, Louis Naecker, August Naecker [and others] were during the months of July and August, 1887, residents of this district, each pursuing the calling of a musician; that during those months there was in the district an association or organization of musicians by the name of 'The Washington Musical Assembly, No. 4308, K. of L.,' containing 150 members, and a branch of a larger association known as 'The Knights of Labor of America,' extending throughout the United States, and having a membership of five hundred thousand persons, of which 10,000 were residents of this district; that during the period named Edward C. Linden,

Louis P. Wild, John S. Pistorio, James C. Callan (the appellant), Joseph B. Caldwell, George N. Sloan, John Fallon, Anton Fischer, and Frank Pistorio, were members of the said local assembly, each pursuing the calling of a musician; that on the 17th day of July, 1887, said local association imposed upon Franz Krause, one of its members, two fines, one of $25 and the other of $50, which he refused to pay upon the ground that they were illegal; and that said Linden, Wild, Pistorio, Callan, Caldwell, Sloan, Fallon, Fischer, with sundry other persons, whose names were unknown, did, on the 7th day of August, 1887 [just 20 years ago to-day], unlawfully and maliciously combine, conspire, and confederate together to extort from Krause the sum of $75 on account of said fines, to prevent the parties first above named—Krause, Naecker and others—and each of them, from pursuing their calling and trade anywhere in the United States; and to 'boycott,' injure, molest, oppress, intimidate, and reduce to beggary and want, not only said persons and each of them, but any person who should work with or for them, or should employ them or either of them. The information charged that the manner in which the defendants, so conspiring, proposed to effect said result, was to refuse to work as musicians, or in any other capacity, with or for the persons first above named, or with or for any person, firm, or corporation working with or employing them, to request and procure all other members of said organizations, and all other workmen and tradesmen, not to work as musicians, or in any capacity, with or for them or either of them, or for any person, firm, or corporation that employed or worked with them or either of them, and to warn and threaten every person, firm, or corporation that employed or proposed to employ the said persons, or either of them, that if they did not forthwith cease to so employ them, and refuse to employ them, and each of them, such person, firm, or corporation so warned and threatened would be deprived of any custom or patronage, as well from the persons so combining and conspiring as from all other members of said organization in and out of the district."

In this latter respect the case is quite close to the one under consideration. The information further charged that:

"On the 8th day of August, 1887, the said persons, among whom was the appellant, in execution of the purpose of said conspiracy, combination and confederation, sent and delivered to each member of 'The Washington Musical Assembly No. 4308, K. of L.,' and to divers others persons in the district, whose names are unknown, a certain printed circular of the tenor following:

" 'Sanctuary Washington Musical Assembly 4308, K. of L.

" 'Washington, D. C., August 8, 1887.

" 'Dear Sir and Brother: In accordance with a resolution of this assembly and in compliance with the constitution and by-laws of the order, you are hereby notified that the following named members of this assembly are hereby suspended for having performed with F. Krause, in direct violation of the official notice of said Krause's suspension from this assembly. You will, therefore, not engage or perform, directly or indirectly, with any of them.' "

Then follow the names of the parties. A demurrer was interposed, and was overruled, and the defendants requested a trial by jury. The request was denied, and a trial was had before the court, without the intervention of a jury, with the result already stated.

That part of the opinion which is material to this case is where Justice Harlan speaks of a conspiracy, and says:

"A conspiracy such as is charged against him [Callan] and his codefendants is by no means a petty or trivial offense. 'The general rule of the common law,' the Supreme Judicial Court of Massachusetts said in Commonwealth v. Hunt, 4 Metc. 111, 121, 38 Am. Dec. 346, 'is that it is a criminal and indictable offense for two or more to confederate and combine together, by concerted means, to do that which is unlawful or criminal, to the injury of the public, or portions or classes of the community, or even to the rights of an individual.' In State v. Burnham, 15 N. H. 396, 401, it was held that 'combinations against

law or against individuals are always dangerous to the public peace and to public security. To guard against the union of individuals to effect an unlawful design is not easy, and to detect and punish them is often extremely difficult.' Hawkins, in discussing the nature of conspiracies as offenses against public justice, and referring especially to St. 21 Edw. I, relating to confederacies to procure the indictment of an innocent person, says that, 'notwithstanding the injury intended to the party against whom such a confederacy is formed may perhaps be inconsiderable, yet the association to pervert the law, in order to procure it, seems to be a crime of a very high nature, and justly to deserve the resentment of the law.' So in Regina v. Parnell, 14 Cox C. C. 508, 514, it was observed that an 'agreement to effect an injury or wrong to another by two or more persons is constituted an offense, because the wrong to be effected by a combination assumes a formidable character. When done by one alone, it is but a civil injury, but it assumes a formidable or aggravated character when it is effected by the powers of the combination.' Tomlin says that 'the word "conspiracy" was formerly used almost exclusively for an agreement of two or more persons falsely to indict one, or to procure him to be indicted of felony,' but that 'now it is no less commonly used for the unlawful combinations of journeymen to raise their wages, or to refuse working, except on certain stipulated conditions.' * * * These authorities are sufficient to show the nature of the crime of conspiracy at common law. It is an offense of a grave character, affecting the public at large, and we are unable to hold that a person charged with having committed it in this district is not entitled to a jury, when put upon his trial."

Justice Harlan again had occasion to consider the matter in an opinion written by him on October 1, 1894, while he was sitting upon the Circuit Court of Appeals of the Seventh Circuit. The case was that of Arthur v. Oakes, 63 Fed. 310, 11 C. C. A. 209, 25 L. R. A. 414, heard by Justice Harlan, Judge Woods, and Judge Bunn; Justice Harlan delivering the opinion of the court, in which he used this language:

"The combinations or conspiracies which the law does not tolerate are of a different character. According to the principles of the common law, a conspiracy upon the part of two or more persons, with the intent by their combined power to wrong others, or to prejudice the rights of the public, is in itself illegal, although nothing can actually be done in execution of such conspiracy. This is fundamental in our jurisprudence. So a combination or conspiracy to procure an employé or body of employés to quit service in violation of the contract of service would be unlawful, and in a proper case might be enjoined, if the injury threatened would be irremediable at law. It is one thing for a single individual, or for several individuals each acting upon his own responsibility, and not in co-operation with others, to form the purpose of inflicting actual injury upon the property or rights of others. It is quite a different thing, in the eye of the law, for many persons to combine or conspire together with the intent, not simply of asserting their rights or of accomplishing lawful ends by peaceable methods, but of employing their united energies to injure others or the public. An intent upon the part of a single person to injure the rights of others or of the public is not in itself a wrong of which the law will take cognizance, unless some injurious act be done in execution of the unlawful intent. But a combination of two or more persons with such an intent, and under circumstances that give them, when so combined, a power to do an injury they would not possess as individuals acting singly, has always been recognized as in itself wrongful and illegal."

The matter is also discussed by Judge Thayer, in the case of Hopkins v. Oxley Stave Company, 83 Fed. 912, 28 C. C. A. 99, to which I have already referred. I have cited these cases because of the conspicuously high reputation the judges who wrote them bear, and because of the great respect that is paid them. Reading from the syllabus, this was a case where "the members of two labor organiza-

tions entered into a combination to compel a manufacturer of casks and barrels to discontinue the use of a machine for hooping the same. This object was to be accomplished by notifying the plaintiff's customers and other persons not to purchase machine-hooped barrels, and by inducing the members of all labor organizations throughout the country, and persons who were in sympathy with them, not to purchase provisions or other commodities which were packed in machine-hooped barrels." After discussing the merits of the matter, Judge Thayer, speaking for himself and Judge Sanborn, Judge Caldwell dissenting, said:

"It is conceded that their purpose was to warn all of the plaintiff's immediate customers not to purchase machine-hooped barrels or casks, and to warn wholesale and retail dealers everywhere not to handle provisions or other commodities which were packed in such barrels or casks."

So in the case at bar we have a warning posted at Livingston. "This warning was to be made effectual by notifying the members of all associated labor organizations throughout the United States, Canada, and Europe not to purchase provisions or other commodities, and, as far as possible, to dissuade others from purchasing provisions or other commodities which were packed in machine-hooped barrels or casks. The object of the conspiracy, it will be seen, was to interfere with the complainant's business, and to deprive the complainant, and numerous other persons, of the right to conduct their business as they thought proper. To this end, those who were engaged in the conspiracy intended to excite the fears of all persons who were engaged in making barrels, or who handled commodities packed in barrels, that, if they did not obey the orders of the associated labor organizations, they would incur the active hostility of all the members of those associations, suffer a great financial loss, and possibly run the risk of sustaining some personal injury. It may be conceded that, when the defendants entered into the combination in question, they had no present intention of resorting to actual violence for the purpose of enforcing their demands; but it is manifest that by concerted action, force of numbers, and by exciting the fears of the timid, they did intend to compel many persons to surrender their freedom of action, and submit to the dictation of others in the management of their private business affairs. Another object of the conspiracy, which was no less harmful, was to deprive the public at large of the advantages to be derived from the use of an invention which was not only designed to diminish the cost of making certain necessary articles, but to lessen the labor of human hands. While the courts have invariably upheld the right of individuals to form labor organizations for the protection of the interests of the laboring classes, and have denied the power to enjoin the members of such associations from withdrawing peaceably from any service, either singly or in a body, even where such withdrawal involves a breach of contract, yet they have very generally condemned those combinations usually termed 'boycotts,' which are formed for the purpose of interfering, otherwise than by lawful competition, with the business affairs of others, and depriving them, by means of threats and intimidation,

of the right to conduct the business in which they happen to be engaged according to the dictates of their own judgments. The rights of an individual to carry on his business as he sees fit, and to use such implements or processes of manufacture as he desires to use, provided he follows a lawful avocation, and conducts it in a lawful manner, is entitled to as much consideration as his other personal rights, and the law should afford protection against the efforts of powerful combinations to rob him of that right and coerce his will by intimidating his customers and destroying his patronage."

We come, now, to some cases within the Ninth Circuit, of which this is a part:

Cœur d'Alene Consolidated & Mining Co. v. Miners' Union of Wardner et al. (C. C.) 51 Fed. 260, 19 L. R. A. 382, decided by Judge Beatty. The record in that case disclosed that the Miners' Union attempted to drive certain persons who were not members of their organizations out of the camps and gulches where the mining operations were conducted, and otherwise sought to intimidate them, and to deter them from working. Judge Beatty drew the distinction between what might be regarded as libel and what might be regarded as an attempt to interfere with a person's business by doing that which is subversive to the good order of a community. He said:

"A clear distinction will be observed between the two classes of cases above noted. In the one, when the acts complained of consist of such misrepresentations of a business that they tend to its injury, and damage to its proprietor, the offense is simply a libel; and in this country the courts have with great unanimity held that they will not interfere by injunction, but that the injured party must rely upon his remedy at law. On the contrary, when the attempt to injure consists of acts or words which will operate to intimidate and prevent the customers of a party from dealing with, or laborers from working for, him, the courts have with nearly equal unanimity interposed by injunction. In the one case it is an injury to a man's business by libeling it; in the other, by force, threats, and other like means, he is prevented from pursuing it; and, while the damage might be as great in one case as in the other, but most likely with different consequences to the good order and peace of the community, the courts have determined upon different remedies. What constitute such actionable threats or intimidations must be determined in each case from all the circumstances attending it. If the things done or the words spoken are such that they will excite fear or a reasonable apprehension of damages, and so influence those for whom designed as to prevent them from freely doing what they desire, and the law permits, they may be restrained, and the courts will look beyond the mere letter of the act or word into its spirit and intent."

Another case decided in this circuit is that of Loewe et al. v. California State Federation of Labor et al. (C. C.) 139 Fed. 71, and the following paragraph in the opinion of Judge Morrow is pertinent, particularly so in view of the posters, described in this case, that were put up at Livingston, and in view of the contention made by Mr. Fairgrieve in his affidavit:

"The defendants contend that the allegations of the bill of complaint and the supporting affidavits are insufficient to justify the court in issuing a temporary injunction; that it does not appear that any force, threat, or intimidation has been used by the defendants to enforce the alleged boycott against the product of complainant's factory; that all that has been done by the labor organizations named in the bill has been to urge upon the friends of labor to use their patronage for the benefit of labor; that they had the constitutional

right to do this, either by the publication of their views upon the subject or by communicating them orally to their friends and to the public generally. But can it be truthfully said that this is all that has been done by the defendants and those who have acted with them in enforcing the boycott described in the bill of complaint? Are they not doing something more than speak, write, and publish their sentiments? Are they not using the power of their combined numbers, acting in concert, to drive the complainants out of business and destroy their property, unless they are willing to surrender the control and management of their business to a labor organization? Are they not acting in combination, not merely for the ultimate purpose of advancing their own interests as workmen, but for the direct and immediate purpose of injuring the complainants in their business and property? If these questions must be answered in the affirmative—and upon the facts before the court they cannot be answered otherwise—then what follows? The weight of authority is that these acts are unlawful, and may be restrained by injunction."

In the case of Evenson v. Spaulding (C. C. A.) 150 Fed. 517, to which I have already referred, the Circuit Court of Appeals of this circuit touched upon the general doctrine applicable. "The affidavits," said Judge Gilbert, speaking for the court, "sufficiently sustained the allegations of the bill and the conclusion of the court below, and showed that the appellants were pursuing a systematic course of interference with the business of the appellees in peddling buggies and wagons in the state of Washington; that, as an agent of the appellees would go through the country taking in his train a number of buggies or wagons, the agents of the appellants would follow, generally in pairs, in order the better to watch, harass, and dog the steps of the peddler. Whereever the peddler would stop, the followers stopped; wherever he lodged, they lodged. As he started out in the morning, they were close in pursuit. Whenever he engaged in conversation with a customer, they would interrupt the conversation, and advise the customer not to buy, and, to 'prevent trouble,' the customer would often refuse to buy. The followers in every instance had no vehicles of their own to offer. Their declared purpose was to prevent the appellees' agents from making sales. The result was frequent personal altercations, and in one instance a fist fight. The appellees' agents were often intimidated. Some of the followers carried rifles, some of them had been made deputy sheriffs, and, in one instance, one of the appellees' agents was arrested by such a sheriff under the provision of a law which had been declared void by the superior courts of the state of Washington. The proof showed a practical destruction of the business of the appellees in the state of Washington, and that the purpose of the appellants, and it is not by them anywhere denied, was to continue in the course of action complained of. It is contended on behalf of the appellants that their acts were but the acts of competitors in business, and that they had the legal right to go upon the highways and engage in conversation with any one; and, in general, to do the acts which are complained of. This contention cannot be sustained. The association was a combination of men engaged in various lines of business. It had no property of its own save the money that was raised for the purpose of interfering with the appellees. It had not, nor had the majority of its members, any buggies or wagons for sale. * * * The appellants contend that their combination in itself was not unlawful, that no unlawful

means were used in furtherance of it, and that the damage to the appellees, if any they sustained, was the natural and unavoidable result of competition, incident to the carrying on of the appellants' business in a lawful manner. It is to be admitted that the appellees have no right to be protected against competition, and that the appellants have the right to push any lawful trade by all lawful measures and to keep and maintain the benefits thereof, and to exclude others from participation in it, if they can. But, while the appellees have no right to protection against competition, they have the right to protection against wanton and malicious interference and annoyance." The order granting an injunction pendente lite was affirmed.

The cases I have read well illustrate the views of the federal courts —the Supreme Court of the United States, the Circuit Courts of Appeals—and of the circuit judges and the district judges. It is true that some of the state courts do not take the same view, and yet I find that the Virginia Supreme Court of Appeals in the case of Everett Waddey Company et al. v. Richmond Typographical Union (decided March 15, 1906) 105 Va. 188, 53 S. E. 273, 5 L. R. A. (N. S.) 792, in a remarkably clear statement, used this language:

"A combination lawful within itself may become a conspiracy when the purpose in view is to ruin or damage the business of another, because of his refusal to do some act against his will or judgment; and accordingly it was held in the well-considered case of Doremus v. Hennessy, 176 Ill. 608, 52 N. E. 924, 54 N. E. 524, 43 L. R. A. 797, 802, 68 Am. St. Rep. 203, that all parties to a conspiracy to ruin the business of another because of his refusal to do some act against his will or judgment are liable for all overt acts illegally done in pursuance of such conspiracy and for the consequent loss, whether they were active participants or not. In that case, as in the cases we have cited above, it was held that, while the members of the labor union have the right to induce others, by persuasion and argument, to become members of their union, they have no right to insist that another person unite with them or fix his scale of prices as that of the union, and make his refusal a pretext to break up his business by inducing his customers to break their contracts and stop dealing with him. In the opinion it is said: 'No persons, individually or by combination, have the right to directly or indirectly interfere with or disturb another in his lawful business or occupation, or to threaten to do so for the sake of compelling him to do some act which, in his judgment, his own interest does not require. * * * Every man has a right, under the law, as between himself and others, to full freedom in disposing of his own labor or capital, according to his own will; and any one who invades that right without lawful cause or justification commits a legal wrong, and, if followed by an injury caused in consequence thereof, the one whose right is thus invaded has a legal ground of action for such wrong."

It is fair to say, however, that in that case the court refused to issue an injunction upon the facts that appeared in the evidence.

I have read the case of Marx & Hass Jeans Clothing Co. v. Watson, 168 Mo. 133, 67 S. W. 391, 56 L. R. A. 951, 90 Am. St. Rep. 440, which was cited and read by counsel yesterday, and, with great respect to the learning of the distinguished court that rendered the opinion, I think they lost sight of some basic principles—some cardinal principles that underlie government itself. That is, while the right of free speech and to print or publish what one pleases is guaranteed by the Constitution, yet there is also guaranteed the right of an individual to carry on a lawful business in a lawful way, and

every constitutional guaranty is subject to the limitation that a man pursuing a business or enjoying his rights shall always be bound by the restraints of law. Unless that be the correct doctrine, liberty is but license, and the citizen is not bound by these restraints of law, which forbid license that ultimately leads to the subversion of government. There is no doubt whatever of the right of individuals to withdraw from working wheresoever they please. There can be no doubt of it. That is a cardinal basic principle; but there is another principle that is correlative: If there be the right to withdraw from the service of an employer, there is the right to work for an employer. The very same principle of liberty that guarantees the right in one instance protects the man in the enjoyment of it in the other. Whether a man be a union man, or whether he be a "scab"—whether he be a nonunion man—he has the right to work for whomsoever he pleases, and the law must protect the one as it must protect the other, in the enjoyment of his constitutional and inalienable rights. I cannot but think that the court in the Missouri case omitted to give full weight to these principles.

I have also read the case of Butterick Publishing Company v. Typographical Union No. 6, 50 Misc. Rep. 1, 100 N. Y. Supp. 292, cited by counsel. It does not agree entirely with the decision of the Supreme Court of Missouri; on the contrary, it draws a distinction between persuasion by proper means and that form of persuasion which carries with it intimidation, coercion, or illegal acts, and it recognizes, I think, those principles which uphold a man in the right of persuasion peaceably, and yet in his right to work.

In granting these orders, courts are confronted oftentimes by difficulties in reaching correct decisions. It may often happen that the facts render it hard to determine what is just and right to all parties concerned, but I think this case appeals much more strongly to a court of equity than a number of those which were cited in argument yesterday. And there is another rule, which is that a court of equity, in the exercise of its power, and a chancellor, in the exercise of his judicial discretion, may conform his rulings to the exigencies of a changing society, so that there can be no situation arising out of modern complexities which cannot be dealt with by a court of equity, provided a wrong has been done, and he who is entitled to the protection of the law comes into court and asks for that protection. I trust that, upon reflection, the parties concerned in this matter who have posted the bills, and who have written or printed the circulars or letters which have been referred to, will realize that their own rights as citizens may some time be invaded, and that they themselves may at some time ask the protection of a court of equity against invasion of their rights. If they do, the arm of the court will protect them, as it must now protect the complainant company in the enjoyment of its rights.

An order in compliance with these views may be prepared.

CUMBERLAND TELEPHONE & TELEGRAPH CO. v. RAILROAD COMMISSION OF LOUISIANA.

(Circuit Court, E. D. Louisiana, Baton Rouge Division. August 24, 1907.)

No. 61.

1. TELEGRAPHS AND TELEPHONES—STATE REGULATION—POWERS OF RAILROAD COMMISSION OF LOUISIANA.

Const. La. art. 283 et seq., creates the Railroad Commission of Louisiana, and confers upon it authority to adopt, change, or make "reasonable and just rates, charges and regulations" to govern railroad telegraph and telephone service, etc., "to adopt such reasonable rules, regulations and modes of procedure as it may deem proper for the discharge of its duties * * * and to regulate the mode and manner of all investigations and hearings of railroad companies and other parties before it in the establishment of rates, orders and charges." It is given power to summon and compel the attendance of witnesses and the production of books and papers, and its decisions are made reviewable by the courts. *Held*, that such provisions did not confer arbitrary power on the commission to make rates, but by necessary implication required it to fix rates or charges only after a full investigation into the facts without which it could not determine what rates, charges and regulations were just and reasonable.

2. SAME—MANNER OF EXERCISING POWERS.

The fixing by a state commission of rates of charge to govern a telephone company based solely on the value of the company's property in the state as returned for taxation and its net earnings as shown by its annual reports, is a merely arbitrary act, and not a valid exercise of the power to establish "reasonable and just rates."

3. SAME—REVIEW OF ORDERS BY COURT—SCOPE.

Under the provisions of articles 283–286 of the Constitution of Louisiana which create the Railroad Commission of Louisiana, with power to make "reasonable and just rates, charges and regulations," governing public service corporations, and provide that its orders may be reviewed by the courts in an action brought against it by any party affected thereby, and which may be dissatisfied, as such provisions are construed by the Supreme Court of the state, such an action is of a plenary character, and the court may not only determine the legality and regularity of the action of the Commission in making the order, but may also upon evidence introduced before it determine the reasonableness and justness of the rate, charge or regulation made by the order.

4. SAME—ORDER MADE BY COMMISSION—PRESUMPTION OF REASONABLENESS.

There is no presumption that rates of charge for a telephone company fixed by a state commission are reasonable and just, where it is shown that they were adopted arbitrarily without any investigation of the facts necessary to enable the Commission to form an intelligent judgment as to their reasonableness.

5. SAME—BASIS OF ORDER FIXING RATES—VALUE OF PROPERTY.

The value of the property of a telephone company within a state while a factor to be considered is not the sole, nor probably the most important, factor in determining what would be reasonable and just rates for it to charge for service between points in the state.

6. SAME—ORDER REVIEWED.

An order made by the Railroad Commission of Louisiana reducing the rates to be charged by a telephone company for service between points within the state *held* illegal and null, because adopted arbitrarily on conjecture, and not based on investigation or the exercise of judgment and discretion as required by the state Constitution; and also because the rates so established were not reasonable and just, it being shown that

the rates previously in force were reasonable and just to the public, and that under them the company could not earn as much as 7 per cent. net profit on its Louisiana investment.

In Equity. Suit for injunction.

W. L. Granbery, Denegre & Blair, and Victor Leovy, for complainant.

Walter Guion, Atty. Gen. of Louisiana, and E. H. McCaleb, Jr., for defendant.

SAUNDERS, District Judge. 1. The complainant is a corporation organized under the laws of the state of Kentucky, and is domiciled in and a resident of that state, and owns and operates an extensive system of telephone lines and exchanges in Louisiana and other states. The defendant, the Railroad Commission of Louisiana, is a public corporation organized under the laws of the state of Louisiana, and is empowered by the Constitution and laws of Louisiana "to adopt change or make reasonable and just rates, charges and regulations" for telephone companies operating in that state on their business between points therein. In the exercise of the power so conferred upon it, the Commission on December 13, 1905, adopted an order (No. 488) fixing a tariff of rates and charges on complainant's intra Louisiana toll line messages. This tariff was adopted by the Commission precisely as framed and proposed by complainant itself. On August 6, 1906, the Commission adopted another order (No. 552), whereby considerable reductions were made in the tariff contained in order 488. There is a preamble to order 552, which gives the reasons for the reduction in the rates as follows:

"Upon numerous complaints being made to the Commission against the charges made by the Cumberland Telephone & Telegraph Company in regard to the rates for long distance conversations between points in the state of Louisiana, the Commission instituted this proceeding, and accordingly a hearing was had at Baton Rouge, Louisiana, on August 6, 1906.

"The Commission has fully investigated the charges made by said company; believes they are unnecessarily high and excessive, and at the hearing the company failed to show any good reason why the reductions proposed by the Commission shall not be made.

"The Commission finds it necessary however to rearrange the rates proposed by it in the order and in accordance with its conclusions; and it is hereby ordered," etc. [Then follows a detailed tariff of the rates as reduced.]

On August 16, 1906, complainant filed with the Commission a petition asking for a rehearing on its decision repealing the tariff contained in Order 488 and substituting the lower tariff contained in Order 552. This petition gives the following as the grounds upon which it claimed a rehearing, viz.:

"The Cumberland Telephone & Telegraph Company hereby respectfully prays for a rehearing of the above case, and that the judgment therein rendered and filed on the 6th day of August, 1906, be set aside on the following grounds to wit:

"First. The judgment of the Commission states that numerous complaints have been made to the Commission against the charges made by this company for long distance conversations between points in the state of Louisiana, but at no time, either prior to or at the trial of this case, was any specific information given to this company of the character of the complaints, or of the

particular rates complained of, and the company was unable to meet any general or indefinite complaint, and was not placed in the position to meet specific complaints with specific evidence that this company was not furnished with the name of a single complainant.

"Second. That the Commission has not made any investigation which would allow it to reach a conclusion that the rates charged by the company were unnecessarily high or excessive; that this company was entitled under law to be confronted with some charges supported by evidence sufficient to establish a prima facie case before it could be called upon to answer; and that no evidence of any kind whatsoever was offered at the trial or produced to show that the long distance rates of this company were unreasonable or excessive, nor were any of the complaints made to the Commission brought to the knowledge or submitted for the inspection of or made known to this company.

"Third. That the long distance rates in force prior to this recent order, having been approved and put in force by the Commission, were in law presumed to be reasonable and proper until this presumption was met and overcome by proof, and this company could not legally and properly be called upon to offer any evidence until this presumption had been met and a prima facie case made out.

"Fourth. That the Commission proceeded upon the theory, as shown by its order, that the burden was upon the company to show good reason why the reduction proposed by the Commission should not be made; whereas, under the law, the rates then in force and established by the Commission were presumed to be reasonable and fair, and could not be reduced unless good reason were shown why the reductions proposed by the Commission should be made.

"Fifth. Because it was shown at the trial on behalf of this company that the long distance rates prevailing in Louisiana were as low as existed in other parts of the country, and that Louisiana was enjoying the lowest schedule of long distance rates promulgated by any telephone company in the United States, and this, notwithstanding the fact that in many portions of the United States much more thickly populated than Louisiana the revenues of long distance lines greatly exceeded those in Louisiana by reason of greater population, and the expense of lines and equipment in Louisiana, by reason of its damp climate and soil, were and are greater than in other localities, and notwithstanding that it was additionally shown and known to the Commission that the proportion of swamps and navigable waters requiring to be crossed by cables was excessive in Louisiana.

"Sixth. Because the business of this company in this state has not heretofore, and does not now, justify the payment to the stockholders of the company of more than 7 per cent. dividend which is less than what would be a reasonable return on capital invested, considering the nature and character of the business, and no showing whatsoever was made, and, in fact, there was no intimation of any kind, that the company was deriving excessive profits from its business.

"Seventh. That no evidence was offered, and no tender of any evidence made to show that the company's receipts and expenditures from toll lines in the state or any examination whatsoever made into the revenues and expenses of toll lines.

"Eighth. Because the toll rates in force and approved by the Commission are in themselves reasonable and fair, and should not be disturbed.

"Ninth. Because it is not possible for the Commission to reach a satisfactory conclusion and be able to determine that the company's long distance toll rates are high or excessive unless it will make a thorough investigation into the revenues derived by the company from its business, the expenditures of the company, the depreciation, cost of maintenance, amount of investment, and other elements entering into the problem, which can only be arrived at by careful, painstaking, and expert investigation and examination, and no such investigation or examination has been made and no effort made to make such investigation.

"Tenth. Because the rates proposed to be established by the Commission in its order of August 6, 1906, if put in force, would be ruinous and cause irreparable injury to this company, because as this company operates, not only

in the state of Louisiana, but also in the states of Tennessee, Kentucky, Mississippi, Illinois, and Indiana, the toll rates in all of said states, which are upon the same schedule as prevailing in this state, heretofore approved by this Commission, would necessarily have to be changed to conform to the reduced rates or lower rates established for Louisiana, for it would be manifestly impossible for this company to charge more in those states than charged in Louisiana for a similar service in the face of the fact that in those states the lines of the company largely run through more populous districts and cost less to build and maintain, and because, if this company accepts and acquiesces in the new or reduced rates established by this Commission as being reasonable, it would not be able and could not claim that the higher rates charged in other states for similar service, rendered under more favorable circumstances, were not unreasonable.

"Eleventh. Because, even upon the theory adopted by the Commission, its order of August 6, 1906, is unreasonable, inconsistent, and unfair, because in the paragraph providing for toll rates between any two points exceeding 20 miles it establishes rates which are not only inconsistent, but which would compel this company, if it acquiesced therein, to discriminate against its patrons by charging less to patrons for long distance conversation between points exceeding 20 and less than 40 miles than it charged its patrons for conversations between points less than 20 miles, the difference being in the pole-line and air-line measurements.

"Twelfth. Because a comparison of rates established by the Commission's order of August 6th with rates established by the Commission for similar service by telegraph companies clearly shows that the proposed rates are unreasonably low.

"Wherefore, petitioner respectfully prays for a rehearing and that this, its application, be set down for hearing at a date to suit the convenience of the Commission after its vacation."

The rehearing asked for was granted, but apparently nothing was done on the rehearing except to hear argument. On the same day on which this argument was heard, the Commission rendered the following order:

"The Commission having granted a rehearing in the above case, and having heard the Cumberland Telephone & Telegraph Company at Baton Rouge, La., on October 10, 1906, finds no cause to change its opinion as to what constitute fair and reasonable rates for telephone toll service, as furnished by the said company, between places in the state of Louisiana, and as set forth in its order No. 552 adopted on August 6, 1906.

"It is now ordered that the rates as adopted and established by the said order No. 552 adopted August 6, 1906, be and the same are hereby reaffirmed, and made effective within 10 days from the date of this order.

"By order of the Commission.

"Baton Rouge, Louisiana, Oct. 10, 1906."

Thereupon the complainant on October 19, 1906, filed its bill in this case, praying that the Commission be enjoined from putting in force the reduced tariff contained in Order No. 552, that said order be declared null and void, and that the Commission be enjoined from instituting any proceedings to compel complainant to pay fines or penalties for disregarding and violating said order. This relief is asked upon two grounds: (1) That the tariff in Order 488 is entirely fair, just, and reasonable, so far as concerns the public, but does not afford complainant a fair, just, and reasonable compensation for its services, whereas the tariff proposed in Order 552 would compel complainant to render its services at unreasonable, unjust, and unremunerative rates, which would not afford complainant a reasonable return for the service rendered; that said reduced tariff is unreasonable and unjust in itself,

and is not justified by any conditions either concerning the service in question, or by the financial or physical condition of complainant's property or affairs, and would result in the taking of complainant's property without due process of law and without compensation previously made, in violation of specified provisions of the federal and state Constitutions. (2) That said Order No. 552 was adopted without evidence or investigation justifying it, and "without making an investigation or examination into any facts necessary to reach a determination and without any effort in that direction."

Before taking up the evidence in the case, let us see what under the Constitution of Louisiana are the powers of the Commission, in what manner those powers can be validly exercised, and the relation of the courts to the Commission, under the provision of the Constitution itself.

2. Article 283 of the Constitution of Louisiana creates a Commission, designated as the "Railroad Commission of Louisiana," and article 284 declares that:

"The power and authority is hereby vested in the Commission, and it is hereby made its duty, to adopt, change or make reasonable and just rates, charges and regulations, to govern and regulate railroad, steamboat and other water craft, and sleeping car, freight and passenger tariffs and service, express rates, and telephone and telegraph charges, to correct abuses, and prevent unjust discrimination and extortion in the rates for the same" on line or business done within Louisiana. The Commission shall have power to adopt and enforce such reasonable rules, regulations and modes of procedure, as it may deem proper for the discharge of its duties, and to hear and to determine complaints that may be made against the classification and rates it may establish, and to regulate the mode and manner of all investigations and hearings of railroad companies, and other parties before it, in the establishment of rates, orders and charges and other acts required or authorized by these provisions. They shall have power to summon and compel the attendance of witnesses, to swear witnesses and to compel the production of books and papers, to take testimony under Commission and to punish for contempt, as fully as is provided by law for the district courts.

"Art. 285. If any railroad, express, telephone, telegraph, steamboat and other water craft or sleeping car company, or other party in interest, be dissatisfied with the decision, or fixing of any rate, classification, rules, charge, order, act or regulation, adopted by the Commission, such party may file a petition, setting forth the cause of objection to such decision, act, rule, rate, charge, classification, or order, or to either or to all of them, in a court of competent jurisdiction at the domicile of the Commission, against said commission, as defendant, and either party to said action may appeal the case to the Supreme Court of the state, without regard to the amount involved, and all such cases, both in the trial and appellate courts shall be tried summarily and by preference over all other cases. Such cases may be tried in the court of the first instance either in chambers, or at term time; provided, all such appeals shall be returned to the Supreme Court within 10 days after the decision of the lower court.

"Art. 286. * * * Provided, that whenever any rate, order, charge, rule or regulation of the Commission is contested in court, as provided for in Art. 285 of this Constitution, no fine or penalty for disobedience thereto, or disregard thereof, shall be incurred until after said contestation shall have been finally decided by the courts, and then only for acts subsequently committed."

Powers of Commission and How Exercised. The Constitution begins by authorizing the Commission to establish "reasonable and just rates, charges and regulations" with respect to the public service cor-

porations subjected to its jurisdiction. As the Commission cannot know by intuition what rates, charges, and regulations would be "reasonable and just," before it has made a careful examination into all the facts which bear upon those rates, charges, and regulations, it would be a fair inference, even if there were nothing else in the Constitution on the subject, that the Constitution by necessary implication requires the Commission to make full investigation into the facts before it establishes its rates, charges, and regulations. "Cum aliquid imperatur, imperatur et id perquod devenitur ad illud." The reasonableness and justice of a charge for transportation by a railroad, for example, depends upon a great many facts, most of which are peculiar to each road. What did the railroad actually cost to construct? How much does it cost to operate? Was the road constructed carefully, economically, and properly? Or was it constructed extravagantly and wastefully, with unnecessary expenditure of money? Is the cost of operation only what a prudent and intelligent administration would incur? Or are unnecessary expenses incurred? Is the pay roll loaded down with high salaries to a few favored virtually sinecure officials? Or are the salaries only such as are customarily paid in the administration of similar properties of similar magnitude? What is the volume of business done? What are the facts in the locality in which the corporation operates affecting the question whether a decrease in rates will lead to an increase in business? And what, relatively to the increased business, would probably be the increased cost of operation? What amount of business has the company actually done in the past? And what has it actually cost, all things considered, to do this amount of business? What does it cost to maintain the plant of the company in good working order? And what is the best and most economical way to provide for meeting this cost? All these and many other questions of fact must be most carefully investigated and considered before any Commission can act intelligently and with any likelihood of success in the matter of establishing "reasonable and just rates, charges and regulations" for public service corporations. Even when all the facts, which should enter into the discussion and control the decision, have been ascertained with the utmost possible care and exactness, the conclusion is still doubtful in many cases. Where the facts are not known or inquired into, the regulations made by any Commission would be mere arbitrary edicts, or, at best, only conjectures made in good faith, and tested at the expense of the regulated corporations. The whole spirit of our institutions revolts at the idea that any Commission or department of the government should be vested with such arbitrary and irresponsible power over the fortunes or business of any persons whatever, even though they belong to the much harassed and perplexed legal persons known as public service corporations. In view of the fact that the Constitution in express terms authorizes the Commission only to establish "reasonable and just rates, charges and regulations," and of the further fact that the reasonableness and justice of such rates, charges, and regulations cannot be even conjectured intelligently without exact knowledge of the facts, I should have no hesitation in concluding, though there were nothing else in the Constitution but the bare mandate to establish reasonable and just

rates, etc., that the Constitution by implication requires the Commission to make full and adequate investigation into the facts before it exercises its powers. It has no arbitrary authority. It is not a bureau of conjecture and experiment. The provisions of article 284 of the Constitution seem to me to put this conclusion beyond dispute. That article declares that:

"The Commission shall have power * * * to hear and determine complaints that may be made against the classification and rates it may establish and to regulate the mode and manner of all investigations and hearings of railroad companies and other parties before it, in the establishment of rates, orders, charges, and other acts required or authorized by these provisions. They shall have power to summon and compel the attendance of witnesses, to swear witnesses, and to compel the production of books and papers, to take testimony under Commission, and to punish for contempt, as fully as is provided by law for the District Courts."

Not only is the Commission furnished with the amplest power to investigate all facts concerning the proper discharge of its duties, but express mention is made of the Commission's regulation and use of these powers in the *establishment* of rates, charges, orders, etc. This clearly indicates that the Constitution expected, and therefore requires, that the conferred powers of investigation shall be used in the investigation and ascertainment of those facts which it would be indispensable for the Commission to be informed about in establishing reasonable and just rates. The idea of the Constitution is obviously that the Commission shall, in every exercise of the powers intrusted to it, use every means to learn what reason dictates, and to do what justice requires.

In discussing the powers of a similar Commission in California, the Supreme Court of that state say:

"If they [the Commission] attempt to act arbitrarily, without investigation, or without the exercise of judgment or discretion, * * * they violate their duty, and go beyond the powers conferred upon them." San Diego Water Co. v. San Diego, 118 Cal. 556, 50 Pac. 633, 38 L. R. A. 460, 62 Am. St. Rep. 261, cited with approval by the Supreme Court of the United States in San Diego Land & Town Co. v. National City, 174 U. S. 752, 19 Sup. Ct. 804, 43 L. Ed. 1154.

I think this dictum of the California Supreme Court correctly states the law as to the powers, and the legal mode for the exercise of the powers, of the Commission to regulate the public service corporations of the different states. These Commissions have no arbitrary powers. They have no authority to fix any rate they please simply because it so pleases them. Their only authority is to fix reasonable and just rates. This requires investigation into the facts, in order to enable the Commission to determine, by the exercise of judgment and discretion upon the ascertained facts, what is reasonable and just. It would be as absurd to talk of the exercise of judgment or discretion without a previous investigation into and determination of the facts, as to talk of feats of swimming performed on dry land, or the use of the microscope in Egyptian darkness.

Relation of the Courts to the Louisiana Railroad Commission. In most states the laws do not make provisions for a review by the courts of the action of the Commissions, when the regulated corporations

are dissatisfied with such action. But the Constitution of Louisiana expressly subordinates to the decision of the courts the final validity of the action of the Commission. When any party affected by any order of the Commission is dissatisfied therewith, the Constitution declares that the party dissatisfied shall have the right to file a petition in a court of competent jurisdiction, making the Commission defendant thereto. The dispute between the Commission and the party dissatisfied is then tried in court. That dispute is whether the rate, order, or regulation of the Commission is reasonable and just or not. The courts decide this question, and are bound to decide it on their own convictions as to what is reasonable and just under the proved facts of the case. The entire controversy goes into the courts in Louisiana for decision, and the courts are not limited to the determination of the single question whether the order complained of would violate the fourteenth amendment of the federal Constitution, by confiscating, in effect, the complainant's property, or appropriating it to the use of the public without allowing the owner due compensation or return for such use. If that question is in a particular controversy, it goes, of course, to the court, but the entire controversy which was between the complainant and the Commission is transferred in Louisiana to the court for its decision. When the controversy comes before the court for decision, what will be the result if it should appear that the Commission's action was so irregular as to be null? If, for example, it should be shown that the order complained of was in substance a mere arbitrary edict, made without investigation, and therefore made without the exercise of judgment and discretion upon the actual and known facts of the case? I think a court would have no difficulty in holding such action of the Commission to be illegal and null, not because it is demonstrated to be unjust or unreasonable, but because the Commission had no power to act in that manner. But could the court go further, and on the evidence adduced at the trial in court, which the Commission had not considered or passed upon, hold that the order complained of was unreasonable and unjust? My own view would have been that in such a case the court should have limited its action to declaring the order complained of to be illegal. But the Supreme Court of Louisiana seems to have decided the other way in the case of the Railroad Commission v. Kansas City Southern Ry. Co., 111 La. 133, 35 South 487, as to the power of the state courts. In that case the Commission passed a general order forbidding the removal of any switches or spurs without first obtaining the consent of the Commission. In ignorance of the order, the defendant, a few days after it had been adopted, removed the spur of an abandoned mill. The Commission imposed a fine of $1,000 for this violation of its order. The defendant resisted on the ground that the spur was useless and abandoned, and that there was no reason to maintain it. The Commission refused to hear evidence on this defense, and sued solely on the ground that its order had been disobeyed. In the suit to enforce and collect the fine imposed by the Commission, the defendant appeared and was permitted to introduce evidence to establish its defense. The reasonableness of the order depended on the facts pleaded in defense. The Supreme Court held

the order in passing the fine to be unreasonable, and therefore null; thus giving effect to evidence determinative of the reasonableness of the order, which had been first received in court and had never been passed on by the Commission; for the Commission had proceeded on the theory that mere disobedience to their order entitled them to fine the company that disobeyed, regardless of evidence to show that obedience in the particular case was not reasonably required. The Supreme Court rejected this theory, declared that evidence was admissible to show an excuse, and proceeded to pass on the evidence offered to establish an excuse.

3. The Commission has offered in this case only certain statements and exhibits furnished by the telephone company, and tending to show its financial condition and property, and the evidence of its secretary. Mr. Barrow, and an affidavit of the president, Mr. De Fuentes, as to the manner in which and the facts on which the Order No. 552 reducing the rates, was adopted. Mr. Barrow's testimony is not as specific and clear on this point as it might have been, but it is due to him to say that he answered all questions put to him with entire frankness. I gather from his testimony that the reason for adopting Order 552 was this: The complainant is required by law to file an annual statement with the Commission, showing, among other things, the value of its property in Louisiana and the net amount realized from its Louisiana business. On the basis of the value shown by these statements, the complainant was making from 10 per cent. to 15 per cent. a year. The Commission was of opinion, therefore, that on its own showing the profits made by the complainant were unreasonably large, and accordingly made the reduction contained in Order 552. Mr. Barrow admits that these annual statements of the complainant showed only the valuation placed on the company's property in Louisiana for the purposes of taxation, and that such valuation of the property was not, in his opinion, its real value. Yet the reductions ordered were based solely, so far as appears, on the relation between the valuation so shown and the profits made by the company. The problem of fixing reasonable and just rates is a much more difficult and intricate problem than this simple rule of three method followed by the Commission. The factors to be considered are far more numerous and the operation much more complicated. In the oral argument it was conceded that it would be fair for complainant to earn 7 per cent. net dividend on its actual investment in Louisiana from its Louisiana business. The evidence is clear that the complainant is not now earning that much in its Louisiana business alone, nor on its Louisiana business with a proportion of interstate business added. It is urged by the Commission that included in the Louisiana investment of complainant is a sum earned from Louisiana business set aside in the reserve fund and then used in extending the system in Louisiana, and now treated as a part of the Louisiana investment of the stockholders. This may be so to some extent—it is certainly possible. But it is impossible for me to determine from the figures in the record to what extent, if at all, it is a fact. Counsel for defendant have not themselves undertaken to indicate what, even in round figures, they consider is the sum thus earned in the business and reinvested in the business, without having been

distributed to the shareholders in dividends. It will be time to consider the legal results from such a state of facts when it shall have been shown to exist in a definite sum, and not in a purely conjectural amount. The evidence is conclusive that, so far as the public is concerned, the existing rates established by Order No. 488 are reasonable and just. No attempt has been made by evidence, no suggestion has been made in the oral argument, that these charges are unreasonably high to the public.

Counsel for the Commission urge with great earnestness (1) that the law presumes the rates established by the Commission to be reasonable and just; (2) that the value of complainant's property and plant in Louisiana is in reality the amount shown in the complainant's annual statement to the Commission; (3) that the reduced rates established by Order 552 are, as a matter of fact, reasonable and just.

(1) As to Presumption that Rates Ordered by Commission are Just and Reasonable. The establishment of reasonable and just rates of compensation for the services rendered by public service corporations is a task of the greatest difficulty, and one that requires the most careful and thorough investigation into a multitude of facts. If the Commission will take the trouble to read the cases of Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819, and Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014, decided by the Supreme Court of the United States, or the decisions in any volume of the Reports of the Interstate Commerce Commission, they will see how many are the factors to be considered, and what a mass of testimony and figures have to be sifted before reaching any conclusion as to what rates are reasonable and just. In the present case no investigation whatever was made by the Commission before they acted. They simply combined two statements contained in the annual report of complainant—the statement as to value of plant and the statement as to net earnings—and from these two amounts figured out what would be a reasonable and just return for the complainant to get from its Louisiana business. This procedure ignores nearly all the elements of the problem, and bases this Commission's solution on an erroneous process. There is no reason in law nor in fact why a court should presume that the Commission has by this method of dealing with the problem hit upon rates that are, in fact, reasonable and just.

(2) Value of Complainant's Property in Louisiana. Counsel for the Commission argue that the complainant's property in Louisiana was not all paid for with complainant's capital, but was partly paid for out of a surplus, or reserve, or depreciation fund, which was accumulated by complainant from the receipts of its Louisiana business, and was then reinvested, not in repairs or maintenance, but in extensions and additions to the property. This may be a fact, but it is not shown to be a fact. The Commission has power, if it wishes to do so, to direct the books of complainant to be so kept as to show such use of receipts. In the present state of the books, this seems to be impossible. And the floating debt of the complainant would seem to be much greater than any sum which could possibly have been used from the reserve, or surplus, or depreciation fund for extensions and additions, after paying for maintenance and repairs. Apart from this dis-

cussion as to the value of complainant company's property in Louisiana, that value is not the sole, nor probably the most important, factor in determining the reasonableness and justness of the rates which the complainant is entitled to charge for the business it does in Louisiana. It may well happen that, although the complainant's plant was constructed properly and economically and without any waste, yet the present value of that property would be little or nothing. For wrecking purposes the plant is probably worth nothing more than the value of the exchange buildings in the different cities, which would be only a small part of the sum expended by the complainant. Other conditions may have destroyed the attractiveness of the property as an investment. For example, the apprehension of competition from new inventions, such as the telautophone or others, may have made capitalists unwilling to invest money in telephone plants. Other conditions may have had the same effect. It is conceivable, therefore, that the plant might have no value whatever at the present date, none the less the business is conducted for the present; and it surely could not be claimed that because the present value of the plant is nothing therefore the persons using that plant would be entitled to use it without paying any sum whatever for the use of it. While the present value of the plant is one element to be considered in determining the reasonableness of the rates, it is very far from being the most important element. And yet it is the only element which the Commission has considered in this case at all.

(3) As to the Reasonableness of the Rates. The only reason that the Commission has for supposing that it has correctly guessed what would be a reasonable and just rate of compensation to allow the telephone company is its assumption that that rate could be properly arrived at by considering only the value at which the complainant's property is taxed in Louisiana and the net returns which the company makes over and above its expenses and allowances for depreciation and repair. As I have just stated, this is something wholly erroneous. Under the facts disclosed in this record, I am clearly of opinion that complainant is entitled to a fair return on its money actually invested; that 7 per cent., in a business of the sort carried on by complainant, is a fair and proper return; and that complainant is not now deriving from the rates authorized by Order 488 as much as 7 per cent. on its investment in Louisiana.

The public could not, to-day, get as complete a telephone system as the existing one by expending a much larger sum than that on which the complainant asks to base its rates. Moreover, it has been shown that the rates charged in Louisiana are the same in most cases, and less in many cases, than the corresponding rates charged under similar circumstances and for similar service by telephone companies elsewhere. The public, therefore, has no shadow of a reason to complain either that it is paying a rate that is unreasonable and unjust as to the public, or that the complainant is making an unreasonably large profit on its investment. I therefore find that the order of the Commission No. 552, reducing the rates authorized by Order No. 488, is illegal and null, by reason of its being on arbitrary conjecture, not based on investigation or the exercise of judgment and discretion ap-

plied to ascertained facts; and, further, that the evidence in this case establishes that the complainant does not now earn under the tariff in Order 488 as much as 7 per cent. on its Louisiana business, and as I consider that a net profit of 7 per cent. on the Louisiana investment would be only a fair return in a business of this character (and counsel for defendant seem disposed to admit that this would be a fair and reasonable profit), any reduction of the existing rates would be unreasonable and unjust.

There will be judgment for complainant as prayed for in the bill.

CUMBERLAND TELEPHONE & TELEGRAPH CO. v. RAILROAD COMMISSION OF LOUISIANA.

(Circuit Court, E. D. Louisiana, Baton Rouge Division. September 18, 1907.)

No. 66.

INJUNCTION—FEDERAL COURTS—TEMPORARY RESTRAINING ORDER.

The authority given to federal courts by Rev. St. § 718 [U. S. Comp. St. 1901, p. 580], to grant temporary restraining orders pending a motion for injunction, is expressly limited to cases "where there appears to be danger of irreparable injury," and will usually be exercised only to preserve the existing status. Such an order will not be granted ex parte in a suit by a telephone company against a state commission empowered by the state Constitution to establish and regulate telephone rates to enjoin the commission from interfering to prevent the complainant from increasing its present rates of charge, where application for permission to make such increase has been made to the commission and denied after a hearing, the decision of the commission being entitled at least to be treated as prima facie correct.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 315.]

In Equity. On application for temporary restraining order.

W. L. Granbery, for complainant.

SHELBY, Circuit Judge. This suit is brought by the complainant, a corporation organized under the laws of Kentucky, against the defendant, a public corporation under the laws of Louisiana. The complainant owns and operates a system of telephone lines in Louisiana. The defendant, the Railroad Commission of Louisiana, is empowered by the Constitution of that state to adopt, change, or make reasonable and just rates for telephone companies on their business between places within the state.

The original bill alleged that the existing rates of charges approved by the Commission do not give the complainant an adequate, just, and reasonable return or profit on its investment. And it was specially averred (1) that the charges for night messages and Sunday messages were inadequate; and (2) that the charges for the use of cable lines under and across the Mississippi river are unreasonably low and inadequate. It was averred that the complainant had applied to the Commission for leave to abolish the night and Sunday rates and to increase the charges for cable messages, and that the Commission had refused to take any action on the complainant's petition. The complainant prayed in its original bill for an injunction restraining the Commission

from hindering the complainant from abolishing the half rates for night and Sunday business, and in making extra charges for cable messages. The Commission answered that it had declined to take any action on the petition of complainant because of the pending in this court of another suit—No. 61—of this complainant against the Commission relating to rates. 156 Fed. 823. Evidence was taken and the case was submitted for final decree, but no final decree was entered, as is shown by this excerpt from Judge Saunders' opinion:

"Inasmuch as the Commission has never officially acted upon the above stated application of complainant, I think that this court should decline to take action for the present and until the Railroad Commission has had an opportunity to consider and pass upon the matter. Especially am I of this opinion since the counsel for defendant have stated in open court that there is no disposition whatever on the part of the Commission to delay or evade action in this matter. The refusal of the Commission to act was bona fide, and was based, I think, upon sufficient reasons. Accordingly I shall take no action on this petition. The complainant will be referred to the Railroad Commission, who will consider and pass upon the application. If the complainant is dissatisfied with the ruling of the Commission, it will then have leave to renew and press its application for relief in this case under an amended and the original bill herein."

This order having been entered August 24, 1907, the complainant filed the amended bill September 12, 1907, which is now presented to me. The amended bill repeats the averments and prayer of the original bill, and makes the following additional averment:

"Your orator now states by way of amendment that on September 10, 1907, the defendant, the Railroad Commission of Louisiana, at a regular session in Baton Rouge, took up the question of permitting your orator to abolish its night and Sunday rate, and also its application to be permitted to charge ten cents (10) additional for each toll message through submarine cables and $5 for subscribers for direct line exchange service, and $1.50 for party line exchange service through submarine cables, and your orator presented as evidence the entire record in causes 61 and 66, and, in addition, presented the sworn statement of your orator's auditor, showing that the taxes to be paid by your orator during the year 1907 in the state of Louisiana would amount to $107,902.77, and that the increase for 1907 over 1906 would amount to $37,953.67. It was also shown that if your orator received each and every toll message at the day rate for night and Sunday service, the increased revenues per annum, both interstate and intrastate in Louisiana, would only amount to $40,233.48, and that if your orator were permitted to charge for submarine cable service, both long distance and exchange, at the rates hereinabove set out, and would receive each message at the increased rate, that the increase in revenues per annum would amount to $21,395.40. Your orator further states that on September 11, 1907, the Commission, without having before it, so far as your orator is aware, any additional facts or information, peremptorily declined to permit your orator to charge any additional amount whatever for toll service, or exchange service, through submarine cables, but did permit your orator to abolish its half rate for night and Sunday toll service, thus permitting your orator to increase its net revenues per annum $2,279.81."

No answer has been filed by the defendant to the amendment, nor does it appear that the defendant has had notice of the amendment.

The bill is presented to me that an order may be made setting the amended bill down for hearing on the motion and prayer of the complainant for an injunction pendente lite, and that notice of the motion may be given to the defendant. An order to that effect will, of course, be made.

The complainant also asks me to immediately grant an order "restraining and enjoining said Railroad Commission of Louisiana from in any manner interfering with your orator in charging extra for submarine cable service for both toll line and exchange service, and restraining the said Railroad Commission from instituting or authorizing or directing any other to prosecute or institute any suit or suits, action or actions, against your orator for the recovery of any fines or penalties, or taking any action looking to the assessment of any fines or penalties under and by virtue of any of the provisions of the Constitution of Louisiana herein recited, by reason of your orator and the officers and agents of your orator, or either of them, putting into effect the changes herein specified." This order, if made, would remain in effect till the hearing of the motion for the injunction.

The following is the only statute conferring the authority to grant the order asked for:

"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. U. S. § 718 [U. S. Comp. St. 1901, p. 580].

Cases are often presented in which it is the duty of the court to grant a temporary restraining order on an ex parte application under this statute, and in some of them the very purpose of the injunction would be defeated by the notice unless it was accompanied by a temporary restraining order. And many cases occur in which it seems equitable and just that the existing state and condition of the parties or the property involved should be preserved and maintained from the serving of the notice till the motion is heard. The statute, properly applied, reasonably limited in its application, is very useful in protecting the rights of litigants. Such an order, however, is not proper in all injunction suits. The statute itself in plain terms limits its application to cases where "there appears to be danger of irreparable injury." It is contended by the complainant that it would suffer irreparable injury if not permitted to increase its charges for cable messages immediately; that such injury would occur by a delay of 20 days, when the motion for the preliminary injunction may be heard. This contention is based on the assumption that the court will certainly hold that the present rate of charges is unjust and unreasonable. On this question there is nothing before me, on the one hand, except the amended bill of the complainant, and, on the other hand, the finding and decision of the Commission. The bill asserts, and states facts tending to show, that the present rates are unjust and unreasonable. The decision of the Commission refusing to allow the increased charges is, in effect, a holding that the present rates are reasonable and just. Should the sworn bill, on this motion, prevail over the Commission's decision? The Commission refused to allow the increased rate after a hearing at which was presented all the evidence which the complainant chose to present. The bill before me does not show, and could not properly show, what evidence was offered before the Commission. It is alleged that the Commission had before it as

evidence "the record in causes 61 and 66" and the "sworn statement of your orator's auditor"; and the pleader adds that there was no other evidence "so far as your orator is aware." Evidently the Commission does not agree with the complainant as to the effect of the evidence offered by the complainant, or it had other and further evidence before it of which the complainant was not aware. To grant the temporary restraining order would be to suspend or vacate the order of the Commission till the hearing of the motion for the temporary injunction on the assertions of the complainant as to the effect of evidence which has been held by the Commission insufficient to sustain the complainant's contentions. To grant the order would be to make the averments of the bill override the formal decision of the Commission on a question of fact. The Railroad Commission of Louisiana consists of three commissioners, who act under the authority of the Constitution of the state. Their decision is entitled to respect and consideration, and, to say the least, their findings and decisions on questions of fact should be treated as prima facie correct.

The Commission's decision is subject to judicial review, and, in cases where it has fixed a rate, a party in interest, dissatisfied with the rate fixed, may suspend its operation without injunction, to the extent of avoiding all fines and penalties, by suit in a court of competent jurisdiction. Const. La. arts. 285, 286. In the present case the bill is not presented to complain of a rate fixed by the Commission without complainant's consent, but the injunction is sought to enable the complainant to fix a higher rate than the one now existing, without the permission of the Commission; and, in asking for the injunction, the complainant assumes that articles 285 and 286 are inapplicable, and that an injunction is necessary to protect the complainant against fines and penalties.

In considering this motion, I have had in view the fact that the preliminary restraining order is not asked, as is usually the case, to preserve an existing status, but it is asked to enforce a change from lower to higher rates. The complainant, wishing to increase its charges, seeks the order to prevent action by the Commission which would tend to preserve existing conditions. In this case therefore to refuse to grant the order is to hold that the present conditions shall prevail till both sides may be heard on the motion.

After carefully considering all the circumstances disclosed by the record before me, I have concluded that it would not be a proper exercise of judicial discretion to grant the preliminary restraining order.

As to whether a preliminary injunction should be issued on the hearing of the motion, or a permanent injunction when the cause is tried, are questions not ready for decision, and as to such questions I do not mean to intimate any opinion.

The motion for a temporary restraining order is denied.

THE TAURUS.

(District Court, D. Delaware. March 4, 1907.)

No. 696.

COLLISION—EVIDENCE—MUTUAL FAULT.

A collision having occurred between a naphtha launch proceeding up the Christiana river on the right side, and a tug, with a barge in tow, proceeding down the river on the same side, *held*, that the tug was at fault for being on the wrong side of the river, and for not seasonably signaling, and the launch in fault for stubbornly holding her course after learning that the tug had a tow and that a collision would be inevitable, unless the launch changed her course.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, §§ 52, 73–77, 187–192.

Signals of meeting vessels, see note to The New York, 30 C. C. A. 630.]

(Syllabus by the Court.)

In Admiralty.

Horace G. Knowles, for libelants.
William S. Hilles, for respondent.

BRADFORD, District Judge. Charles P. A. Bright and William M. Bright as owners of the screw naphtha launch Ralph W. have libeled the steam tug Taurus to recover damages for injury sustained by the launch through a collision with the tug in the Christiana River in this district October 4, 1904, between ten and eleven o'clock at night. Just before giving the single blast hereinafter referred to the launch was coming up the river at a distance of between one third and one half a mile from and below the draw-bridge of the Philadelphia, Baltimore and Washington Railroad Company, and the tug was proceeding down the river having a barge in tow. The collision caused the launch to sink with its cargo and to suffer other damage. The libel alleges in substance, among other things, that the launch prior to the collision was coming up the river in a proper manner and gave "due and proper signal" to the tug to go to starboard or toward the southerly side of the river; that the tug gave no answer to the signal; that its engines were not stopped in due time to check its headway, nor was its course properly directed; that the tug was improperly and unskillfully managed and navigated; that when the tug was at the distance of about 100 feet from the launch the former vessel "without warning, suddenly and contrary to signal changed her course," heading across the river toward its northerly side and across the bow of the launch, towing or swinging the barge around and causing it to strike with great force against the bow of the launch; and that the collision was wholly due to the negligence and want of proper skill on the part of the tug. The answer of the owner of the tug denies that the launch was prior to the collision coming up the river in a proper manner; and alleges in substance that the tug with its tow was "being navigated and directed in a careful and prudent manner," and with proper lights; that the tug after passing through the draw-bridge was proceeding down the river a little to the northeastward of the centre of the channel; that the launch was coming up the river to the southwestward

of the centre of the channel in a course which, if held, would have avoided a collision; that when the launch was about 100 feet from the tug the former vessel suddenly changed its course, at the same time giving "one blow with a horn"; that the persons in charge of the tug had no knowledge or intimation that the launch intended so to change its course; that the tug seeing it was impossible for the launch to cross its bow immediately blew two whistles and called to the launch not to attempt so to cross; that the tug immediately thereafter again blew two whistles and slowed its engine; that the launch, nevertheless, collided with the barge in tow of the tug; that at the time of the collision the engines of the launch were running and that vessel made no effort to avoid the collision, but recklessly and carelessly ran into the barge; and that the launch at the time of striking the barge was going across the river in a direction at right angles to its former course and that of the tug and barge. The answer also denies all material allegations in the libel directly bearing on the question of fault as to the collision.

The evidence is somewhat voluminous, and much of it, as is usual in cases of collision, is contradictory and unsatisfactory. I have found it necessary carefully to consider most of the testimony in the light of the undisputed or clearly established facts and the probabilities in order to ascertain the weight to which it is entitled. Some of the evidence in which points of the compass are mentioned is somewhat confusing, owing to the fact that several compass directions are expressed indifferently with respect to the same thing. It may avoid misapprehension to state that whenever a side of the river or of its channel is referred to as northerly, easterly or northeasterly, the left hand side as one faces down stream is meant; and so whenever reference is made to the southerly, westerly or southwesterly side, the right hand side as one so faces is meant. Articles 25 and 27 of the sailing regulations for inland waters of the United States (Act June 7, 1897, c. 4, 30 Stat. 101, 102 [U. S. Comp. St. 1901, pp. 2883, 2884]), are as follows:

"Art. 25. In narrow channels every steam-vessel shall, when it is safe and practicable, keep to that side of the fair-way or mid-channel which lies on the starboard side of such vessel.

"Art. 27. In obeying and construing these rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger."

It clearly appears that the tug did not keep to that side of the mid-channel which lay to starboard, when below the draw-bridge and while approaching the launch. The answer admits that "after passing through the railroad draw-bridge the said tug, with her tow * * * were going down the Christiana River a little to the eastward or northeastward of the centre of the channel," and the evidence on both sides abundantly establishes the fact. The tug thus pursued a course on the side of the mid-channel lying to port, in violation of article 25, unless it was unsafe or impracticable to keep to the side of the mid-channel lying to starboard, or the dangers of navigation or collision or special circumstances required a departure from the course specified in the article. But the evidence wholly fails to disclose any such element of

unsafety, impracticability, danger or special circumstances. It does not appear that there was any stress of wind or water, or any obstacle to the safe navigation by the tug with its tow of any portion of the channel, or any other consideration requiring, justifying or excusing a departure from the usual course prescribed by law. Nor does the answer assign any reason why the tug proceeded down the river on the port and not the starboard side of mid-channel. Under these circumstances and in view of the fact that the collision occurred on the port side of mid-channel there is at the outset a prima facie presumption of fault on the part of the tug. It is, however, contended by the claimant that the launch in coming up the river and while nearing the tug did not keep on the side of mid-channel which lay to starboard of the former vessel; that the course of the launch was on the southerly side of mid-channel; that it would not have been practicable or safe for the tug to cross to the other side of the river to avoid the launch; that if the latter vessel had held its course no collision would have occurred; and that the collision was caused by a sudden and wholly unnecessary change by the launch of its course to starboard or toward the northerly side of the river. This contention is not supported by a preponderance of the evidence. On the contrary it is refuted not only by the direct testimony of witnesses but by the gross improbabilities involved in it. It is important at the outset to ascertain the position of the launch and the tug in the river and their courses and bearing immediately preceding the giving of the single blast by the former vessel. The witness Davis, captain of the tug, states in effect that at that time the tug with its tow was proceeding down the river parallel to and on the northerly or port side of mid-channel and about 60 or 70 feet from the northerly side of the channel, the channel there being 250 feet wide, and the launch was proceeding up the river, showing only its starboard side light, and hugging the southerly side of the channel at the distance from that side of about 60 or 70 feet; that the launch was then distant from the tug about 125 or 150 feet; and that if the launch had continued to hold its course the collision would not have occurred. He further states in effect that the launch as soon as the single blast was given swung to starboard, crossed from the southerly to the northerly side of the channel still swinging to starboard, and ran head on against the starboard side of the barge at a point about 20 feet from its bow; the launch at the instant of collision heading in a direction at right angles with its former course and the line of mid-channel. With respect to this testimony of the captain of the tug several things properly may and should be said. First, on its face, while it is possible, it is extremely improbable that it is correct. The evidence shows, and it is not disputed, that the tug, the barge and the launch carried the lights required by law, and the captain of the launch testifies to the effect that he knew at the time of giving the single blast that the tug had a tow. Under these circumstances and, according to the testimony of the captain of the tug, with a clearance between that vessel and the launch of about 100 feet, had the latter continued to hold her course, and, in the absence of any evidence suggestive of intoxication, lunacy or other incompetency on the part of the captain of the launch, it is, to say the least, highly improbable that

the launch should have executed the manœuvre attributed to it by the captain of the tug. Again: the statement by the captain of the tug of the position in the channel of the launch at and just prior to the time of the giving of the single blast is not corroborated by any witness in the case. Hopkins, the engineer of the tug, did not see the launch or know its position until the tug had slowed down after the giving of the single blast. The same is to be said of Davis, the fireman of the tug. Windal, the steward of the tug, did not see the launch until after the collision. The same is to be said of Blocksom, the mate of the Taurus, and of Jefferson, the captain of the barge. Such of the witnesses on the part of the claimant as saw the launch after the giving of the single blast and prior to the collision speak of the position and movements of the vessels when disaster was immediately impending and unavoidable, and after the swinging of the launch to starboard and of the tug and its tow to port in such manner as at night and in the excitement of the moment to beget confusion as between the courses of the vessels with respect to the line of the channel and the angle of intersection of such courses. Further, aside from its inherent improbability, the correctness of the statement of the captain of the tug is negatived by a clear preponderance of the evidence. Bright, the master of the launch, testifies to the effect that at and prior to the giving of the single blast the launch was proceeding up the river on the northerly side of the channel and that when that blast was given the tug was "coming direct at me" with its red and green lights both visible. Penington, a deck hand on the launch, testifies to the effect that when the single blast was given "the Taurus was making down with her lights bearing on us and that means they were both coming head towards each other," and that he then saw both the green and red lights of the tug. Bright, a son of the master of the launch, who was engaged as engineer in running it, testifies to the effect that at the time the single blast was given the tug and the launch "were running right direct at one another, lights shining." It thus clearly appears from the evidence that before and at the time of the giving of the single blast the launch was pursuing its course up the northerly side of the channel where it had a right to be, and the tug with its tow was pursuing its course down the same side of the channel where it had no right to be; and that when the blast was given the tug and launch were approaching each other end on in such manner as to involve risk, and, indeed, certainty, of collision, should both continue without change of course. As between an incumbered vessel and one which is unincumbered, the general rule is that the former is privileged to hold her course and the latter must keep out of her way. The Mayumba (D. C.) 21 Fed. 476; The Syracuse, 9 Wall. 672, 19 L. Ed. 783; The Lucy, 74 Fed. 572, 20 C. C. A. 660; The Jamestown (D. C.) 114 Fed. 593; The Alabama (D. C.) 114 Fed. 214; Mitchell Transp. Co. v. Green, 120 Fed. 49, 56 C. C. A. 455. But the fact that the tug was towing a barge did not confer a privilege on the former vessel to pursue a course on the port side of the channel in violation of article 25 of the sailing regulations. And being on the wrong side, it was especially incumbent on the tug to observe great vigilance and care to avoid collision. There is conflict in the testimony as to the dis-

tance of the launch from the tug, when the single blast was given. The captain of the tug, as before stated, testifies that at that time the two vessels were 125 or 150 feet apart. The master of the launch testifies that the vessels were then distant from each other, he should suppose, about 500 or 600 feet. Penington in his testimony places the distance at "about one hundred yards, more or less." Bright, the engineer of the launch, states that the vessels were about 50 or 75 yards from each other. None of the other witnesses testify on this subject. An average of the above estimates of distance would place the tug and the launch from 270 to 320 feet from each other when the single blast was given, and this probably is not far from the fact. But whether this be a slight overestimate or a slight understatement of the distance is unimportant in view of the other facts in the case. The tug and the launch for some time prior to the single blast were approaching each other end on, and if the tug intended, in violation of article 25, to continue its course on the northerly side of the channel, it was under an obligation not to be guilty of any act or omission calculated to confuse or mislead those navigating the launch with respect to such intention. The captain of the tug had no right to assume that those on the launch would believe that the tug, while having ample opportunity to direct its course to starboard and pass in safety with its tow to the proper side of the channel, would persist in its wrongdoing without at least giving by way of signal some intimation of its purpose. Under the circumstances it was peculiarly incumbent on the tug to give to the launch seasonable notice of the course it intended to pursue. This the tug did not do. It did not signal the launch until after the latter had given the single blast, if, indeed, it gave any signal at all to the launch, which on the evidence is somewhat doubtful, but unnecessary to decide. · Further, it was the duty of the tug prior to the single blast and before a collision was imminent or seriously threatened seasonably to abandon its illegal course and proceed with its tow to the southerly side of the channel, and the tug was in fault for not so doing. Again: when the single blast was given it was understood by the captain of the tug. He admits that he heard it distinctly and knew what it meant. He then was aware that the launch was going to starboard, toward the northerly side of the river, and that the tug was notified by the launch to direct its course toward the southerly side of the river. The tug neither went to starboard as signaled nor held its course, but went to port; thus swinging with its tow toward the northerly side of the river and the place of collision. If the tug promptly on being signaled by the launch had directed its course to starboard, I have no substantial doubt on the evidence that the collision would have been avoided. Or if the tug had, notwithstanding the signal from the launch, continued to hold its course, I am on the evidence strongly inclined to believe that no collision would have occurred. That the tug, after hearing and understanding the single blast of the launch, should have disobeyed it and without stopping or attempting to stop and without even a danger signal, have directed its course to port, either with or without the giving of two blasts, betrayed a reckless disregard of the consequences which naturally might be expected to result to the launch as the smallest of the three vessels. The

only hypothesis on which the conduct of the tug could be justified or extenuated is that the launch without any inducement whatever and in full view of the tug and its tow left a place of perfect safety on the southerly side of the river and went across the channel and into the jaws of destruction. This hypothesis, however, as before indicated, must be rejected not only by reason of its utter improbability, but as opposed to a clear and decisive preponderance of the direct evidence. The more reasonable and, I have little doubt, the true explanation of the collision is that, when the tug and the launch were approaching each other end on, the former, although on the wrong side of the channel, was not willing unnecessarily to go with its tow to starboard in order to make way for what is recognized as a comparatively small and unincumbered craft, and negligently omitted until too late the observance of proper precautions against collision.

The question remains whether or not the launch was also in fault. It is not disputed that from the time the tug with its tow passed through the draw-bridge until the collision the lights of the vessels were visible to each other; and it clearly appears from the evidence that when the tug and the launch were approaching each other end on and were, as before stated, probably from 270 to 320 feet apart, the launch gave a single blast and immediately proceeded to starboard, and the tug practically at the same moment starboarded its helm and went to port; the vessels thus nearing each other on converging and intersecting courses, with the result that the tug crossed the bow of the launch, and the latter vessel and the barge collided. The master of the launch in describing the circumstances under which the vessels approached each other and came together, among other things, testifies:

"Q. 32. What did you do after she got through the draw? A. I stood there with my one hand on the wheel and the other hand I had my horn in, waiting for her to blow. I have always made it a practice to do that with all large boats. I wait until I get a signal from them so as to give them whichever side they want, because I know they draw more water than I do, and I can run nearer the shore than they can. Q. 33. Did she give you any signal? A. She did not. Q. 34. What did you do? A. I waited until I thought she was near enough. Then seeing that she wasn't going to blow, I blew to her, but she didn't answer me. As soon as I blew I turned my wheel to port and run my boat to the starboard. If he had held his course I would have cleared her. I could have cleared her on either side if he had told me which way he wanted to go. * * * Q. 37. What did she do after you blew your horn? A. She kept bearing off to the same side of the creek I was going on until she got close to me, then she cut across my bow and came down across the other side of me. That threw the barge quartering around, and it came quartering at me. As soon as I saw she wasn't going to let me get on that side, I told the men, 'Men, we are in a collision. Look out for yourselves.' I gave my man the bell, and he had her on the back gear running back when the barge fetched up into me. * * * Q. 82. At the time you saw the Taurus crossing your bow, did you make any efforts to avert a collision, and if so, just state what? A. Yes, sir. After she started to cross my bow, I saw I couldn't get on the starboard side where the law told me to go, and so I gave the boy the bell to put her on the back gear immediately. He had her on the back gear by the time I got done pulling the bell. * * * X 158. In relation to you, which way was the Taurus headed when you blew the horn the first time? A. Coming direct at me. * * * X 160. What did he do when you blew the horn? A. He hauled off a little on the north side of the creek. * * * X 162. And that happened when you were about five or six hundred feet away? A. Somewheres about that distance. * * * X 184.

And you knew she had a tow? A. Yes, sir; I knew she had a tow. * * * X 190. When you gave that signal you put your wheel to port. Hard to port? A. No, sir; not hard to port. I put it to port. * * * X 204. You said when you gave your blow that he turned his wheel to starboard and went to port, too? A. I didn't say which way he turned his wheel. X 205. You said he changed his course? A. He did change his course, but some wheels turn one way and some turn another. X 206. He changed his course to the northern side of the creek? A. He did, yes, sir. * * * X 219. How far away from the boat were you when you reversed your gear? I don't know the exact distance. I was several feet away. I should judge twice the length of my boat, perhaps. X 220. Up to that time you kept your wheel hard to port? A. Yes, sir. X 221. Port and hard to port? A. Yes, sir. * * * X 225. Did the Taurus keep going towards the northern side of the creek all the time? A. Yes, sir; she did after she started that way. * * * X 236. Can't you give us any idea as to how far away from your bow the side of the Taurus was when she went by you? A. She was not very far. * * * She was somewheres in the neighborhood of seventy five feet, somewheres thereabouts, more or less. * * * X 254. Where was the Taurus in relation to your boat when you reversed your propeller? Had she passed by you? A. No, sir; she had not. She was crossing my bow, or very near across, when I reversed my propeller."

The witness Penington states that from the time the launch gave her single blast she bore to starboard—"when he blew the horn we sheered to the right." He further testifies:

"X 91. When did you slow down? A. Just before the collision. X 92. How far were you off the barge when your engine was going full speed ahead? A. It wasn't very far. * * * X 94. The length of your boat? A. It may have been very near the length of the tow line, I can't tell you positively; when the captain gave him the bells to go back on her he hollered and says, look out, there is going to be a collision. * * * X 102. How far were you from the barge when you slowed your engine down for the first time? A. I judge as near as I can, as far as from here to that building over there, more or less. X 103. Can't you give it to us in feet? A. I judge about twenty yards or twenty five. X 104. Then what happened, you say you gave her the bell to stop her? A. A bell to slow her down; one to stop her and two to go back on her."

Bright, the engineer of the launch testifies in part as follows:

"Q. 22. What course did you take when you blew the whistle? A. We held to our right. * * * Q. 27. How much did the tug clear you, how far from you? A. She wasn't very far. Q. 28. How far? A. I can't tell exactly. Q. 29. One yard or ten yards? A. I don't think she was over two or three yards. * * * Q. 41. What signals were given and what did you do? A. He gave me one bell to slow her and one bell to take the wheel off of her and he gave me two to come back on her, and I did it. Q. 42. How far were you from the Taurus when the first signal was given to you? A. I should judge about fifty yards. * * * X 80. Did he give the signal to slow as soon as the horn blew? A. No, sir, not exactly."

While for the reasons already given the tug was grossly at fault, I have been forced to the conclusion that the launch was not free from blame for the collision. It is true that the latter vessel was on the northerly side of the channel where the tug had no right to be, and it is further true that the tug immediately on hearing the single blast from the launch, if not considerably earlier, should have directed her course to the southerly side of the channel. But the unlawful and negligent conduct of the tug did not justify persistence by the launch in a manœuvre which, however proper under ordinary circumstances, was directly calculated to result in collision, nor the omission by the

launch of reasonable care and skill to avert disaster. The rules of navigation were adopted for the purpose of preventing and not of causing collisions; and, therefore, article 27 wisely provides that in obeying and construing them due regard shall be had to any special circumstances rendering a departure from them "necessary in order to avoid immediate danger." When the master of the launch gave the single blast and ported his helm he knew that the tug was incumbered with a tow and he further knew a moment later that the tug did not assent to the course proposed; for he saw it moving toward the northerly side of the channel. It was then evident that a continuance by the tug and the launch to hold their respective courses meant danger if not certainty of collision. Under these circumstances, matters then not being in extremis, the obvious duty of the launch was to give a danger signal and reverse her propeller, or, possibly, if practicable, to change her course to port in conformity with the manifested desire of the tug. The launch gave her signal to the tug either seasonably or unseasonably. If seasonably, there should have been no difficulty on the part of the launch, notwithstanding the fault of the tug, in avoiding a collision by changing her course or reversing. If unseasonably, danger signals and reversing should have been resorted to immediately on the tug's beginning to swing to port. But, instead of exercising ordinary precaution, the launch persisted in swinging to starboard and going at full speed until, according to the evidence on the part of the libelants, the tug was crossing or about to cross its bow, when the master gave the order to reverse and exclaimed, "Men, we are in a collision. Look out for yourselves." Having reached the conclusion that both the launch and the tug were at fault, an interlocutory decree will be made dividing damages and costs between them.

THE NORGE.

(District Court, S. D. New York. October 8, 1907.)

SHIPPING—LIMITATION OF LIABILITY—LOSS OF VESSEL AT SEA.

Evidence considered, and *held* to entitle the owner of the Danish steamship Norge to a limitation of liability on account of her loss at sea while on a voyage from Copenhagen to New York through striking a derelict or unknown obstruction under the surface of the water to the southward of Rockall Rock, by which she was so injured that she sank in 20 minutes, and a number of persons lost their lives; it being shown that she was seaworthy and properly manned and equipped, that she was on an approved route with a lookout properly stationed, and that there was no fault or negligence in her management. Claims made by representatives of persons who lost their lives by the disaster also dismissed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, §§ 644, 645.

Limitation of liability of vessel owner, see note to The Longfellow, 45 C. C. A. 387.]

In Admiralty. Proceeding for limitation of liability.

Wing, Putnam & Burlingham, for petitioner.

Henry M. Heyman, for various claimants.

ADAMS, District Judge. A petition was filed herein by Det Forende Dampskibs-Selskab (The United Steamship Company) as owner of the steamship Norge to limit its liability by reason of the sinking of that steamer on the morning of the 28th of June, 1904. The steamer was proceeding from Copenhagen to New York via Pentland Frith and the Flannan Islands. The allegations of the petition are, inter alia:

"Fifth: After sailing from Christiansand and on June 25th, 1904, the steamship Norge, with all her equipment, (excepting three boats as hereinafter stated) and all the cargo, effects and baggage on board were totally lost at sea on June 28th, 1904, in the following circumstances:

The Norge passed through the Pentland Firth, on the 26th, and was abreast of Butt of Lewis at 8 A. M. on the 27th. At 11.40 A. M. on the 27th she was abreast of the Flannan Islands, in 58° 22' North latitude, and 7° 38' West longitude. From this point the usual steamship route was to follow the great circle, passing south of Rockall Rock, and the course was set thence West by North by compass to allow for deviation, which should take the ship well to the South of Rockall Rock, which is a well known reef or cliff about 70 feet high and about 220 feet in circumference, situated about 220 miles from the Flannan Islands. It is surrounded by an area known as the Rockall Bank, extending in length 150 miles in a Northeasterly and Southwesterly direction, and about 45 miles in width. There are known to be submerged rocks or reefs in this area North of the Rockall Rock, and there is a submerged rock known as St. Helen's Reef about two miles East of the Rockall Rock, but no rocks or reefs South of Rockall Rock were known. The vessels of this Line and other Steamship Lines had repeatedly crossed the Rockall Bank South of the Rockall Rock and close to it, and the charts as well as repeated soundings made upon the Bank South of the Rock had there shown a depth of fifty fathoms, and had not disclosed the existence of any reefs or rocks in that locality. Since leaving Copenhagen the Norge's compasses had been daily tested and observed, but no unusual deviation indicated.

Sixth: The Norge proceeded on this course from the Flannan Islands at the rate of abouf 10¾ knots per hour. The weather was clear with a moderate Southerly wind and an unsteady swell from the Southwest. At seven thirty P. M. the ship's course was verified from the position of St. Kilda, which was still in view on the horizon.

At 5 o'clock in the morning of the 28th, the same course and speed having been maintained, the weather became somewhat hazy, and a lookout was stationed forward. The patent log indicated a run of 178.6 miles, which corresponded with the normal full speed of the ship. As they might not sight Rockall Rock owing to the weather, the master for abundant precaution and in order to allow for any unusual drift or unexpected deviation, changed his compass course to W. S. W. This course was maintained at full speed until 7.30 A. M., when it was reckoned that a distance of 27 miles had been made. The course was then changed back to West by North the weather being then fairly clear, so as to see a good distance. After running on this course 2½ or 3 miles, at about 7.45 A. M. the ship struck hard upon an unknown obstruction, without any object having been sighted by either the lookout or any other person on board.

The engines were reversed, and the ship came off. The boats were immediately ordered cleared away, but owing to the settling of the bow, and the crowding of the passengers, only five boats could be launched from the ship, and of these one was badly damaged. The Norge sank in deep water in about twenty minutes.

The boats stood by until the ship sank and picked up all the people they could. The weather was then thick and rainy and the boats drifted in a Northerly direction. After more than two hours, the weather cleared somewhat, and one or two persons in the boats thought that they caught a glimpse of a rock about four miles to the Northwest. Subsequently, after several days, the occupants of said five boats, which had become separated, were

rescued by different ships, the occupants of one boat being landed at Stornoway, Hebrides, those of another boat at Grimsby, of another at the Faroe Islands and of another at Aberdeen. Of those on the Norge, all were lost excepting the persons thus saved in these five boats being 143 passengers and 24 of the crew."

Then follow the usual averments in a case of this kind, further showing the necessity for the proceeding by reason of actions brought in New York against the petitioner to recover various large sums. The petition further shows a number of existing claims, not in suit, due to the steamer's loss. The ordinary proceedings ensued which resulted in the presentation of the claims in suit, in which answers were filed on behalf of the estates of 12 drowned passengers. They denied many of the petitioner's allegations and further answering averred:

That the loss was caused wholly by unseaworthiness of the vessel and by the negligence of those in charge of the vessel, as follows:

"(1) That the said steamship when she went to sea was unseaworthy and unfitted to encounter the ordinary perils of navigation. That her several bulkheads were imperfectly and defectively constructed and unable to sustain the weight of water which would press upon them through a leak or hole in said steamship below the water line thereof. That said steamship was built many years ago, and had been in long active and continuous service.

(2) That she was not equipped with a sufficient number of life boats or life preservers, nor provided with the usual and ordinary life saving devices and appliances.

(3) That she was insufficiently manned and equipped, and was not provided with a full, complete, adequate and competent crew, or with proper officers to manage and navigate said steamship.

(4) That she had no competent and sufficient lookout properly stationed and attentive to his duties as such, and engaged in the proper performance thereof.

(5) That the said S. S. 'Norge' took no timely or proper steps to avoid the accident or foundering on the rocks whereon and whereby she was sunk, as she was bound by law to do.

(6) That said steamship 'Norge' was not provided with a full complement of licensed officers sufficient at all times to manage said steamship; that such officers were incompetent, inexperienced, and not properly qualified to perform the duties ordinarily required of them; that the crew of said steamship was composed mainly of young, inexperienced and incompetent boys and men, almost all of whom deserted their posts of duty and were insubordinate, panic stricken, not amenable to orders, were unruly, intoxicated, violent, obstructive and utterly regardless of the lives or safety of the passengers on said steamship 'Norge,' or of any of them; that the captain, officers and crew of said S. S. 'Norge' were in a state of drunkenness and intoxication, and unmindful of their several duties, during the entire voyage, and of the lives and safety of the passengers committed to their charge."

Upon the issues raised a great deal of evidence was taken abroad for the petitioner, and some here. The latter was by deposition and the subsequent examination of a witness for the petitioner in court. The claimants called and examined in court two of the immigrant passengers who were on the steamer, but this testimony did not serve to contradict the petitioner's proofs, but merely tended to show that when the accident was happening there was trouble about some of the passengers being taken into the saving boats.

It appeared that the Norge maintained a high class in the Bureau Veritas and was seaworthy in every respect. She had been inspected just before her departure on this voyage and found to be not only sea-

worthy as to her hull but that she carried a full crew and complement of boats and life saving apparatus. Her officers and crew were well qualified. She had a small number of boys on board but they were competent to perform their duties and no real criticism can be made against the steamer in such respect. There was no evidence whatever of intoxication on board. The crew was regularly served with an ordinary beer at meals which would only produce intoxication when used in excessive quantities and that does not appear to have been the case here.

The master of the vessel had had considerable experience and in following the route adopted, he was not only acting upon his own knowledge and that of other masters but was navigating in conformity with the recommendations of the German Hydrographic Office. He remained on the bridge until the vessel went down and was rescued from drowning by one of the saved boats. His account of the accident was as follows:

"Seventh Interrogatory:

State particularly the navigation of the Norge on June 28th, giving the weather, the wind, and course of the vessel, on that day, up to the time of her loss. State who were on the bridge of the vessel on the morning of that day, who, if any one, was on the lookout, and at what time the vessel struck or stranded, and whether the object struck was seen by anyone upon the ship. A. The course on the 28th was true S. 74° W., but as the variations increased and the course was unaltered from the 27th, it became somewhat more southerly in reality. In the morning of the 28th June at 5 o'clock, the distance sailed from Flannan Isles being then 179 miles, I was informed that it was somewhat hazy, which, however, only lasted a moment. For the sake of caution, the course was altered to S. 42° W. The ship ran out a distance of 27 miles on this course until 7–30 a. m., when the course was again altered to the previous one, and I consider we were a good deal south of all grounds even should the current have placed us some miles towards the north. The weather was clouded but clear, the wind south, force one. We ran three miles on this course when the ship struck at 7–45 a. m. The first officer, Gilbe, was on the bridge and the sailor Hannibal Christensen was on the lookout at the time of stranding. I was myself on the bridge at 5–30 a. m. and continually from 6–15 a. m. together with Gilbe. The object struck was not seen by any one previous to striking, but immediately afterwards a quantity of wreckage was noticed.

Eighth Interrogatory:

After the stranding, state what precautions were taken how soon the boats were lowered away, the number of boats launched, and how long the Norge remained afloat; and if she sank, at what time she sank and in what manner. State also what became of the boat in which you were, and also of the other boats so far as you know, giving the number of passengers and crew who were rescued. A. After the stranding I steamed full speed astern, which was considered the best under the circumstances. I endeavored to manoeuver the ship round in order if possible to get back to a fishing steamer, which had been passed at 6 o'clock in the morning and was still visible at 7 o'clock, which is also a proof that the weather was not hazy. The endeavor to turn the ship round had shortly afterwards to be given up as she did not answer to her helm, more especially on account of her fore part sinking quickly, thereby lifting the after part so that the propeller was out of the water. Under these manoeuvers, orders were given to sound the fore part of the ship, and immediately afterwards I was informed that there was water in the fore part. I gave orders to close all water-tight doors, and to inform all the passengers to come on deck with lifebelts on. I ordered the engine room to pump the fore part of the ship, to get the boats ready and to lower them to the rail, but as I saw how quickly the ship sank I gave orders to put the boats out. Further, I gave orders to bring further provisions to the boats, to bring for-

ward the ship's journals, to arrange for women and children to go first into the boats, that the crew should refrain from entering the boats, to cut all lashings on everything which could float, as well as on the raft. The steam whistle was continually used. At the time the ship struck, it became a little hazy with rain. I also convinced myself that several of my orders were carried out. I was informed from the engine room that the watertight doors were closed and that pumping of the fore part of the ship had been commenced. When the water reached the entrance to the engines, I gave orders for the engine room staff to come up on deck. Up to this time, when I should say about 10–15 minutes had gone since the time of striking, 7 of the boats had been got out. The eighth boat was got out with great difficulty just before the ship sank. On the whole, the lowering of the boats was made very difficult through the ship lying over at the stem and through the large number of passengers in the beginning struggling to get into the boats. The steamer sank at 8–05 a. m., after floating about 20 minutes. During the time after the ship struck, I left the bridge twice, the first time when No. 1 boat was launched in order to get as many of the women and children into the boats as possible, in which I was also successful. When lifeboat No. 2 was being lowered, the tackle falls became fastened against the bridge on account of the heeling of the ship, which made it impossible to get it away. I gave orders to the carpenter who was employed in the lowering of the boat, to cut the tackle, which was also done. The ship sank with her forepart downwards. I was not in any boat when the ship sank, but was drawn under the water, and after swimming about for about 1 hour 25 minutes, I was picked up by lifeboat No. 1, which was still drifting about the place without being manoeuvered. Sail was rigged after I regained my strength, and my intention was, if possible to endeavor to reach St. Kilda, should we not be found by some passing steamer; as it seemed clear to me—the boat being over-filled with people—that we must spare the provisions and water, and these were only given out in small proportions. At 5 o'clock a. m. on the 2nd July, we made signal to an east bound steamer, but were not observed. A child died on the same day named Alfred Emil Constantin Henderson, which was buried at sea with the consent of the parents. On the 3rd July at 5 A. M. signal was made to a sailing vessel, but it was not observed. In the afternoon of the same day, about 12–30, we sighted St. Kilda, and in the evening made signal to a steamer, which turned out to be S/S Energy, Captain Schaffer, and by which steamer we were picked up. The bearing of St. Kilda was about 18 miles south. As we all suffered considerably, it was decided, with the consent of Captain Schaffer to let S/S Energy call in at Stornoway in order to land us there so that we might come under the Doctors' treatment. We were landed at Stornoway in the afternoon of the 4th July. We had been 71 in the boat.

As far as I know, the passengers and crew of No. 3 boat were picked up on the 29th June at 7 o'clock a. m. by the fishing steamer Salvia and were brought to Grimsby. No. 5 boat was picked up in the afternoon of the 4th July by S/S Largo Bay and was landed at Aberdeen. No. 7 boat was broken in lowering. No. 2 boat has not been heard of since. No. 4 was discovered by Olga Pouline on the 5th July and brought in to Thorshavn on the Faroe Isles. No. 6 boat went down. No. 8 boat was picked up by Savona on the 3rd July in the evening and brought into Stornoway. In all, 143 passengers and 24 of the crew were in these boats.

Ninth Interrogatory:

How do you account for said accident? State why the same occurred and whether the same might have been avoided on your part or the officers of said vessel. A. I cannot give any explanation of the disaster, neither do I know whether and on what ground she struck, as the ship, according to the course set, should have been a long way south of Rockall. Some have stated that there have been magnetic influences, but I am unable to express myself as to this. The disaster could not have been avoided by my aid, neither do I consider any negligence on the part of the officers and crew has been prevalent."

It appears that the vessel either struck a derelict, which the floating wreckage would seem to indicate, or some unknown rock or obstruction causing the sinking and the consequent loss of life. The evidence sustains the account set forth in the petition, as quoted above, and nothing has been offered to meet it.

A special exemption from liability was claimed under the laws of Denmark, as the law of the Norge's flag. According to this law, it is claimed that a shipowner is not liable in damages for loss of life on his vessel unless the loss was occasioned by acts of the owner of a criminal nature so as to constitute the crime of manslaughter under the provisions of the Danish law defining such crime, but it is not necessary to consider this feature of the case as the evidence shows that the loss of life was not caused by any defect in manning or outfitting the vessel or, in fact, any negligence of those on board.

There will be a decree sustaining the petition and dismissing the claims.

THE AMSTERDAM.

THE ROTTERDAM.

(District Court, S. D. New York. September 26, 1907.)

SHIPPING—DAMAGE TO CARGO—LIABILITY OF SHIP.

A claim that shipments of tobacco from Holland ports to New York, made on two different vessels, were damaged by sea water on the voyages through the unseaworthiness of the vessels or negligent stowage, *held* not sustained by the evidence, which tended to show that the tobacco was delivered in the same condition in which it was received, and that it was probably damaged previously on its shipment from Sumatra to Holland.

In Admiralty. Suits for damage to cargo.

Eustace Conway, for libellant.

Wing, Putnam & Burlingham, for claimant.

ADAMS, District Judge. These actions were brought by the Mannheim Insurance Company, the assignee of Rothschild & Brother, to recover from the steamships Amsterdam and Rotterdam the damage alleged to have been caused to certain Sumatra tobacco, shipped on the said vessels for New York by the said assignors.

The claim against the Amsterdam is that the steamer on or about the 6th of May, 1901, received on board at Rotterdam, in the Netherlands, 128 cases of tobacco in good order, and duly issued a bill of lading agreeing to deliver the same in New York in the same good order; that she arrived at her port of destination on or about the 20th of May, 1901, and delivered the tobacco to the consignees but not in the condition in which it was received but in bad order and condition, through being damaged by salt water, which was due to the unfitness of the hold of the steamer in which the tobacco was stowed and the carelessness and negligence in stowing and handling the same. That the said water soaked through the boards of the cases which contained the tobacco and soaked the same, whereby the owners were damaged in the sum of $7,537.88.

The claim against the Rotterdam is of a similar character for loss on 32 casks of tobacco, shipped about the same time and said to amount to $1,788.30.

The answers of the claimant, the Holland America Line, in both instances deny all charges of negligence and allege that the shipments were made at Amsterdam, where the claimant had offices as well as at Rotterdam; that the cases containing the tobacco were of wood and effectually concealed the contents so that the carrier could only know the apparent external condition of the packages; that the shipments were delivered at the claimant's pier in Amsterdam from barges or lighters; thence they were forwarded in closed railway cars to the steamer in Rotterdam so that they were there laden on board without having received any water or other damage since they had come into the claimant's custody; that the tobacco of the firm of Rothschild & Brother, with other tobacco, was well and carefully stowed under deck of the steamer and discharged in the same good external order and condition as when shipped and was so received and accepted and receipted for by the consignee; that it was also examined by United States officials on the dock and at public stores; that the shipment was presumably from a larger quantity of similar tobacco carried in the Amsterdam, the next succeeding steamer, which arrived in New York May 20, 1901; that this lot of tobacco was also received for shipment in apparent good order and condition and was so delivered and accepted on the dock in New York; that the first intimation to the claimant of any claim for damage on this shipment or the Rotterdam was received on June 4th and 7th, together with notice of claim on the Amsterdam shipment, to the effect that 160 bales of tobacco from the two steamers were seriously damaged by water.

There are some slight discrepancies in the dates between the allegations of the libel and of the answers, but of no material importance.

Shortly after the actions were at issue they were consolidated and subsequently tried as one.

It appears that the Rotterdam sailed on May 2nd and the Amsterdam on the 9th. The libellant's tobacco on these vessels was part of a shipment from Sumatra, brought to Amsterdam by a long sea voyage. Another shipment, consisting of 71 bales, was brought to this country by the steamer Statendam. Mr. Putnam of Putnam, Kissam & Koehler, libellant's appraisers, examined this tobacco as well as the libellant's, and on June 7th, 1901, the firm wrote to the claimant that they found the tobacco badly damaged by contact with sea water, even more badly than the tobacco in suit; they further said:

"From the appearance of these cases we do not believe the damage to this tobacco occurred on the three steamers in question. We think it probable that all these cases were wet before shipment at Rotterdam. There is no doubt, however, that this tobacco was damaged after having been packed in cases at Amsterdam."

The tobacco came to Amsterdam in bales but was there casually examined and repacked in bales and then in new wooden cases made to fit the bales. No damage was noticed to the bales at this time, nor in the subsequent handling up to the time of their being in store on this side, when the warehouseman opened the packages and found the bales

stained and a further examination developed considerable damage. It is urged by the libellant that this damage was due to salt water but that claim has been vigorously disputed and the preponderance of evidence is not such as to base any reliable finding as to liability upon that fact. Preceding the delivery to the Holland Line the tobacco had been transported a long distance over salt water and it may as well be that the damage was received in such transportation as upon these steamers. Assuming, however, that it was salt water damage, the evidence is not sufficient to fasten responsibility therefor upon these steamers. It was held in The Folmina (D. C.) 143 Fed. 636 (affirmed 153 Fed. 364, but subsequently certified to the Supreme Court on the question of burden of proof), that if the ship shows there was no negligence on its part, or of the carrier in outfitting her for the voyage and that the ship was sound as to its plates, pipes, rivets and hatches, that neither imagination nor experience suggests any way for water to enter that is not negatived or at least that the carrier did not contribute to, then the libel must be dismissed even assuming that the cargo was damaged by salt water while on the voyage. The foregoing is extracted in substance from the libellant's brief and therein it is conceded that such a doctrine is the one the libellant is required to meet.

It is claimed, therefore, that the Amsterdam received the cases in good order, and while they were apparently in the same condition when delivered in New York, they were in fact considerably damaged, though it was not ascertained till subsequently. Thirteen cases out of the shipment were opened by the Custom House weighers in New York but nothing wrong discovered then; much weight, however, should not be attached thereto as no careful examination was made for damage. No discovery of damage was made until the warehouseman took charge of and opened the cases, when he noticed the same. He said:

"The side of the bale was black against the matting—the yellowish matting that was inside the case,—it was a black stain on the yellow matting"

—and sent word to his clients, the Messrs. Rothschild, on the 27th day of May, 1901.

The libellant's claim is that the steamer was unseaworthy as to lower hold 2, where the tobacco was probably stowed, in being under a wooden deck, 2 or 3 inches thick, on top of which was a steerage cabin. The deck had a hatch composed of several small hatches which were not caulked though covered with tarpaulins. The log showed that considerable water was shipped on the 12th and 13th of May which, it is urged, must have found its way to the tobacco, it not being sufficiently protected. It is suggested that "some slight damage," noted in the log, would have become dry in the 8 or 9 days left of the voyage. There is some doubt as to correctness of the log, the testimony of the officers of the steamer being to the effect that it was a good voyage without any rough weather. But whether it was rough or not, I fail to see any liability on the part of the ship. It is admitted by the libellant that there was no perceptible damage to the cases and it is difficult to understand how such a damage as is claimed here could

have occurred without showing on the cases. Moreover the hatch was adequately protected by tarpaulins, even if the covers were off.

As to the Rotterdam, she sailed May 2d and reached New York on the 12th. The 32 cases, involved herein, were probably stowed in the between decks in No. 2 hold and lower part of No. 2 and No. 4 holds. There was very little bad weather on this voyage. The tobacco, it is claimed, was damaged to the extent of 23½ per cent. and it is admitted by the libellant that no opportunity for the entrance of sea water has been shown into the places mentioned. In connection with this vessel the libellant claims that salt water damage having been shown, the explanation of the place of stowage of the injured cases is due from the claimant. The answer to this suggestion is that the claimant has shown the proper handling and delivery of the tobacco. The testimony in so showing excludes any consideration of the suggestion.

I find that the tobacco on both vessels was carefully handled and properly stowed in the holds. It is not probable that the damage subsequently found to tobacco transported on these vessels, and also on the Statendam about the same time, could have occurred on the vessels. It is much more likely that it happened before.

The weights of the tobacco have a strong tendency to show that the damage did not occur while it was in the claimant's custody. Tobacco increases very much in weight when wet. The cases were weighed at the warehouse in Amsterdam, then at the pier there, then on the claimant's pier in Hoboken, then by the Custom House weighers, then at Palmer's Warehouse, and very little difference appeared. In a few instances there is a slight variation, but not enough in any instance to affect a belief that if any such damage had occurred on the vessels, the scales would have shown it.

It is not necessary to determine when or where the damage occurred. It is sufficient to conclude that it did not occur by any fault of these steamers.

Libels dismissed.

In re STEELE.

(District Court, N. D. Alabama, S. D. November 9, 1907.)

1. BANKRUPTCY—COURTS OF BANKRUPTCY—POWER TO APPOINT REFEREES.

Where there are two district judges of a federal district, having equal and concurrent authority, one of such judges, sitting in bankruptcy within the district, the other judge being absent from the district, constitutes the court of bankruptcy, and has power to make a valid and binding appointment of a referee in bankruptcy, and the absent judge cannot subsequently come into the district, while the judge making the appointment is holding court therein, and without the latter's concurrence, set aside such appointment and remove the appointee from office.

2. COURTS—CONCURRENT JURISDICTION—IMPROVIDENT ORDER—VOID ACT OF JUDGE.

Where there are two district judges of a federal court having equal and concurrent authority, and one judge, who is not within the district at the time an order appointing a referee in bankruptcy is made by the other judge sitting in bankruptcy within the district, goes into the district in which the order was made for the sole purpose of setting aside said order, and makes an order setting same aside, said order so made is

without authority, and will be set aside as improvidently made and absolutely void.

In Bankruptcy. On motion to set aside improvident order removing a referee.

Sterling A. Wood, for petitioner.

HUNDLEY, District Judge. This is an application made to me by Nenian L. Steele, having been duly filed and presented on the 6th day of November, 1907, asking an order of this court setting aside an order made by Judge Thomas G. Jones on the 5th day of November, 1907, as having been improvidently made. The facts stated in the motion, and duly sworn to, are as follows:

"First. That on the 1st day of November, 1907, this court sitting in bankruptcy by its order entered upon its minutes, and a commission duly signed, appointed this petitioner a referee in bankruptcy for certain counties of the Southern Division of the Northern District of Alabama.

"Second. This petitioner duly qualified as such referee on the 4th day of November, 1907, by taking the oath of office and giving bond as provided by law, and entered upon the discharge of the duties of his office, and is now exercising the same.

"Third. That the petitioner at the time of his appointment and qualification was in all respects qualified and competent to discharge the duties of referee.

"Fourth. That at the time of petitioner's appointment by this court sitting in bankruptcy the district judge presiding thereat and making said order of appointment was the only and sole judge of this court then within or sitting in the Northern District of Alabama.

"Fifth. That at the time of the making of the order of appointment on November 1, 1907, the only other district judge of the United States at that time alleged to be entitled by appointment or designation to sit in the Northern District of Alabama was the Honorable Thomas G. Jones, who at the time of said appointment was not in the said Northern District of Alabama at all, but was at his home and residence in the city of Montgomery, in the Middle District of Alabama, in which district he is and was the sole and only resident judge, and was then sitting at Montgomery as the district judge of the Middle District of Alabama.

"Sixth. On the 5th day of November, 1907, the said Hon. Thomas G. Jones came from his place of residence in the city of Montgomery to the city of Birmingham, in the said Northern District of Alabama, and entered an alleged order removing the petitioner from his said office of referee. This order was made ex mero motu, without notice to, and in the absence of, this petitioner.

"Seventh. That, at the time the said alleged order of removal was made by said Hon. Thomas G. Jones, the judge of this court was then sitting and holding court for the said Northern District of Alabama, and did not sanction nor participate in, nor have knowledge of, the making of said order. That the said Hon. Thomas G. Jones came within the said Northern District of Alabama for the sole and only purpose of making said order, and, having made the same, returned to his home and residence in Montgomery, in the Middle District of Alabama, and that said visit of the said Hon. Thomas G. Jones was the only visit he has made to the said Northern District of Alabama since the appointment and qualification of the judge of this court."

I have given careful consideration to the lengthy opinion of the judge on making the order herein complained of, and which order not only seeks to revoke the order under which the petitioner was appointed and commissioned, but seeks to remove him from his office of referee. The conclusions reached in that opinion are based alone upon the contention that Judge Jones is still a judge in the Northern Dis-

trict of Alabama with equal authority and power as the judge of this court. An effort was made therein to judicially construe the act of Congress creating the judge of the Northern District of Alabama, and to determine whether or not the judge delivering the opinion is in fact a judge of the Northern District. In fine, the question is presented of a judge deciding the question of his own power to act or exist as a court. I have made diligent search of the text-books and decisions to find a precedent wherein a court could finally determine for itself whether or not it is a court. This identical question was well considered and decided in the case of Hill et al. v. Tarver, Recorder, 130 Ala. 595, 30 South. 499, in which the Supreme Court of Alabama in its unanimous opinion says:

"When the constitutional inquiry relates to the legality of the court which assumes to act—involving its power to act in any case—it is unnecessary to object preliminarily to its exercise of jurisdiction. In the very nature of things it could not determine the question of its own power to act or exist as a court."

See, also, High on Extraordinary Remedies, § 773.

I shall not attempt to review or decide that question, for two reasons: First, neither Judge Jones nor this court has the power to finally decide it; and, second, the question is not in reality involved in the case at issue. Conceding, therefore, for the purpose of this decision only, that there are two judges of the Northern District of Alabama, each with equal and concurrent authority, we have two questions and two only presented for determination in this proceeding: First. Can one of these district judges sitting in bankruptcy within the Northern District of Alabama, and while the other district judge is absent from the district, make a valid and binding appointment of a referee in bankruptcy without the concurrence of the other judge? Second. If the judge who is in the district makes such appointment while the other judge is absent from the district, can the absent judge come into the district, while the judge making the order is holding court therein, and set aside the appointment without notice to and without the concurrence of the other judge? The appointment of this petitioner was made under the authority afforded by sections 34 and 37 of the bankruptcy law. Act July 1, 1898, c. 541, 30 Stat. 555 [U. S. Comp. St. 1901, p. 3435]. That appointment was made without reference or regard to any other referees in bankruptcy, and was made because the business of the court demanded the appointment. The authority of the court of bankruptcy to appoint referees is confined in number only within the discretion of the court itself. This is clearly authorized by section 37 of the bankrupt law, which is as follows:

"Such number of referees shall be appointed as may be necessary to assist in expeditiously transacting the bankruptcy business pending in the various courts of bankruptcy."

Acting under this authority, some weeks since, I appointed W. C. McMillan, Esq., a referee in bankruptcy at Talladega, and had an order entered reappointing H. D. McCarty, Esq., a referee in bankruptcy at Anniston; the latter being a former appointee of Judge Jones. Although it has been some weeks since those appointments were

made, they have so far remained unchallenged. But the appointment of this petitioner is challenged by Judge Jones upon the grounds, as stated in his opinion, that the federal statute confides the appointment of referees to the courts, instead of to the judges, and concludes with the final declaration that "the power and authority are given to the court, and not to the judges." It is true that the authority is conferred by the bankruptcy law upon the "courts," and this necessarily brings us to the consideration of the question of what is the court.

The word "court" originally meant only a yard, palace, or garden, and according to Cowell it meant "the house where the king remained with his retinue; also the place where justice was administered." Anderson's Law Dictionary. So, in early history, the court meant the place where the king was domiciled, because the king was actually the fountain and dispenser of justice. The earlier courts were merely assemblages in the courtyard of the baron or of the king himself by those whose duty it was to appear at stated times or upon summons. This idea of the place predominating as the designation of a court caused Blackstone to adopt Coke's definition that "a court is a place where justice is judicially administered." 3 Blackstone's Commentaries, 24. Indeed, the Supreme Court of Alabama, in Ex parte Branch & Co., 63 Ala. 384, adopted the definition that a court is "a place where justice is administered." This definition has been held to be too narrow, and the definition given by a majority of judicial decisions is that:

"A court is a tribunal duly constituted, and present at the time and place fixed by law for judicial investigation and determination of controversies." 2 Century Dictionary, p. 1312; 8 A. & E. Encyc. of Law, p. 22.

A court is also held to be "an incorporeal being, which requires for its existence the presence of the judge." 8 A. & E. Encyc. of Law, p. 22; State v. Judges, 32 La. Ann. 1261; Lawyers Tax Cases, 8 Heisk. (Tenn.) 650; Mason v. Woerner, 18 Mo. 570; Hobart v. Hobart, 45 Iowa, 503; Matter of Terrill, 52 Kan. 29, 34 Pac. 457, 38 Am. St. Rep. 327. It has been further held that:

"The court is not the judge or judges as individuals, but only when at the proper time and place, they exercise judicial powers."

I fail to find a single case or authority wherein the judge is held to be the court, or a part of the court, while absent from the territory prescribed by law within which the court is required to be held. A statement of the law on this question is tersely made and discussed by the late Chief Justice Brickell in the case of Branch & Co., supra. The bankruptcy act itself defines, in section 1 thereof, what is meant by the word "court" in the following language:

"'Court' shall mean the court of bankruptcy, in which the proceedings are pending, and may include the referee."

At the time I appointed this petitioner, were the proceedings pending in Huntsville in the Northern District, or were they pending in the Middle District, where Judge Jones was in fact at that time sitting as the district judge of the Middle District of Alabama? Was

it intended by Congress that the court of bankruptcy should be a divided court, with one judge sitting in one district, and another judge sitting at the same time without the district? Does the court follow the judge, or does the judge follow the court? If the court follows the judge, and two judges are sitting at the same time in different districts, which judge does the court follow? By the terms of the act of Congress, the jurisdiction of courts of bankruptcy is confined to "their respective territorial limits." Chapter 2, § 2, Bankruptcy Law. The courts have held that:

"Both time and place are essential constituents of the organization of a court; that is to say, in order to constitute a court, the officer must be present at the time and place appointed by law." 8 A. & E. Encyc. of Law, 24.

As shown above, the act of Congress fixes the territorial limits, and the federal law fixes the place where courts are held in this district. The "time and place appointed by law," in the case at bar, was in the Northern District of Alabama, and the officer now claiming to have been a part of this court at that time was not, in fact, within the territory of this court when this appointment was made. As is well said by Brickell, C. J., in the case of Branch & Co., supra:

"One of the guaranties of Magna Charta is that the court—the power of exercising judicial functions—should not migrate with the king, but should hold its sittings at the place and time fixed and settled."

Surely it will not be seriously contended that the court of bankruptcy is a migratory court, in view of the act of Congress confining its territorial limits within the several districts in which the court is held. The learned judge admits by his action in this matter that the court of bankruptcy is not a migrating court, but is in fact a court prescribed by territorial limits, for he did not seek to set aside the order appointing this referee until he had left his residence and court in the Middle District, and had come within the confines of the Northern District, of Alabama. If he did not intend to admit by his action this undoubted natural conclusion, it was wholly unnecessary for him to make a special visit to the city of Birmingham in the Northern District for the sole purpose of removing this petitioner from his position of referee in bankruptcy, for he could with equal impunity, and I might say with as much authority, have made his order while holding court within the Middle District in the city of Montgomery.

Again, it is claimed that this court cannot properly make an appointment without the assent of the other judge, because it takes both to comprise the court. The language authorizing the appointment of referees is identical, in terms, with the language prescribing the rights, powers, and duties of the court. Then it follows, if the contention made be true, that the concurrence of both judges is absolutely essential to the validity of every order or decree made by the court, and, if one of the judges should be absent or sick, the wheels of justice would immediately stop. Surely no court would contemplate such a narrow and unreasonable construction of the statute. But the very opinion of the learned judge himself is sufficient authority to justify the conclusion that the order removing the petitioner was improvidently granted. If, as is stated therein—"where both judges are of

equal authority and dignity, and neither judge is an associate judge, one judge cannot, without the consent of the other judge, properly make an appointment to which his colleague objects"—then it is equally true that one judge cannot make a removal to which his colleague objects. Again, it is conceded that both judges have concurrent jurisdiction. This being the case, it has been held with practical unanimity that, "where a judgment or decree has been rendered by a court of competent jurisdiction, it can only be reviewed by such methods as are provided by law, and no other court of concurrent jurisdiction has any power to modify, annul, or set aside such judgment or decree." 11 Cyc. 991, and numerous authorities there cited. This well-known legal principle has been settled in no uncertain terms by numerous decisions of the federal and state courts. In the case of Young v. Montgomery & Eufaula R. Co., Fed. Cas. No. 18,166, which was a case decided by Justice Woods of the Circuit Court, sitting in the Middle District of Alabama, and in which case the question of the removal of a receiver appointed by a court of co-ordinate jurisdiction was passed upon, the court, in its opinion in that case, after citing numerous authorities, says:

"These authorities show that a question which is pending in one court of competent jurisdiction cannot be raised and agitated in another court; much less can one court assume to take possession of and administer property which is in the possession of another court and in course of administration by it. * * * No court or judge would be authorized to grant such a leave ex parte, and thus dispose of valuable rights and advantages of other parties, without at least giving them their day in court. * * * And no matter what showing the complainants may be able to make as to the incompetency, unfitness, or dishonesty of the receiver, this court cannot act. That showing must be made to the court which appointed him, and it must be asked to remove him. * * * This court does not sit to revise or review the proceedings of that court. Any motion, therefore, to appoint a receiver in this case, while the property to be administered is in the possession of a receiver appointed by another court, must be overruled, and this court can entertain no motion to remove or otherwise interfere with a receiver appointed by another court."

Reference is made by the learned judge in his opinion to my refusal to join him in making up a test case, for the purpose of having an adjudication as to whether or not he still remains a judge in this district. A sufficient answer to this proposition is that any such case made up by agreement between the judges would indeed be but a moot question, which any court before whom the matter was pending would promptly dismiss as such. This proposition is so well understood by bench and bar that citation of authority to sustain it is unnecessary. There is, however, a legal and orderly way in which all such questions may be raised for adjudication and settlement. That way is open to any litigant who should feel aggrieved at any decision or order made by the court or any judge thereof, but it cannot be raised or determined by the action of a judge ex mero motu, as in this matter. My jurisdiction and authority are subject to determination by an appellate tribunal alone, and it is not within my power to yield any part thereof to any other judge or court of co-ordinate jurisdiction. The petitioner is left without a remedy in this matter, save by virtue of the petition herein filed. The order of removal, made by the learned judge on November 5, 1907, was not made in the due course of any

legal proceeding before him, nor was anything brought before him by any person claiming to have been aggrieved. The case, if indeed it may be called a case, was one of his own making and without the knowledge of or notice to this petitioner, whose rights were at the time being passed upon. The whole proceeding was coram non judice and absolutely void, from which an appeal would not lie.

As is well known, upon my entering into the discharge of the duties of my office, I found every docket within this district greatly congested with undetermined cases. Except the one special visit of Judge Jones above alluded to, no other judge has been upon the bench in this district. As best I can, day and night, my time has been given unsparingly to the litigants before the court. At the time this motion was presented to me the court was in session in Huntsville, and there are now so many pressing cases on my desk needing attention that I can illy spare the short time I have given to this matter.

From the facts sworn to in the petition, and from the law as above stated, I deem it to be my duty to entertain this petition and to grant the relief prayed. An order will be here made, setting aside the said order of removal of November 5, 1907, as being improvidently granted and without warrant of law. The clerk will enter the order hereto attached.

UNITED STATES v. SMITH.

(Circuit Court, W. D. Washington, W. D. March 22, 1907.)

ARMY AND NAVY—OFFENSES BY CIVILIANS—PURCHASE OF MILITARY PROPERTY FROM SOLDIER—ELEMENTS OF OFFENSE.

To warrant a conviction under Rev. St. § 5438 [U. S. Comp. St. 1901, p. 3674], for knowingly purchasing or receiving in pledge from a soldier in the military service of the United States arms, clothing, or other public property, such soldier not having the lawful right to sell or pledge the same, it must be proven beyond a reasonable doubt that defendant actually purchased or received in pledge from a soldier the property described in the indictment with knowledge that the seller or pledgor was at the time a soldier in the service of the United States, and that the property was military property such as the government issues, but it is not necessary to prove that the soldier had no lawful right to sell or pledge such property because the same is expressly prohibited by Rev. St. §§ 1242, 3748 [U. S. Comp. St. 1901, pp. 876, 2527], and the jury may in a proper case give effect to the provisions of such sections making possession of such property by a civilian presumptive evidence that the same was sold, bartered, or pledged in violation of such prohibition.

Criminal Action. Indictment for buying and receiving in pledge government property from a soldier in violation of section 5438, Rev. St. [U. S. Comp. St. 1901, p. 3674]. Evidence offered by the government to prove admissions by the defendant in giving testimony before a court-martial on the trial of the soldier for selling or pawning the property was excluded. The defendant was convicted and sentenced to pay a fine of $1,200 and costs.

P. C. Sullivan, U. S. Atty., Walter Christian, Asst. U. S. Atty., and John J. Bradley, for the United States.

A. L. Miller and C. O. Bates, for defendant.

HANFORD, District Judge (charging the jury). Gentlemen of the jury, the defendant is on trial for a criminal act. He is charged with the commission of a criminal action by the indictment against him, and it is for you to decide the question as to whether he is guilty or not guilty. Having entered a plea of not guilty, the burden is placed upon the government to prove that he is guilty by evidence sufficient to convince you beyond a reasonable doubt. All acts which are prohibited by law are not criminal, and I am going to call your attention to the provisions of the statutes of the United States which affect the case, and try to point out to you, so you will understand clearly, the element of criminality in this case, which must, to justify conviction of the defendant, be found by the jury from the evidence.

The statutes of the United States provide:

"Sec. 3748. The clothes, arms, military outfits, and accouterments furnished by the United States to any soldier shall not be sold, bartered, exchanged, pledged, loaned, or given away; and no person not a soldier, or duly authorized officer of the United States, who has possession of any such clothes, arms, military outfits, or accouterments, so furnished, and which have been the subjects of any such sale, barter, exchange, pledge, loan, or gift, shall have any right, title, or interest therein; but the same may be seized and taken wherever found by any officer of the United States, civil or military, and shall thereupon be delivered to any quartermaster, or other officer authorized to receive the same. The possession of any such clothes, arms, military outfits, or accouterments by any person not a soldier or officer of the United States shall be presumptive evidence of such a sale, barter, exchange, pledge, loan, or gift."

Now, you will see that this is a prohibitive statute, it prohibits the sale, barter, exchange of, or dealing in military goods, but it is not a criminal statute. It does not make the dealing in such property criminal nor subject any person to punishment by law. A similar statute provides that:

"Sec. 1242. The clothing, arms, military outfits, and accouterments furnished by the United States to any soldier shall not be sold, bartered, exchanged, pledged, loaned, or given away; and the possession of any such property by any person not a soldier or officer of the United States shall be prima-facie evidence of such sale, barter, exchange, pledge, loan or gift. Such property may be seized and taken from any person, not a soldier or officer of the United States, by any officer, civil or military, of the United States, and shall, thereupon, be delivered to any quartermaster or other officer authorized to receive the same."

That is not a criminal statute. It simply prohibits the disposition of the military stores of the United States, except as they are issued to soldiers in the service of the United States. Comment has been made in argument upon the failure of the government to call certain witnesses to prove that a soldier has no right to sell his blanket. Such testimony would be entirely useless because it could not add anything to the declaration of the law. The law provides that a soldier shall not sell blankets and clothing and accouterments that are furnished him for use in service. Nothing could be added by testimony of a witness.

This indictment is founded upon a statute of the United States which I will read to you, and then show you the element that constitutes criminality:

"Sec. 5438, Rev. St. [U. S. Comp. St. 1901, p. 3674]. * * * Every person who knowingly purchases or receives in pledge for any obligation or indebtedness from any soldier, officer, sailor, or other person called into or employed in the military or naval service any arms, equipments, ammunition, clothes, military stores, or other public property, such soldier, sailor, officer, or other person not having the lawful right to pledge or sell the same, every person so offending in any of the matters set forth in this section shall be imprisoned at hard labor for not less than one nor more than five years, or fined not less than one thousand nor more than five thousand dollars."

You will observe that the provisions of this statute apply to persons who knowingly purchase or receive in pledge any of the kinds of property described here from a soldier, officer, or sailor in the service of the United States. The elements of the crime are guilty knowledge, and the actual purchase of and receiving in pledge the kind of property named and receiving it from a person in the military service of the United States. All those things are necessary to be proven in order to make it a criminal case. The guilty knowledge that is a necessary element of the crime is not knowledge that the act is unlawful. The law does not permit ignorance of the provisions of the law to avail as a defense in any case, but the knowledge must be knowledge of the facts, knowledge that the property offered for sale or pledge is the military stores or property of the United States—that is, arms, clothing, or property that is provided by the United States for use in the military service, and knowledge that the person offering to sell or to pledge it is a person in the military service at the time. It will be necessary, therefore, to warrant a verdict finding this defendant guilty of the crime charged in this indictment in either one of the counts, for the jury to find that the evidence convinces beyond a reasonable doubt that this defendant did knowingly purchase or receive in pledge the blanket specified in the indictment from a person who was then in the service of the United States as a soldier.

The other statutes that I have read to you contain a rule of evidence; that is, that the bare possession of such property of the United States by a person not in the service of the United States is prima facie evidence that it has been sold or pledged. Now, that is a rule which the jury have a right to consider as supplying evidence in the case. If the defendant did have this blanket in his possession, that possession was prima facie evidence that the same had been sold or pledged. It is not prima facie evidence of a guilty transaction, because it does not imply that it was taken by a purchaser or pledgee with guilty knowledge. You are instructed in this case that the presumption of law is that the defendant is innocent of the crime of which he is charged, and that presumption continues throughout the case, until shown by the United States government that he is guilty of the crime charged beyond a reasonable doubt.

The fact that the defendant himself did not go upon the witness stand and testify in this case must not be used against him in arriving at your verdict. There is no inference of guilt because he does not go upon the witness stand. That is so, gentlemen of the jury, because the Constitution of the United States does not permit any exertion of force or compulsion to make a person give evidence against himself in order to punish him for a criminal act. He has a right to be a wit-

ness on his own behalf, and he has a right under the Constitution and laws of the United States to refrain from being a witness, and, if he exercises his Constitutional rights in his own way, no one has a right to presume anything against him on account of doing what you and I and all of us may do—claim our rights. In this case you must find from the testimony beyond a reasonable doubt, before you can convict the defendant, that he knowingly received or bought, or received in pledge, the military blanket in question. The mere fact that he kept it one night would not be sufficient, unless you find from the testimony that he knowingly purchased or received in pledge a blanket belonging to the United States government from a soldier, your verdict must be for the defendant. If you cannot find from the testimony in the case that the blanket was sold or pledged by a soldier, and that the defendant received the blanket knowing it to be the property of the United States, then your verdict must be not guilty. The point of this instruction is that the knowledge of the defendant must be made to appear from the evidence. The right of a soldier to sell or pledge a blanket is not the fact to be proved, because the prohibition is declared by the law.

I have mentioned and reiterated in this charge to the jury that the evidence must be sufficient to convince you beyond a reasonable doubt that the defendant is guilty in order to justify a verdict finding him guilty, and I will say, further, that, even if there should be in your estimation a preponderance of the evidence against him, still, if it falls short of convincing you beyond a reasonable doubt that the defendant is guilty, you must render a verdict of not guilty. I want the jury to understand this rule. It is a reasonable rule, and not an unreasonable rule. The kind of a doubt that requires an acquittal after a candid consideration of the evidence is a reasonable doubt, not such a doubt as an unwilling mind would conjure up from the realms of possibility, and because of the possibility of a mistake would refuse to be convinced, but it is an actual doubt that you are conscious of, after having given the testimony a candid consideration, and such a doubt as in a matter of like importance in your own affairs would cause you to hesitate before acting—such a doubt as a reasonable person would give heed to, and would consider that his mind was unconvinced because of it.

Jury returned a verdict of guilty. Defendant filed a motion for new trial on account of insufficiency of evidence. May 20th motion argued and denied by the court. June 8th, court sentenced defendant to pay a fine of $1,200 and costs.

In pronouncing the sentence, the court said that this case was deserving of a severe penalty; that many persons are inclined to believe that the law is too severe and unnecessary. There are very good reasons for its being enforced, for there is nothing so demoralizing to the soldier and the service as this buying of clothing and uniforms by civilians.

In re KENYON et al.

(District Court, S. D. Ohio, Eastern Division. July 16, 1907.)

1. BANKRUPTCY—FINDINGS OF REFEREE—REVIEW.

A judge will not interfere with the findings of a referee in bankruptcy on questions of fact, unless convinced that they are manifestly against the weight of the evidence.

2. SAME—RIGHT TO RESCIND CONTRACT WITH BANKRUPT—ELECTION OF REMEDIES.

Claimant deposited money with a banking firm four days before it was adjudged a bankrupt on a voluntary petition, receiving a certificate of deposit therefor. With knowledge that the firm was insolvent when it received his deposit, he filed his claim against the estate in bankruptcy. Five months later he made a demand on the trustees for the return of his money, but thereafter filed a new claim, to which, as requested by the referee, he attached a copy of his certificate of deposit, at the same time filing a petition to recover the amount of his deposit from the trustees. *Held* that, on learning of the insolvency of the bank when it received his deposit, he was bound to elect promptly whether to rescind the contract for the alleged fraud or to affirm it, and that his filing his claim, subsequently ratified by the filing of the second claim, constituted an irrevocable election, by which he was precluded from also claiming a rescission.

In Bankruptcy. On review of decision of referee.

On October 14, 1904, J. P. Ansley deposited a check with D. C. Kenyon, the active member of the banking firm of D. C. & F. L. Kenyon, doing business as the Rushsylvania Bank, for which check he received a small sum in cash and the bank's certificate of deposit for the residue, which certificate Ansley expected to cash early in the week following. On the evening of the same day the members of the banking firm considered the bank's embarrassed financial condition, and on the evening of the following day, after consulting their attorney, decided to go into bankruptcy. On October 18th the firm was adjudicated bankrupt on a voluntary petition. On the day of Ansley's deposit, and before the bank's insolvency was determined, an entry of his transaction with the bank was made on its books, and the check was sent to a neighboring bank for clearance and paid. The deposit was made without any solicitation, promise, or representation on the part of Kenyon. On November 1, 1904, at the first creditors' meeting, Ansley filed proof of his claim, but did not attach thereto a copy of the certificate of deposit as an exhibit. The consideration named in his proof of the bank's indebtedness to him was "money deposited in their [Kenyons'] bank." On April 11, 1905, Ansley, as found by the referee, demanded of the trustees in bankruptcy a return of his deposit. On October 20, 1905, the referee notified him to attach his certificate of deposit to his proof of claim as an exhibit. Five days later he made a second proof of his claim, attaching thereto a copy of such certificate, which proof alleged that he deposited a check at the bank and received therefor the certificate of deposit and a small sum in cash, that the bankrupts are indebted to him in the sum named in the certificate, that they were insolvent as they well knew at the time of its issuance, and never acquired title to his money; and on the same day he filed his petition against the trustees to rescind his contract with the bank and recover the money represented by the certificate, alleging that the Kenyons, when they received his deposit, knew themselves to be insolvent, received his money with intent to cheat and defraud him, and that the title thereto never passed to them, and prayed an order directing the return of the money to him by the trustees. His claim was allowed by the referee on the same day. He has not at any time withdrawn either of his proofs of claim, nor has he at any time averred when he first learned of the bank's insolvency

and alleged fraudulent conduct, or that he did not know of the fraud charged when he proved his claim. Both proofs of his claim are still on file. On evidence adduced the referee found that D. C. Kenyon, and perhaps both Kenyons, must have known of the bank's insolvency at the time of Ansley's deposit; that Ansley learned on the day of the adjudication of the bank's insolvency of the facts on which he bases his charge of fraud, and that he did not elect to rescind in time, but proved up his claim; that he thereby made an election of remedy, on account of which he cannot maintain a separate independent suit to rescind and recover the money deposited, and that the evidence does not sufficiently establish intent on the part of the Kenyons to cheat and defraud Ansley. The case is here on a petition for review of the referee's decision.

John C. Hover, for J. P. Ansley.
A. Jay Miller, for trustees.

SATER, District Judge (after stating the facts as above). As a referee enjoys the opportunity of seeing and hearing the witnesses and has knowledge of the general administration of the estates which pass through his court, and is in frequent contact with the parties in interest, he is peculiarly qualified to judge of the credibility of witnesses and the weight of the evidence. A judge will not therefore interfere with his conclusions on questions of fact, unless convinced that they are manifestly against the weight of the evidence. Rider, In re (D. C.) 96 Fed. 811; Southern Pine Co. v. Trust Co., 141 Fed. 802; 73 C. C. A. 60; Loveland, Bankruptcy (3d Ed.) 408.

The record is indefinite as to when Ansley first learned that at the time of his deposit the bank was insolvent, but, taking it as a whole, the referee was justified in finding that he knew of it as early as October 18, 1904. Ansley was required, on the discovery of the fraud alleged, to elect promptly to rescind his contract with the bank and seek recovery of his money, or to affirm his transaction with the bank by making proof of his claim. The two remedies are not concurrent. He twice elected to affirm by twice proving and filing his claim. His demand on the trustees on April 11, 1905, for the return of his money, was made more than five months after his election of affirmance, and his filing a second proof of claim was a ratification of his first election. It is true that, when he made his second proof of claim, he also filed a petition to recover the amount of his deposit from the trustees; but he neglected to withdraw either of his proofs of claim, made no allegation as to the time of his discovery of the fraud charged against the bankrupts, retained at all times possession of the certificate of deposit, made no offer to surrender it, and requested, on the filing of his second proof of claim, that the referee, after having inspected the same, return the certificate to him. Having made proof of his claim and secured its allowance, he is, in the absence of inadvertence, fraud, or mistake, none of which are alleged, bound thereby, because, when a creditor makes proof of his claim against a bankrupt's estate, he stands in the position of a plaintiff at law, and becomes a party to the suit. Brandenberg, Bankruptcy, § 852; Prescott, In re, 5 Biss. 523, Fed. Cas. No. 11,389; Collier, Bankruptcy (6th Ed.) 437.

In Wiswall v. Campbell, 93 U. S. 347, 23 L. Ed. 923, Mr. Chief Justice Waite held:

"Every person submitting himself to the jurisdiction of the bankrupt court in the progress of a cause, for the purpose of having his rights in the estate determined, makes himself a party to the suit, and is bound by what is judicially determined in the legitimate course of the proceeding. A creditor who offers proof of his claim, and demands its allowance, subjects himself to the dominion of the court, and must abide the consequences."

Section 57 of the bankrupt act of July 1, 1898 (30 Stat. 560, c. 541 [U. S. Comp. St. 1901, p. 3443]), sustains the view that a creditor in making proof of his claim becomes a party to the suit. Lowell, Bankruptcy, § 216, states that:

"Though proof is not payment, it is an election to submit the debt proved to the jurisdiction of the court of bankruptcy. * * * When the law permitted a creditor to pursue his action at law, notwithstanding the bankruptcy as an alternative remedy, the court would restrain a creditor who had proved a debt from the prosecution of an action upon it."

In Standard Varnish Works v. Haydock, 143 Fed. 318, 74 C. C. A. 456, decided by the Sixth Circuit Court of Appeals, it appears that the creditor proved its claim, participated in the proceedings at a creditors' meeting, voted for the election of a trustee, and subsequently, on leave, withdrew its claim and filed an intervening petition setting forth that the goods on account of which it had filed and proved its claim as a creditor against the bankrupt had been purchased by the bankrupt upon false representations as to its financial condition, upon which the creditor relied in making the sale and which representations were known to the bankrupt to be false at the time of the sale. It also appears that the bankrupt at the time of the sale had no intention or reasonable expectation of paying for the goods, and prayed that the trustee be ordered to return such portion of the goods as still remained in his possession and that a claim for the balance be allowed against the estate. In that case it was held (page 319 of 143 Fed., page 457 of 74 C. C. A.):

"As the referee properly said in his opinion, it was open to the petitioner, the purchase having been procured by fraud, to elect whether to confirm the sale notwithstanding, and maintain the position of a creditor for the price, or to repudiate the sale and recover the goods. But the vendor must make his election promptly on discovery of the fraud. This is the settled law. Upon this principle Judge Ray held, in Hildebrant, In re (D. C.) 120 Fed. 992, that a vendor could not affirm the contract of sale as to part of the goods, and claim the price and disaffirm as to another part, and recover the goods in specie. And see Seavey v. Potter, 121 Mass. 297; and, having made his election in such circumstances, the vendor makes it once for all. Kennedy v. Thorp, 51 N. Y. 174; Moller v. Tuska, 87 N. Y. 166; Heller v. Elliott, 44 N. J. Law, 467; Carter v. Smith, 23 Wis. 497. The petition did not state when the petitioner became aware of the falsity of the bankrupt's representations of its solvency and of its fraudulent purpose, or whether it was before or after the petitioner proved its claim and participated in the proceedings as a creditor. And if, as it has in some cases been held, the burden of proof that the election was made with knowledge of the facts is upon the party who urges the estoppel, it would be difficult to resist the conviction that the circumstances attending the assignment and the adjudication of bankruptcy were sufficient to have shown the petitioner that the bankrupt in procuring the goods

had made false representations in regard to its solvency. Not only did the petition make no claim that the petitioner was ignorant, at the time of proving its claim, of the facts in regard to the representations of the bankrupt and of its intention in making the purchase, but the facts stated by the referee are sufficient prima facie to support the conclusion that the petitioner had knowledge of the essential facts when it voted for the trustee. In these circumstances, the election of the petitioner to prove its claim as a general creditor was final. There is good ground for saying that it was too late for the exercise of an election after the petitioner had joined the general creditors in shaping and carrying forward the bankruptcy proceedings, and influencing their associates in their action. The suggestion that the proceedings probably would have been the same without the petitioner's co-operation cannot avail. The assumption of the position of a general creditor toward the assets would naturally be a strong inducement to the other creditors in pursuing the bankruptcy proceedings, for this would imply a sharing of the assets, and this result would be defeated if their associates were permitted to turn about and reclaim the assets in specie."

Reflecting on the question at issue are Baxter, In re (D. C.) 12 Fed. 72; Loveland, Bankruptcy, 405.

In Ormsby v. Dearborn, 116 Mass. 386, it was held that a creditor who proved his claim against an estate in bankruptcy for goods sold and delivered to the bankrupt could not maintain an action in replevin for the same goods by proof that he did not sell the goods to the bankrupt, because his election of remedy by proof of his claim was inconsistent with the suit in replevin. The two cannot stand together. If they could, the creditor might receive the whole or a part of the price of the goods in the bankruptcy proceeding, and by his suit in replevin regain and hold the goods themselves.

Under section 21 of the bankrupt law of 1867 (14 Stat. 526, c. 176) "proof of a debt is considered an election not to proceed against a bankrupt by action. Such proof operates as a statutable discontinuance of actions and suits in respect of the same claim and demand, and is a waiver of all other legal and equitable remedies in respect of the debt proved. In the English courts an application may be made for an injunction to restrain the action by a creditor who has proved, or to expunge the proof. Diack, Ex parte, 2 Mont. & Ayr. 675; Bernasconi, Ex parte, 2 Glyn. & Jam. 381." James, Bankruptcy, 97; Haxtun v. Corse, 4 Edw. Ch. (N. Y.) 585.

Under the same law in Parmlee v. Adolph, 28 Ohio St. 10, it was held that if a creditor, after he discovered the false and fraudulent character of representations made to him to induce a contract, proved up his claim in a court of bankruptcy, he would after that be precluded from a rescission of the contract, because such appropriation of the claim as his own after the discovery of the fraud would bar his right to such rescission. He would be acting with knowledge of his legal rights. In Everett v. Derby, 5 Law Rep. 227, decided under section 5 of the bankrupt law of 1841 (5 Stat. 444, c. 9), it was held:

"The proof of the debt is an election to proceed in bankruptcy, and is a conclusive bar to any further proceedings, in a suit at law or in equity for the recovery of the same debt." Bump, Bankruptcy (11th Ed.) 629.

If it be urged that the provisions of the bankrupt acts of 1841 and 1867 are more specific in defining the remedies of creditors than the

act of 1898, the answer is that those acts and the decisions under them recognize and enforce the principle that a creditor cannot at the same time in the same suit or in different suits pursue different remedies for relief on the same claim, and that he cannot at the same time affirm and disaffirm a contract induced by fraud. He must offer to rescind promptly. Parmlee v. Adolph, supra.

In Scott v. Walton, 32 Or. 464, 52 Pac. 180, it was said:

"A party who has been induced to enter into a contract by fraud has, upon its discovery, an election of remedies. He must either affirm the contract and sue for damages, or disaffirm it and be reinstated in the position in which he was before it was consummated. These remedies, however, are not concurrent, but wholly inconsistent. The adoption of one is the exclusion of the other. If he desires to rescind, he must act promptly, and return or offer to return what he has received under the contract. He cannot retain the fruits of the contract awaiting future developments to determine whether it will be more profitable for him to affirm or disaffirm it. Any delay on his part, and especially his remaining in the possession of the property received by him **under the contract, and dealing with it as his own, will be evidence of his intention** to abide by the contract."

The fact that the referee notified Ansley to complete the proof of his claim by attaching the certificate of deposit as an exhibit did not nullify Ansley's original election of remedy. He ratified that election by filing a second proof. In the absence of an objection to his failure to attach the certificate of deposit as an exhibit to his original proof of claim, it would not have been error had the referee waived the attaching of the exhibit and allowed the claim. Carter, In re (D. C.) 138 Fed. 846; Loveland, Bankruptcy, 395. The views above expressed render unnecessary a discussion of St. Louis & S. F. Ry. v. Johnston, 133 U. S. 566, 10 Sup. Ct. 390, 33 L. Ed. 683, and other cases, cited to the point that D. C. Kenyon's knowledge of the bank's insolvency entitled Ansley to a rescission and recovery of his money.

For the foregoing reasons, the decision of the referee is affirmed.

SHEPHERD v. DEITSCH.

(Circuit Court, S. D. New York. August 20, 1907.)

See 138 Fed. 83.

Joseph L. Levy, for the motion.
Hans v. Briesen, opposed.

LACOMBE, Circuit Judge. Inasmuch as the judgment debtor has paid the judgment and all costs of supplementary proceedings imposed on him, there is no reason why the injunction against his disposing of his property should not be vacated. Indeed, this is conceded. Examination of the record heretofore convinced the court that the debtors of the judgment debtor were themselves the cause of the undue prolongation of the proceedings, and the expenses to which the judgment creditor was put should be paid by them personally, not by the judgment debtor. How the judgment creditor shall proceed to enforce such payment is not clear, and the court makes no suggestion; but certainly that amount should not be taken out of the sum they owe to the judgment debtor. To do so would be to impose the cost on the latter, who has already paid all that the court held he should be required to.

The injunctions against the third parties are vacated, so that they may no longer use them as an excuse for not paying to the judgment debtor the amounts they respectively owe him.

THE JOHN K. GILKINSON.

(District Court, S. D. New York. October 7, 1907.)

1. SHIPPING—PROCEEDING FOR LIMITATION OF LIABILITY—JURISDICTION.

A tug, which, in the pursuit of her business, was frequently within the Southern district of New York, and was there in a regular way at the time of the filing of a petition for limitation of liability by her owner, was within the district for the purpose of giving the court jurisdiction, under admiralty rule 57, although the domicile of the owner was elsewhere.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, §§ 648, 649.

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

2. SAME.

Where a District Court has obtained jurisdiction of a proceeding for limitation of liability on a claim for which the owner has been sued, the claimant cannot defeat such jurisdiction after the vessel has been appraised by reducing his claim below the appraisal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, § 648.]

3. TOWAGE—INJURY OF SCOWMAN ON TOW—LIABILITY OF TUG.

The injury of a scowman, in charge of a scow being towed behind another to the dumping grounds, whose leg was caught and cut off by a line while he was attempting to lengthen the towing hawser, *held* on the evidence to have been due to his own negligence, and not to any fault of the tug.

In Admiralty.

See 150 Fed. 454.

Clifford C. Roberts and Peter Alexander, for petitioner.
Wray & Callaghan, for claimant.

ADAMS, District Judge. This action was instituted by the filing of a petition by the Hudson Towboat Company, as owner of the tug John K. Gilkinson, for limitation of liability. The limitation was opposed by Bernard Laughlin, a scowman on the scow H. C. No. 3, who had one of his legs cut off on the 17th of May, 1906, by a line en-

tangling it while the tow was proceeding from New York to sea for the purpose of dumping the said scow and another one, the Neptune. The latter was the leading scow. She was attached to the tug by a hawser of about 100 feet long when the tow started and the No. 3 was fastened closely to her stern, there not having been more than 3 or 4 feet between them. After passing the Battery, the towing hawser was lengthened to nearly its full length of about 700 feet. There was a short hawser on board of No. 3, to be used between the scows when it should become necessary to part them on reaching rough water.

This matter was before the court early in the year on exceptions to the jurisdiction urged by the claimant. The John K. Gilkinson (D. C.) 150 Fed. 454. These exceptions are renewed here upon the allegation that the facts proved differ from those alleged in the petition.

It is now claimed with respect to the first exception that the tug was not legally within this district but only temporarily here for the purpose of having the court entertain the matter. There are some expressions in the testimony of the petitioner's general manager which, if read alone, would form some basis for the contention, but taking the statements altogether, I do not consider that they should be construed to have the claimed effect. There can be no doubt that the vessel was actually within the district when the libel was filed and that although she belonged, according to the domicil of her owner, in New Jersey, yet she was frequently in the district in the pursuit of her business of towing. At the time in question she came to New York in a regular way and was simply detained a short time for the purpose of the filing of the libel while she was actually here. In the absence of clear evidence of an attempt to invoke the jurisdiction of the court by improper means, it seems that this was the correct forum to determine the question involved. There is no substantial difference between the present attitude of the case and the one alleged in the petition, which was the subject of consideration when the exception was first urged.

Regarding the second exception, the claim is that as the claimant demands only $9,000. damages and the value of the vessel has been fixed at $10,000., the petition should be dismissed. The original claim was $25,000. and it was only reduced when it was found that the vessel was valued at $10,000. The court had already acquired jurisdiction and it could not be defeated by a subsequent change in the attitude of the claimant. This feature was also discussed when the exceptions were first heard. The John K. Gilkinson, supra.

On the merits of the case, it appears that the accident occurred about 10 o'clock P. M. The tide was ebb and the Gilkinson was utilizing it to take her tow to sea. The night was calm. When about half way to the dumping grounds, which were about 30 miles from New York, the scowman endeavored to lengthen the distance between the scows. No. 3 was then being towed by two short lines running from the Neptune to No. 3's forward bitts. The tow was already arranged by the scowmen for the sea towing, where it was expected that rough water might be encountered. This was done by a hawser and bridle about 60 fathoms in length, called an intermediate hawser, leading from the stern of the Neptune to posts on the forward end of No. 3. This

hawser was not in use, except so far as the scowman of No. 3 improperly used a part of it on the starboard side, leaving the remainder coiled up on his bow, as a side line instead of taking his own side line for that purpose. The effect of this was to lead the line across the forward end of his scow and when he attempted to throw it off, the accident happened.

A tow of this kind is under the charge of the tug which instructs the scows by whistle signals. The claimant's contention is that on the way down the water became rough and the scowman, after endeavoring for some time to obtain instructions from the tug finally received a signal and then removed the side lines with a view of using the hawser and in doing so the leg of the scowman on No. 3 became entangled with that portion of the hawser which was lying on his deck and very quickly the tautening of the hawser cut his leg off above the ankle.

The claimant contends that it was necessary to use the hawser on account of the rough water and that having received a signal it was the duty of the scowmen to proceed as they did, but the operation to be successful required the cooperation of the tug by stopping or lessening her speed, which she failed to do.

The tug claims that the weather was so calm that there was no necessity whatever for resorting to the intermediate hawser and no instructions or signals were given by her to that effect and therefore she did not stop or lessen her speed but kept on at the rate of about 5 miles, intending to resort to that hawser when she reached a point outside should it become necessary.

The tug's contention seems to be correct. When the accident happened the tow was still within the protected waters of the Bay and the great preponderance of the evidence, including the records of the United States Weather Observer, fully establishes that there was no condition of the atmosphere which would tend to create such a disturbance of the waters as to require the lengthening of the hawser. When the tow started there was practically no wind; between 7 and 8 P. M. it was 4 miles an hour; between 8 and 9 P. M. 3 miles; between 9 and 10 P. M. 6 miles; between 10 and 11 P. M. 13 miles, and between 11 P. M. and midnight 23 miles. All this was from the northwest, which would be practically in the same direction that the tide was running in the Bay.

There was no necessity for slowing or stopping and that fact justified the tug in proceeding and tends to confirm the testimony on her part that there was no reason for a reduction of speed or cessation of headway and that, therefore, she gave no signals and received none.

It seems that the accident was due to the claimant's own fault. He was not justified in lengthening the hawser but assuming that he was, there is no such adequate explanation of the accident as would impose any liability on the tug. The scowman knew, or should have known the effect of starting to tow with the hawser, in drawing it off his scow's deck, and should have kept out of its way, which he could easily have done.

The petition is sustained and the claim dismissed.

FARRELL et al. v. PORT JOHNSTON TOWING CO.

(District Court, S. D. New York. October 3, 1907.)

1. TOWAGE—SINKING OF TOW—NEGLIGENT TOWING.
Evidence considered, and *held* to sustain the contention of a libellant that an injury to the bottom of a barge while she was in tow alongside of a tug was caused by her being towed on rocks outside of the channel in the Kills, and that the owner of the tug was liable therefor.

2. SAME—NONPERFORMANCE OF TOWING CONTRACT—DEFECTIVE APPLIANCE.
A towing company, which undertook to deliver in port a barge which had filled and had been beached, using two tugs for the purpose, but which in fact furnished but one tug, whose pumping apparatus was so defective that it broke and the barge again filled and sank before reaching the wharf to which it was being taken, *held* liable for the consequent damage.

In Admiralty. Suit for injury of tow.

Alexander & Ash, for libellants.
Carpenter, Park & Symmers, for respondent.

ADAMS, District Judge. This action was brought by William Farrell and others, the owners of the barge Atlas and a cargo of some 353 tons of coal laden on board, and Jacob Arends, the master of the said boat, to recover from the Port Johnston Towing Company the damages, said to amount to $1,600, caused by the sinking of the Atlas on the 23rd of October, 1905, while in tow on the starboard side of the respondent's tug Wilkesbarre. The tow was bound from Port Johnston, New Jersey, to the foot of Barrow Street, North River, New York, and in coming through the Kills commenced to leak and subsequently sank off St. George, Staten Island. The Wilkesbarre also had in tow, on her port side, the Lehigh and Wilkesbarre barge No. 30 laden with coal.

The account of the matter given by the libellant substantially is, that the tow came up through the Kills on the New Jersey side of midchannel until it reached a point between West Brighton and St. George, when it crossed over to the Staten Island side in order to get the benefit of the slack water there; that in proceeding it navigated too close to Staten Island, causing the Atlas to strike a reef of rocks which gouged and penetrated the planks in her bottom but did not cause her to sink immediately, though it broke the towing line. The master was at the time in the cabin and felt the rocks grinding the bottom; that he ran out on deck, assisted in making another line fast, then sounded his pump and found the boat had already made 3 or 4 feet of water and was rapidly filling; that he immediately informed the master of the tug who, to save the vessel from sinking in deep water, put her on the beach, as stated, off St. George, where she was nearly covered by water with the rising of the tide.

The version of the matter given by the respondent is that the Atlas was not towed out of the channel nor brought in contact with the ground till she was necessarily beached near St. George; that the towing line parted about a mile from the starting place and another was put out in its place and the tow proceeded in the middle of the Kills until near St. George when the master of the tug noticed the Atlas was low

in the water and called the attention of her master to the fact; that the boat was then sounded and found to be in a dangerous condition from the amount of water she had taken in and was beached, with the assent of her master, off St. George.

The testimony is so conflicting that it is extremely difficult to determine what the facts in the case were. The master of the Atlas was apparently a straightforward witness but is subject to the criticism that he was interested in the recovery. On the other hand, no witness appeared for the tug but the master and the others on board, particularly the deck hand on duty, were not very well accounted for. There was one apparently disinterested witness called by the respondent, that was the master of No. 30, the boat on the other side of the tug, but his testimony, assuming it to have been truthful, does not throw very much light upon the matter. It appears, however, without substantial contradiction, that the Atlas was in good seaworthy condition when the towing commenced and that after the accident her bottom was severely injured and in such way as to indicate that she received the damage while towing in the Kills. The respondent alleged in its answer that the Atlas was unduly loaded and suggests an unknown obstruction but neither contention is supported by the testimony; in fact it is stated therein that the cause of the sinking was swells from a large passing steamer, but that is not credible. The barge having started from Port Johnston in a seaworthy condition and no adequate explanation having been given by the respondent of the damage to the barge's bottom and the master's explanation sufficiently accounting for the injury, I think the libellants' contention that she was towed on rocks outside of the channel in the Kills must prevail. It is urged by the respondent that the damage could have been received when she was beached off St. George, but it does not sufficiently appear that the bottom there was in a condition to produce the damage. Reference is made to the chart where the outside of the channel in the vicinity of the place where she was beached is marked "hrd" but that may mean hard sand. The testimony of libellants' witness Peterson, who had had considerable experience in the Kills, was that at the place of the beaching "it is a nice soft bottom; vessels and boats lay there every day in the week with thousands of tons on them." Upon the whole I conclude that the libellants have maintained the burden of proof.

Another question in the case was with reference to what took place after the beaching. The libellants urge that the respondent undertook to deliver the boat at Barrow Street with the tugs Coleraine and Hoffman but actually sent only the former and her pumping apparatus broke down before the destination was reached, with the consequence that she was not able to keep the Atlas free from water and she sunk just outside of the place she was bound to. The testimony sustains this contention. The Coleraine was using her syphon in the operation and it appears that it was defective by reason of having a hose connection which was unsound. It is claimed that this was a latent defect but such is not established. In the answer it is alleged that the towage to New York and pumping en route were to be done by two tugs, the Coleraine and Hoffman, but in fact no attempt was made to send the latter. If the Hoffman had been used as well

as the Coleraine, it is probable that the sinking would not have occurred. But if it be assumed that the Coleraine alone was ordinarily sufficient to deliver the boat at Barrow Street, in undertaking this venture, which required constant pumping, it should have been seen to that her apparatus for that purpose was in good order. It turned out that it was not in a condition to do this work throughout the venture, owing to the rubber hose bursting near the syphon. With the exercise of ordinary care such a result could have been anticipated because it had a visible "bad spot" at the place, which was known to those managing the tug. I find that the defect was not latent but should have been known to exist. It was sufficiently obvious to require more than ordinary care on the part of the respondent in using her for this purpose.

Decree for the libellants, with an order of reference.

In re LUTFY.

(District Court, S. D. New York. November 12, 1907.)

No. 10,028.

1. BANKRUPTCY—INTERFERENCE WITH PROPERTY OF BANKRUPT—EFFECT OF PAYMENT OF PETITIONING CREDITOR.

The effect of the pendency of involuntary bankruptcy proceedings is not altered by the fact that the claim of the petitioning creditor was paid after the filing of the petition, since until it had been legally dismissed any other creditor may become a party thereto, and any person interfering with the property of the bankrupt after the filing of the petition does so at his peril.

2. SAME—CONTEMPT OF COURT.

While property of a debtor was in the hands of a sheriff under an attachment, a petition in involuntary bankruptcy was filed against him with an application for a receiver. Because of such fact the attorney for the attaching creditor refused to give a bond, and the sheriff, although advised of the bankruptcy proceedings, at the instance of the attorney for an adverse claimant and on being informed by him that the claim of the petitioning creditor had been paid, delivered the property to such adverse claimant, who disposed of the same. *Held* that, while the action of the sheriff was not legally justified, he would be exonerated from the charge of contempt of the bankruptcy court upon his claim that he supposed the bankruptcy proceedings had terminated, but that the adverse claimant and his attorney were clearly guilty of contempt, and would be subjected to a heavy fine unless a bond was given to respond for the value of the property should it be adjudged to belong to the bankrupt.

In Bankruptcy. On motion to punish for contempt.

Arthur L. Livermore, for the motion.

Maurice B. Blumenthal and Maurice M. Greenstein, opposed.

HOLT, District Judge. This is a motion to punish for contempt Alfred J. Johnson, undersheriff of the county of New York, Winfield Sullivan, assistant deputy sheriff of the county of New York, Joseph Macksoud and Maurice M. Greenstein. Deeb Lutfy, the bankrupt, was engaged in the business of manufacturing and selling oriental goods. On August 10, 1907, a warrant of attachment in an action against him was issued to the sheriff of New York county, who there-

upon levied upon and took possession of seven cases of oriental goods, and stored them in a warehouse. On August 14, 1907, a second writ of attachment was issued to the sheriff, with directions to also levy on said seven cases then in his possession. On August 12, 1907, a firm known as Lutfy & Macksoud filed a formal claim of ownership of the goods. The question of ownership was tried before a sheriff's jury, apparently on the same day, and a verdict found, in accordance with the usual practice, in favor of the claimants. The sheriff thereupon demanded that the attaching creditors give a bond. On the 13th a petition in bankruptcy was filed and an application for a receiver made. No judge of this court was at that time in New York City. The papers were sent to me in the country. A receiver was appointed. I notified the attorney for the petitioning creditor on the 14th, by telephone, that I had appointed a receiver. The order was returned by mail, and received by the clerk on the morning of August 15th. On or before that morning, the creditor in the first attachment, having apparently been paid or settled with, directed the sheriff to release the levy of the first attachment. The claim of the petitioning creditor in the bankruptcy proceeding had been paid or settled, and the attorney for the petitioning creditor notified the sheriff that he had no longer any interest in the matter. The sheriff notified the attorney for the creditor in the second attachment that, if a bond was not given, he would release the goods to the claimants. The attorney for the creditor in the second attachment informed the sheriff that a petition in bankruptcy had been filed; that he had been informed by the attorney for the petitioning creditor that a receiver had been appointed; that the order which had been prepared appointing a receiver contained an injunction which specifically enjoined the sheriff from delivering the seven cases of goods attached to any one except the receiver. The attorney for the creditor in the second attachment explicitly warned the sheriff against proceeding, and gave him full notice that the petition in bankruptcy was on file, that a receiver had been appointed, and an injunction issued. The sheriff, however, after such notice, on the morning of the 15th, delivered an order for the goods to the attorney for the claimants. The goods were removed. On the argument of this motion, the attorney for the claimants stated that they were still in the warehouse, and would be returned. He subsequently asserted that he was mistaken, and that the goods have been removed from the country.

The attorney for the undersheriff and the deputy sheriff asserts that they inferred, when the attorney for the petitioning creditor informed them that his claim was satisfied, that the bankruptcy proceedings were at an end; but they had no right to make any such assumption. A petition in bankruptcy is not disposed of by paying the petitioning creditor's claim. It may be availed of by any creditor, and sheriffs are bound to know the law in that respect. But, upon the whole, although the conduct of the undersheriffs in this case is subject to serious criticism, the proof of contempt in this case is not so clear that I should feel justified in finding them guilty of it. They had sufficient notice and reason to believe that the petition was filed, and that a receiver had been or would be immediately appointed. All that the sheriff had

to do was to wait a few hours until he could have official proof of the receiver's appointment. Indeed, the filing of the petition was enough. The fact that the petitioning creditor was settled with was legally immaterial. Until the petition was legally dismissed, any creditor could come in and take advantage of it. Its filing was an injunction and caveat to the world. Any person interfering thereafter with the bankrupt's property did so at his peril. It is time that the sheriffs in this city understood the law on this subject; and while, in this case, I have concluded to assume that they may not have understood the law, it should be understood that no such explanation will be accepted hereafter.

In my opinion Macksoud and his attorney, Greenstein, were clearly guilty of contempt in this case. It was a case of deliberate and intentional withdrawal of goods, claimed to be a bankrupt's goods, after knowledge of the filing of a petition and of the probable appointment of a receiver. If Macksoud owned the goods, that could be easily determined in this court. The object was to make it useless to have that question determined, and to remove the goods where they could not be recovered. Macksoud and Greenstein are each fined $100, to be paid within three days to the attorneys for the receiver, to compensate them for their labor in making this motion, and, if not so paid, each will stand committed until his fine is paid. If a satisfactory surety company bond for $10,000 is given, conditioned for the payment to the receiver of the value of the goods, if it is determined that they belong to the bankrupt, and a stipulation filed that the matter be referred to a referee to take testimony and report, as in a reclamation proceeding, whether Macksoud is the owner of the goods, and, if not, how much is their value, no further punishment will be imposed. If such a bond is not given within three days, Macksoud and Greenstein will be fined the sum of $5,000, to be paid to the receiver, and stand committed until the fine is paid. The order should be settled on notice.

In re HARRIS.

(District Court, S. D. Alabama, N. D. November 8, 1907.)

BANKRUPTCY—RECEIVER—SALE OF PROPERTY.

While a receiver in bankruptcy, appointed under Bankr. Act July 1, 1898, c. 541, § 2 (3), 30 Stat. 545 [U. S. Comp. St. 1901, p. 3421], may be authorized by the court to sell property when necessary for the preservation of the estate, the power to direct such a sale should be exercised only upon such showing as will satisfy the court that the immediate sale is necessary to preserve the value of the property to the estate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 167.]

In Bankruptcy. On application to vacate order of sale.

See 155 Fed. 216.

Brown and Murphy, for petitioning creditors.

Z. T. Rudolph, for bankrupt.

Sterling A. Wood, for receiver.

Powell & Blackburn, for second petitioning creditors.

HUNDLEY, District Judge (orally). On a former date in this court, on an ex parte affidavit of the bankrupt, he being represented

by counsel, and admitting bankruptcy, application was made to me to grant an order permitting the receiver to sell certain property of the bankrupt on giving nine days' notice to the creditors. A formal order was made, under and by virtue of rule 18, general orders in bankruptcy, in reference to the sale of the property. It was averred in the petition that certain property belonging to the bankrupt was liable to be consumed in the costs and expense of keeping it, and it was noted that house rent was liable to be charged for another month against the estate of the bankrupt. On day before yesterday this motion was made to set aside the order granting the receiver authority to make this sale. The attention of the court is called to the fact, in this motion, that this property which the receiver was authorized to sell was not in its nature perishable, and that no good cause could be served the estate of the bankrupt by ordering a sale on such short notice, and, further, that the creditors of the bankrupt had not received any notice that an application was to be made to make the sale.

Now, in the first place, if it was such a case in which the receiver, as distinguished from trustee, could be ordered to make a sale, no notice was absolutely necessary to the creditors; but the very first proposition I meet in the consideration of this case is whether or not the court did have the jurisdiction to order the sale under the facts stated in the petition asking for the sale; or, in other words, did the court have jurisdiction, under the equity powers of the court, to grant this sale deeming it to be to the best interests of the estate that the sale should be made in this summary way, rather than in the due course of bankruptcy proceedings. In a similar case to this (In re Garner [D. C.] 153 Fed. 914), which came before me in the Northern Division of this court at Huntsville, a case to which I gave careful and thorough consideration, there was presented the question as to the right or authority of the receiver to make a sale of perishable property. In that case I held that the authority of the receiver to proceed therein was a proceeding in bankruptcy, rather than an action at law, and that it was the duty of the receiver to preserve the property until the trustee is appointed under the terms of Bankr. Act July 1, 1898, c. 541, § 2 (3) 30 Stat. 545 [U. S. Comp. St. 1901, p. 3421], and therefore it was necessary to preserve the property from decay or from perishing, and that the receiver, under instructions from the court, would have the right to make a sale with or without notice. But I further stated in that case that this was confined only to such cases in which it was clear to the court that the property was, in fact, perishable in part or in its entirety, or would greatly deteriorate if held without a sale, and only that portion which was of such nature could be ordered sold. Now, under these circumstances the receiver is not a general receiver, as designated by the courts in chancery under the common law, but he is a statutory receiver, clothed with the limited powers of the statute under which his receivership was created, and he cannot by the very terms of the statute go beyond the respective powers conferred upon him by the statute itself. The authorities presented to me on behalf of the opponents of the motion now before the bar deal with the question as to the preservation of the estate. Decisions of the Supreme Court of Alabama are

cited to me in reference to the appointment of receivers and wherein the courts order a sale of perishable property, and, while those cases are to a certain extent similar to the case at bar, yet, indeed, in those very cases the Supreme Court of Alabama has held that unless the property is perishable, or unless it is clearly shown that the estate will be depreciated or depleted by the costs and charges of keeping it together or otherwise, the courts have been very slow to grant an order for a summary sale. This, however, is a matter within the sound discretion of the court, to be exercised only upon such showing as will satisfy the court that the immediate sale is necessary to preserve its value. In re Kelly Dry Goods Company (D. C.) 102 Fed. 747; McCreery v. Berney Nat. Bank, 116 Ala. 224, 22 South. 577, 67 Am. St. Rep. 105.

Viewing the facts as they appear in this case, and taking into consideration the invoices and inventories which are very full, the court is bound to know that a great deal of this property is not perishable, and the court would not be authorized to order a sale of the whole property on the petition as here presented, even if the petition showed that some of the property was perishable. The facts set out in this petition are simply that the costs will be accumulated if such a sale is not made, but it is not sufficiently shown either that the estate will be actually jeopardized or that the assets will greatly deteriorate in value. I am therefore of the opinion that the petition fails to set forth and show sufficiently to the court that this property is in part or its entirety perishable by nature or that it will greatly deteriorate by being handled in the due course under the regular bankruptcy proceedings. I shall therefore set aside the order heretofore made, and an order will be made that this case proceed under the proper and usual proceedings of the bankruptcy court. So ordered.

WEISS v. HAIGHT & FREESE CO.

(Circuit Court, D. Massachusetts. November 9, 1907.)

No. 179.

CORPORATIONS—PROCEEDINGS IN INSOLVENCY—CLAIMS OF CUSTOMERS OF BUCKET SHOP.

In the settlement of the estate of an insolvent corporation engaged in conducting a bucket shop, receiving money from customers which it purported to invest in stock deals, but did not, in fact, so invest, a customer may prove his claim for the amount paid to the company, regardless of the purported transaction as on a rescission, or at his option, where the transaction as reported to him by the company showed a profit, and no collusion is shown, for the amount thus shown to be due him and which he could have recovered in an action at law.

In Equity.

See 148 Fed. 399.

Wm. D. Turner, for receiver.

Franklin Bien, for Haight & Freese Company.

John A. Boardman, Alexander Hillary, and Charles F. Hall, for Edward Collins.

Charles Stetson and George Hoague, for certain creditors.

LOWELL, Circuit Judge. The court has found, and now finds, that the respondent, the Haight & Freese Company, was a bucket shop, holding itself out as a broker for the purchase of securities; that for the most part it appropriated the money received from its customers without any purchase of securities for their account. It usually represented to its customers that the money so received had been lost in making good the margins upon the purchases which the customers had directed. For obvious reasons, however, the company represented to some of its customers that their speculations had resulted in profit. Had all customers lost all their money, the company after a time would have ceased to attract.

A customer defrauded in the manner first described has been allowed to prove in this proceeding for the sums which he paid to the company, without regard either to the agreement under which the payments were made or to the state of his accounts as shown by the company's books. In effect, he is thus permitted to rescind his contract because of the company's fraud, and to enforce a claim for money had and received by the company to his use. Thus far there is no dispute.

But those customers, comparatively few in number, who appear upon the company's books to have succeeded in their speculations, and so to be entitled to more money than they paid into the company, naturally wish to prove for the larger sum, upon a trade basis, so-called, rather than upon the cash basis just referred to. Where there was collusion between the customer and the company, this cannot be permitted. But, in cases where the master has found no evidence of the customer's knowledge of the company's fraudulent practices, no one has appeared to oppose the customer's claim to payment upon a trade basis. After careful consideration, the receiver is inclined to think that the trade basis is admissible as a measure of proof alternative at the option of the creditor. The court is compelled to decide the matter without the advantage of argument on both sides of the question.

That the honest creditor could recover on a trade basis in a suit at law against the company is plain. The company agreed to execute the orders of its customers. It pretended to do so, while, in fact, it did nothing in the cases under consideration, so far as appears. Where purchases made in accordance with a customer's orders would have resulted in his profit, the customer could recover that profit in an action of contract, and so is entitled to prove therefor. In re Swift, 112 Fed. 315, 50 C. C. A. 264; North Chicago Mill Co. v. St. Louis Ore Co., 152 U. S. 596, 14 Sup. Ct. 710, 38 L. Ed. 565; Spader v. Mural Mfg. Co., 47 N. J. Eq. 18, 20 Atl. 378. Again, the company rendered weekly or monthly statements to the customer, showing sales and purchases alleged to have been made on his account, which were not actual, but only fictitious. These statements showed certain sums due from the company to the customer. Upon the account so stated, the customer could have recovered against the company, for the company would not have been permitted to introduce evidence of the fraudulent falsity of its own account. If a customer, not in collusion with the company, has a claim good against it in the case sup-

posed, there is no sufficient reason why the claim should not be allowed in this proceeding.

It is true that this decision allows some creditors, whose election was by the company's arbitrary grace, to prove against the company for claims larger than those of other creditors whose conduct or circumstances were the same, except that the latter had the ill fortune to be elected by the company for loss rather than for profit. There is thus an inequality. But proof upon a trade basis gives to the former class no more than its just due, and the denial of like treatment to the majority of creditors arises from the necessities of the case. If these last can show that the execution of their orders would have resulted in a profit, they also may be allowed to prove for it.

THE JOHN A. HUGHES.

THE SCRANTON.

(District Court, S. D. New York. September 30, 1907.)

COLLISION—MEETING TOWS IN FOG—ERROR IN EXTREMIS.

A collision between the tows of two tugs bound in opposite directions in Long Island Sound in a dense fog *held* due to the faults of the two tugs in not stopping when fog signals were heard ahead from vessels they were unable to see. The injured tow *held* not in fault and debarred from recovering her damages from the tugs because of an error made in extremis in turning to port, instead of to starboard.

[Ed. Note.—Collision rules—Speed of steamers in fog, see note to The Niagara, 28 C. C. A. 532.]

In Admiralty. Suit for collision.

James J. Macklin and La Roy S. Gove, for libellant.
Carpenter, Park & Symmers, for the Hughes.
William S. Jenney, for the Scranton.

ADAMS, District Judge. This action was brought by the Baker Transportation Company, the owner of the steel barge Powell, laden with coal and bound from Philadelphia to Providence, in tow of the tug John A. Hughes on a hawser, to recover the damages caused to the Powell by collision with a light barge, the Shickshinny, in tow on a hawser of the tug Scranton, near Race Rock, Long Island Sound, about 10 o'clock A. M. on the 18th of March, 1905. The Scranton and tow of three barges of which the Shickshinny was the leading one, was proceeding west. The length of the hawser between the Powell and the Hughes was about 125 fathoms, and of that between the Shickshinny and the Scranton was about 200 fathoms.

A dense fog prevailed. The tide was ebb running east, about 2 miles an hour. The wind was very light. The Hughes was on a course E. ½ N. and the Scranton W. ¼ S. The testimony of the Hughes with respect to speed was that she was proceeding under one bell and making about 4 miles over the ground; that of the Scranton was that she was running at full speed and making 5 knots. Both tugs were blowing fog signals of one long and two short blasts at proper intervals.

The master of the Scranton said that when he was about off Race Rock Lighthouse, he heard a tug ahead blowing the fog signals, which turned out to be the Hughes; that he continued blowing until he heard the Hughes give one long whistle which he answered with the same and altered his heading to the north which made his course W. N. W. He continued on this course until he heard several toots over the stern of his boat and the hawser to his tow parted. This hawser was parted by the collision.

The master of the Hughes said he heard fog signals from a vessel almost ahead which turned out to be the Scranton; that the Scranton blew one whistle and he answered with one, then ported and hauled about six points to the starboard and steadied; that he did not see the Scranton or any of her tow, but judged she was going at full speed from the sound of her steam; that he felt the hawser leading to the Powell part and saw it was leading over her port quarter; that he heard a crash and went to his tow which he found had been struck on the starboard side. The hawser of this tow was parted one or two minutes before the collision, probably by the turn of the tug to the starboard.

The accounts from the barge are rather meagre. Only one witness, the engineer, was examined from her. He was not on duty at the time of the collision, having gone below at 8 o'clock. The master was dead and the others on board could not be found. The engineer, however, came out on deck just before the vessels struck and he described the way they came together, i. e., the Shickshinny striking the Powell on the starboard side about amidships. He also heard the master order the wheelsman to port. The wheel of the Powell was a ship's wheel and the helmsman evidently understood the order to mean to turn the wheel to port which he doubtless obeyed by turning it in that direction. While the tug was running off to the starboard and away from the approaching tow, the barge turned to the port and directly across its path, thus bringing about the collision which would have bene avoided if the barge had followed the tug.

The question to be determined is, was the barge responsible for the collision in view of the wrong manœuvre made by her? I do not think she was, but that turning the wheel the wrong way was in consequence of the previous faults of the tugs in navigating during such weather, and in not stopping when whistles were heard ahead. The fog was so dense that some of the witnesses said they could not see more than 20 feet. While others made larger estimates, 200 to 300 feet, it is conceded by the tugs that the fog was very thick. I consider that the faults of the tugs were the proximate causes of the collision. When the mistake was made on the barge, the vessels were almost in collision and the error of the barge should not prevent her from collecting the damages which she sustained in consequence of the tugs' manifest faults.

Decree for the libellant, against both tugs, with an order of reference.

UNITED STATES v. CHAMBERLIN et al.

(Circuit Court of Appeals, Eighth Circuit. October 17, 1907.)

No. 2,422.

1. INTERNAL REVENUE—STAMP TAXES ON WRITTEN INSTRUMENTS — MODE OF ENFORCEMENT.

The United States cannot maintain an action of debt for the recovery of stamp taxes owing on a deed of conveyance under War Revenue Act June 13, 1898, c. 448, § 25, Schedule A, 30 Stat. 457 [U. S. Comp. St. 1901, p. 2299], by reason of the failure to affix the required stamps thereto. There being no express authority in the statute for such a proceeding, the means of enforcing payment of the tax are limited to the penal provisions contained therein.

2. TAXATION—"DEBT" DEFINED—TAXES NOT DEBTS.

A tax is not a "debt" within the ordinary meaning of the term, nor in such sense that an action of indebitatus assumpsit may be maintained for its collection, unless expressly authorized by statute.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 1185.

For other definitions, see Words and Phrases, vol. 2, pp. 1864–1887; vol. 8, p. 7628.]

Hook, Circuit Judge, dissenting.

In Error to the District Court of the United States for the District of Colorado.

Ralph Hartzell, Asst. U. S. Atty. (Earl Cranston, U. S. Atty., and Ernest Knaebel, Sp. Asst. U. S. Atty., on the brief), for plaintiff in error.

O. L. Dines (E. E. Whitted, on the brief), for defendants in error.

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

PHILIPS, District Judge. In 1905 the plaintiff in error, the United States of America, instituted this suit in the United States District Court for the District of Colorado, to recover of the defendants in error, as executors of the will of Winfield Scott Stratton, the sum of $4,883, the amount of revenue stamps alleged to be owing by said estate on a deed of conveyance made by said Stratton on the 23d day of May, 1899, conveying to Stratton's Independence Limited, a corporation, certain mining property located in the Cripple Creek mining district of Colorado. The petition alleged that the consideration expressed in the deed was $4,850,000, on which revenue stamps were placed amounting to $4,850; whereas, the true and actual consideration for the conveyance was $9,733,000, leaving the amount of stamps due $4,883. The court below sustained a demurrer to this petition. To reverse this judgment the United States prosecutes this writ of error.

The question for decision is, can the government maintain the action of indebitatus assumpsit for the recovery of such tax? The tax claimed arose under what is popularly known as the "Spanish War tax," provided for by Act Cong. June 13, 1898, c. 448, 30 Stat. 448 [U. S. Comp. St. 1901, p. 2284 (2 Supp. Rev. St. No. 8, 1897–1899)]. Under Schedule A it is provided that on a deed conveying lands, ten-

ements, or other realty, "the purchaser or purchasers, or any other person or persons, by his, her, or their direction, when the consideration or value exceeds one hundred dollars and does not exceed five hundred dollars," shall place a stamp of 50 cents, and for each additional $500 or fractional part thereof in excess of $500, 50 cents. Section 25 of the act provides:

"That the Commissioner of Internal Revenue shall cause to be prepared for the payment of the taxes prescribed in this act suitable stamps denoting the tax on the document, article or thing to which the same may be affixed."

The act specifies what the penalty and consequences shall be for a failure to attach to the instrument the required stamps. Section 7 declares:

"That if any person or persons shall make, sign, or issue, or cause to be made, signed, or issued, any instrument, document, or paper of any kind or description whatsoever, without the same being duly stamped for denoting the tax hereby imposed thereon, or without having thereon an adhesive stamp to denote said tax, such person or persons shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not more than one hundred dollars, at the discretion of the court, and such instrument, document, or paper, as aforesaid, shall not be competent evidence in any court."

Section 10:

"That if any person or persons shall make, sign, or issue, or cause to be made, signed, or issued, or shall accept or pay, or cause to be accepted or paid, with design to evade the payment of any stamp tax, any bill of exchange, draft, or order, or promissory note for the payment of money, liable to any of the taxes imposed by this act, without the same being duly stamped, or having thereupon an adhesive stamp for denoting the tax hereby charged thereon, he, she, or they shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding two hundred dollars, at the discretion of the court."

Section 13:

"That any person or persons who shall register, issue, sell, or transfer, or who shall cause to be issued, registered, sold, or transferred, any instrument, document, or paper of any kind or description whatsoever mentioned in Schedule A of this act, without the same being duly stamped, or having thereupon an adhesive stamp for denoting the tax chargeable thereon, and canceled in the manner required by law, with intent to evade the provisions of this act, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding fifty dollars, or by imprisonment not exceeding six months, or both, in the discretion of the court; and such instrument, document, or paper, not being stamped according to law, shall be deemed invalid and of no effect. [The proviso of this section authorizes the subsequent validation of the instrument by placing the stamps thereon.] But no right acquired in good faith before the stamping of such instrument, or copy thereof, as herein provided, if such record be required by law, shall in any manner be affected by such stamping as aforesaid."

Section 14:

"That hereafter no instrument, paper, or document required by law to be stamped, which has been signed or issued without being duly stamped, or with a deficient stamp, nor any copy thereof, shall be recorded or admitted, or used as evidence in any court until a legal stamp or stamps, denoting the amount of tax, shall have been affixed thereto, as provided by law. * * *"

Section 15:

"That it shall not be lawful to record or register any instrument, paper, or document required by law to be stamped unless a stamp or stamps of the proper amount shall have been affixed and canceled in the manner prescribed by law; and the record, registry, or transfer of any such instruments upon which the proper stamp or stamps aforesaid shall not have been affixed and canceled as aforesaid shall not be used in evidence."

These are the only provisions of the statute respecting the manner of obtaining the revenue from such conveyances, and they contain the only remedial provisions for the enforcement of payment. The language of section 25 clearly enough indicates that "the payment of the taxes prescribed in this act" shall be by "suitable stamps denoting the tax on the document," etc. These were to be prepared by the Commissioner of Internal Revenue, and when bought from the local collector they were to be affixed to the instrument by the vendor or the vendee. No antecedent assessment was provided for or contemplated in respect of this character of tax.

Reliance for the enforcement of the payment of the tax claimed in this case as a debt owing to the government is placed principally upon the decision in Savings Bank v. United States, 19 Wall. 227, 22 L. Ed. 80. The tax in that case was based upon Internal Revenue Act July 13, 1866, c. 184 (14 Stat. 98), which levied a tax of 5 per cent. on bank dividends. The tax was to be paid in money by the bank on the stock of the shareholder. The list or return was required to be made and rendered to the assessor by the bank on or before a given date, in which any dividends or sums of money became due or payable, and the president, cashier, or treasurer of the bank was required to annex thereto a declaration, under oath, in form and manner as prescribed by the Commissioner of Internal Revenue, that the same contained a true and faithful account of the taxes aforesaid; and for any default in making or rendering such list or return, with such declaration annexed, the defaulting bank should forfeit as a penalty the sum of $1,000, and for failure to make or render the list or return, or for any default in the payment of the tax as required, the assessment and collection of the tax and penalty shall be in accordance with the general provisions of law in other cases of neglect and refusal. From which it is apparent that the amount of the tax to be paid was assessed on a particular fund—a dividend in favor of an ascertained beneficiary—and payment of the amount so assessed was to be made in money by the bank to the collector of internal revenue. While the act provides for the imposition of a penalty in the nature of a forfeiture, on default of the bank in performing the duties imposed upon it, the act went further and expressly declared:

"That it shall be the duty of the collectors aforesaid, or their deputies, in their respective districts, and they are hereby authorized, to collect all the taxes imposed by law, however the same may be designated, and to prosecute for the recovery of any sum or sums which may be forfeited by law; and all fines, penalties, and forfeitures which may be incurred or imposed by law, shall be sued for and recovered, in the name of the United States, in any proper form of action, or by any appropriate form of proceeding, qui tam or otherwise, before any circuit or district court of the United States for the district within which said fine, penalty, or forfeiture may have been incurred,

or before any other court of competent jurisdiction. And taxes may be sued for and recovered, in the name of the United States, in any proper form of action before any circuit or district court of the United States within which the liability to such tax may have been or shall be incurred, or where the party from whom such tax is due may reside at the time of the commencement of said action. But no such suit shall be commenced unless the Commissioner of Internal Revenue shall authorize or sanction the proceedings."

With the greatest respect for the eminent jurist who wrote the opinion in the Savings Bank Case, we submit that what is said in the course of the opinion respecting the exemption of the general government from established recognized common-law rights of action and limitations upon the character of action permissible to it, respecting its right to treat a tax as a debt recoverable in the form of assumpsit indebitatus, was quite obiter dictum, as the statute imposing the tax in question expressly declared that it could be recovered by suit at law, and as disclosed in the facts of the case the Commissioner of Internal Revenue had sanctioned the proceeding. The statute itself was an all-sufficient authority for the maintenance of the suit. The tax itself became a charge upon a particular fund, payable in money, directly to the collector of internal revenue, and possessed none of the qualities of a duty to be paid in stamps. In view of the express provision of the statute providing for the recovery of such a tax by suit, it ought not to be said that it was the mind of the court in the Savings Bank Case to overturn the hitherto generally recognized rule of law that a tax is not regarded as a debt. In Lane County v. Oregon, 7 Wall. 71, 79, 80, 87, 19 L. Ed. 101, the Chief Justice, delivering the unanimous opinion of the court, speaking of the clause of the Constitution giving to Congress the power to lay and collect taxes, said:

"What, then, is its true sense? The most obvious, and, as it seems to us, the most rational, answer to this question, is that Congress must have had in contemplation debts originating in contract or demands carried into judgment, and only debts of this character. This is the commonest and most natural use of the word. Some strain is felt upon the understanding when an attempt is made to extend it so as to include taxes imposed by legislative authority, and there should be no such strain in the interpretation of a law like this. We are more ready to adopt this view, because the greatest of English elementary writers upon law, when treating of debts in their various descriptions, give no hint that taxes come within either, while American state courts of the highest authority have refused to treat liabilities for taxes as debts, in the ordinary sense of that word, for which actions of debt may be maintained."

Then, quoting from City of Camden v. Allen, 26 N. J. Law, 398:

"A tax, in its essential characteristics, is not a debt, nor in the nature of a debt. A tax is an impost levied by authority of government upon its citizens, or subjects, for the support of the state. It is not founded on contract or agreement. It operates in invitum. A debt is a sum of money due by certain and express agreement. It originates in and is founded upon contracts, express or implied."

In Meriwether v. Garrett, 102 U. S. 472, 26 L. Ed. 197, the opinion was written by Mr. Justice Field, who dissented in the Savings Bank Case, supra. He asserted broadly that:

"Taxes are not debts. It was so held by this court in the case of Oregon v. Lane County, reported in 7 Wall. 71, 19 L. Ed. 101."

It is true that that was not a suit either by the United States or by the state of Tennessee; but it was the assertion of the sovereignty of the state through the legislative authority, and the whole reasoning of the court was that both the levying and collecting of the tax are legislative matters, and are not judicial, and therefore he said:

"Having the sole power to authorize the tax, it must equally possess the sole power to prescribe the means by which the tax shall be collected and to designate the officers through whom its will shall be enforced. * * * In the distribution of the powers of government in this country into three departments, the power of taxation falls to the legislative."

It is a significant fact that in the dissenting opinion Mr. Justice Strong, who wrote the opinion in the Savings Bank Case, reasserted that:

"By the lawful assessment and levy of a tax the taxpayer becomes a debtor to the municipality, and the debt may be recovered, like other debts, by a suit at law, or, when it is a lien, by a bill in equity."

In Thompson v. Allen County (C. C.) 13 Fed. 99, Mr. Justice Matthews, referring to the Meriwether Case, said:

"I am constrained to conclude that it was decided by the spirit and logic of that case that the collection of a public tax as much belongs to the authority of the state as its levy and assessment, and the reasons which forbid a court to supply the latter apply with equal force to the former."

In Crabtree v. Madden, 54 Fed. 426, 4 C. C. A. 408, the tax sought to be collected was imposed by the Indian tribes. This court, speaking through Judge Sanborn, after asserting that the authority imposing the tax had equal power to prescribe the remedies and designate the officers to collect it, asserted the proposition that actions at law for the collection of taxes, as a rule, are unauthorized, and that the general rule is that where remedies are provided, and such an action is not named as one of them, a common-law action to recover the tax would not lie, even in the courts of the sovereignty which had imposed them. He further said:

"The counsel for plaintiffs attempts to escape this conclusion by the argument that this tax is a debt; that it arises upon an implied contract; that the court has jurisdiction to enforce such contracts, and hence of this action. This position is not tenable. Taxes are not debts. They do not rest upon contract, express or implied. They are imposed by the legislative authority, without the consent and against the will of the persons taxed, to maintain the government, protect the rights and privileges of its subjects, or to accomplish some authorized special purpose. They do not draw interest, are not subject to set-off, and do not depend for their existence or enforcement upon the individual assent of the taxpayers."

It may be conceded that a tax imposed in favor of the government, whether by assessments or other means, having been ascertained, so as to become fixed either as a lien on specific property or as a claim in personam, no matter what technical name may be given to the suit, the government would be afforded a remedy through its courts for the enforcement of its payment, unless it appears from the statute that in respect of the particular tax it was not contemplated that it should be collected by a suit at law. As a means for the enforcement of the purchase of the tax stamps, which was the only mode of pay-

ment prescribed by the act, the statute subjected the derelict to prosecution as a misdemeanant and to a fine of $100, and in addition thereto it disentitled the deed to admission of record under the recording statutes of the state and rendered it inadmissible in evidence in the courts. On the face of the act these penalizing provisions were deemed by Congress as far as it cared to go toward the enforcement of the payment of this tax.

It is not persuasive to say that the penalty and disqualifying incidents imposed might not be effective to compel the purchase of a large amount of stamps. While the penal sum imposed as a fine or the imprisonment might not be a sufficient deterrent against evasions of the tax, the scandal of a conviction under indictment or criminal information and the other consequences attached for the nonaffixing of the stamps were most serious. The nonadmission of the deed of conveyance as a muniment of title might be most disastrous to the grantee in the event of the interposition of the creditors of the grantor or subsequent grantees or mortgagees. In the event of a judicial inquiry, where the rights of the grantee were at issue, the inadmissibility of his deed in evidence, for the lack of stamps, might be ruinous to him. It is sufficient, however, to say that Congress in framing the statute deemed the liabilities and disabilities imposed adequate enough to enforce compliance. The judicial branch of the government has no right to challenge the legislative discretion. The established rule of the common law is that where a legislative act creates a new right, or imposes a new burden, and specifies certain remedies in the form of penalties and the like, the prescription is exclusive of any other remedy.

It is a noteworthy fact that in the matter of "Legacies and Distributive Shares of Personal Property" (pages 798, 799, of the act of 1898), where the tax is ascertained from schedules and constitutes a lien upon the decedent's estate, on refusal of the administrator or executor to pay, it is provided that:

"The collector shall commence appropriate proceedings before any court of the United States, in the name of the United States, against such person or persons as may have the actual or constructive custody or possession of such property or personal estate, or any part thereof, and shall subject such property or personal estate, or any portion of the same, to be sold upon the judgment or decree of such court," etc.

No like provision was made in respect of the failure to place upon any written instrument the required stamps.

The contention on behalf of the government is that this suit is maintainable by reason of section 31 of the act, which declares that:

"All administrative, special or stamp provisions of law, including the laws in relation to the assessment of taxes, not heretofore specifically repealed, are hereby made applicable to this act."

In order to make said section effective to the end desired, it is further claimed that it had reference to and incorporated into the statute the provisions of section 9 of the internal revenue act of 1866, authorizing suit by the government to recover taxes (which has hereinbefore been quoted), which now constitutes section 3213, Rev. St.

U. S. 1878. This, it must be conceded, would be a remarkable extension of the ordinary import of the terms and words employed in said section 31. It occurs under the heading "Legacies and Distributive Shares of Personal Property," declaring that estates in descent and distribution shall be taxed, and providing the amount and the manner of ascertaining the same. As the stamp tax in respect of deeds of conveyance imposed by the war revenue acts of 1864 and 1866 were repealed by Act June 6, 1872, c. 315, 17 Stat. 256, the term "stamp provisions" could have no reference to provisions pertaining to stamps on deeds of conveyance, for those had been "heretofore specially repealed." But there were "laws in respect to the assessment of taxes" which had not hitherto been repealed, such as inheritance taxes, legacies, and personal property, and assessments on incomes.

The term "special"—that is, special provisions of law—certainly did not point out said section 3213, Rev. St. 1878, supra, as that is a general law applicable to all taxes collectible by suit. Its natural import is that it refers to some special provisions of some act which might not have been specified in the particular act. But it can have no reference to provisions respecting the payment of taxes by stamps, as the act of 1898 presents a plenary system, with definite details as to the manner of their payment, and prescribes the remedy for its enforcement.

The only remaining term, therefore, in section 31, upon which the government's contention can be hung, is the word "administrative." The ordinary, common acceptation of this term is that it pertains to matters that are ministerial, administrative, or executive. An assessment might, with admissible propriety, imply a mere ministerial act; but the specification in the section of "laws in relation to the assessment of taxes" clearly enough indicates that in the judgment of Congress the word "administrative" was not sufficient to comprehend an assessment. The omission of the word "collection," which is so closely allied to and usually follows an assessment, would indicate that it was purposely omitted. In any event, the term "collection" is not expressed, and the court has no authority to read it into the statute.

There is another persuasive, if not conclusive, fact that it was not the mind of Congress that a suit could be maintained for the recovery of taxes growing out of a failure to put the required revenue stamps on a deed or other written instrument. Act April 12, 1902, c. 500, § 7, 32 Stat. 97 [U. S. Comp. St. Supp. 1907, p. 646], expressly repeals the act of 1898 requiring deeds of conveyance to be stamped and fixing the amount thereof, and it also expressly repealed section 29 of the act of 1898 respecting legacies and distributive shares of personal property. But this was qualified by the provision (section 8):

"That all taxes or duties imposed by section 29 of the act of June 13, 1898, and amendments thereof prior to the taking effect of this act, shall be subject, as to lien, charge, collection, and otherwise, to the provisions of section 30 of the act of June 13, 1898, and amendments thereof, which are hereby continued in force."

It then recopied said section 30, providing for the manner of assessments and the legal procedure to recover that tax by suit. The failure of Congress to make a like reservation in respect of the en-

forcement of the collection of taxes under the stamp act furnishes, to our minds, an irrefragable argument against the contention of the government.

Suggestive argument is furthermore furnished by reference to other statutes in pari materia respecting tax stamps to be placed on certain packages and articles. Take the act imposing a tax upon the sale, etc., of "filled cheese" (Act June 6, 1896, 29 Stat. 255, c. 337 [U. S. Comp. St. 1901, p. 2239]). Section 10 provides that, whenever any manufacturer sells or removes for sale any filled cheese upon which the tax is required to be paid by stamps without paying such tax, it shall be the duty of the Commissioner of Internal Revenue, within a period of not more than two years after such sale or removal, upon satisfactory proof, to estimate the amount of tax which has been omitted to be paid and to make an assessment therefor and certify the same to the collector. "The tax so assessed shall be in addition to the penalties imposed by law for such sale or removal." Section 17 provides:

"That all fines, penalties, and forfeitures imposed by this act may be recovered in any court of competent jurisdiction."

While the act for the enforcement of the payment of this stamp duty provides penalties and forfeitures, in order that that should not be regarded as the only remedy for the enforcement of the tax, the statute expressly declares that the tax shall be in addition to the penalties imposed by law for such failure, and consequently could be recovered by suit under said section 3213, supra.

Act June 13, 1898, c. 448, 30 Stat. 448, 468 [U. S. Comp. St. 1901, p. 2286], providing for the payment of taxes on mixed flour, declares that "the tax levied by this section shall be represented by coupon stamps," and that the Commissioner of Internal Revenue, for a period of not more than one year after such sale, consignment, or removal, is to estimate the amount of the tax which should have been paid, make an assessment therefor, and certify the same to the collector of the proper district. "The tax so assessed shall be in addition to the penalties imposed by this act for an unauthorized sale or removal," with a further provision "that all fines, penalties, and forfeitures imposed by the section specified may be recovered in any court of competent jurisdiction."

So Act Aug. 27, 1894, c. 349, 28 Stat. 562 [U. S. Comp. St. 1901, p. 2275], declares that, whenever any article upon which a tax is required to be paid by means of a stamp is sold or removed for sale by the manufacturer thereof without the use of the proper stamp, in addition to the penalties imposed by law for such sale or removal, it shall be the duty of the Commissioner of Internal Revenue, within a period of not more than two years after such sale or removal, to estimate the amount of the tax which has been omitted to be paid, and to make an assessment therefor upon the manufacturer or producer of such article, the amount to be certified to the collector, who shall demand payment of such tax, "and upon the neglect or refusal of payment by such manufacturer or producer, shall proceed to collect the same in the manner provided for the collection of other assessed taxes."

Act Aug. 2, 1886, c. 840, 24 Stat. 210 [U. S. Comp. St. 1901, p. 2230], imposed a tax on the manufacture and sale of oleomargarine. Section 6 of the act provided that:

"Every person who knowingly sells or offers for sale, or delivers or offers to deliver, any oleomargarine in any other form than in new wooden or paper packages as above described, or who packs in any package any oleomargarine in any manner contrary to law, or who falsely brands any package or affixes a stamp on any package denoting a less amount of tax than that required by law, shall be fined for each offense not more than one thousand dollars, and be imprisoned not more than two years."

Section 8, after declaring the amount of tax per pound to be paid by the manufacturer thereof, declares that:

"The tax levied by this section shall be represented by coupon stamps; and the provisions of existing laws governing the engraving, issue, sale, etc., relating to tobacco and snuff, as far as applicable, are hereby made to apply to stamps provided for by this section."

And section 9 declares that whenever there shall be a sale "without the use of the proper stamps, it shall be the duty of the Commissioner of Internal Revenue, within a period of not more than two years after such sale," etc., to estimate the amount of the tax which has been omitted to be paid, and to make an assessment therefor and certify the same to the collector, and "the tax so assessed shall be in addition to the penalties imposed by law for such sale or removal." The absence of such a provision in the act of 1898, to the effect that the penalties and forfeitures shall be in addition to the amount of the tax to be paid, in respect of the stamps required to be placed on written instruments and the like, is significant. In respect of the articles above enumerated the assessment of the tax was made upon the thing itself, and created an obligation in personam for the tax after the assessment made by the collector, as provided by the statutes.

There are numerous reported cases under the war revenue tax acts wherein suits were instituted to enforce the collection of taxes under other provisions imposing an assessment upon the thing itself or the fund arising in a particular way. As every lawyer who was in active practice during the period when the stamp acts of 1864 and 1866 were in force will recall, the holders of instruments required by the acts to be stamped met with serious defeats in litigation where the unstamped instruments were rejected in evidence. While some state courts held that the act could not thus determine for the state courts the question of the competency of such instruments as evidence, a great majority of the state courts affirmed the validity of the act in this respect, and the federal courts uniformly enforced it. Notwithstanding the fact that failures in certain instances to place on the designated written instruments the required stamps was brought to public attention, there is not a reported case showing that the government conceived that it had a right of action to recover such tax as a debt. And there is but one reported case under the war revenue tax in question where such right of action has been asserted, and that is the case of Fleshman v. McClain (C. C.) 105 Fed. 610. That was a suit instituted against the collector of internal revenue to recover back a tax alleged to have been illegally exacted, growing out of the failure of a stock-

broker to affix revenue stamps to certain memoranda of sales. The Circuit Court overruled a demurrer to the petition, on the distinct ground that as the stamp duty imposed by the statute was collectible through the sale of stamps and in no other prescribed mode, and the statute having prescribed what penalties might be enforced and recovered, attaching other penalizing incidents for failure to affix the stamp, the right to maintain the suit, therefore, could not arise by implication. This ruling was affirmed by the Court of Appeals of the Third Circuit in 106 Fed. 880, 46 C. C. A. 15. While Gray, Circuit Judge, who spoke for the court, held that the tax was not demandable on other grounds as well, he took pains to say that the grounds upon which the court below based its opinion were "equally controlling and decisive of the case in hand," and then proceeded to adopt the opinion of the district judge. He said, inter alia:

"Congress possessed the sole power to authorize this tax, and the sole power to prescribe the means by which it should be collected. No remedy by suit is given or implied by the act in question, nor is there to be discovered any authority to demand and accept money in lieu of the stamps that are required by law to be affixed. * * * A penalty for failure to obey this statutory requirement is provided, but I find no other remedy in the act."

It seems to us that a contrary view of the statute in question would be far-reaching in its consequences. There is no limitation imposed by the statute of 1898 limiting such suits, for the sufficient reason that the Congress, in our opinion, never for one moment conceived that the United States afterwards, when all the moneys had been realized under the statute for the exigencies of the war debt, and after it had repealed the statute, zealous inspectors or prowlers through ancient records might discover that some instrument had not been properly stamped, and the courts be flooded with suits for the recovery of the deficiencies. The tax sued for accrued in 1899. Mr. Stratton died in 1901. Under the laws of Colorado claims against estates of decedents are required to be presented for allowance within two years. This suit was not brought until after the lapse of about six years, and after the repeal of the statute and the calling in for cancellation by the Internal Revenue Department of all such stamps. The language of Mr. Justice Bradley, in Savings Bank v. United States, supra, would have a juster application to the situation of this suit:

"If the matter is left open so that any person or corporation may be prosecuted for taxes at any time, it leaves the citizen exposed to many hazards, and to the mercy of prying informers, when the evidence by which he could have shown his immunity or exemption has perished."

Finding no express authority in the statute for such a proceeding, we are of opinion that the judgment of the district court should be affirmed. It is so ordered.

HOOK, Circuit Judge (dissenting). The question in this case is whether the government is entitled to maintain an action for the recovery of stamp taxes imposed by the war revenue act of 1898. The government contends that it is because (a) the rule of Savings Bank v. United States, 19 Wall. 227, 22 L. Ed. 80, still prevails, and (b)

by express provision in the act itself Congress adopted and applied to the taxes therein levied all means of collection then authorized by law, and among them was the remedy of plenary action. I am not persuaded that Savings Bank v. United States has been overruled, or that the court's full discussion and decision that a right of action existed independent of statutory provision are obiter dicta. The Supreme Court based its conclusion upon two distinct and independent grounds, either of which was sufficient: First, general principles of law, and particularly those respecting the attributes of sovereignty; and, second, a provision of the statute then in question applying to the particular case. It is manifest that what was said upon either of these cannot be held to be obiter. Any doubt about this would be dispelled by Union Pacific Co. v. Mason City Co., 199 U. S. 166, 26 Sup. Ct. 20, 50 L. Ed. 134, wherein Mr. Justice Brewer said:

"Of course, where there are two grounds, upon either of which the judgment of the trial court can be rested, and the appellate court sustains both, the ruling on neither is obiter; but each is the judgment of the court, and of equal validity with the other."

This language was used in affirmance of our own decision in that case (128 Fed. 230, 64 C. C. A. 348), wherein Judge Sanborn said:

"Where a court places its decision of the ultimate legal issue before it upon its decisions of two legal questions, which were pertinent to the issue, debated at the bar, and considered and determined in the opinion, the decision of either one of which is sufficient to sustain the determination of the ultimate issue, the decision of each of the two questions and of every pertinent legal question decided in reaching either decision has the binding force of an adjudication, and is not a mere obiter dictum."

It is equally clear that Savings Bank v. United States has not been overruled by Meriwether v. Garrett, 102 U. S. 472, 26 L. Ed. 197, or its authority impaired by that case, or by the earlier case of Lane County v. Oregon, 7 Wall. 71, 19 L. Ed. 101. In the Lane County Case it was decided that the statutes of Oregon required certain taxes to be paid in gold and silver coin and that the term "debts" used in the legal tender acts of Congress had no reference to taxes imposed by state authority. Nothing more was decided. In the Meriwether Case, which is relied on as a departure from the rule of Savings Bank v. United States, the question now before us, namely, whether the government can maintain an action for the recovery of taxes levied by it, did not arise at all, and was not decided. Justice Field did not deliver the opinion of the court. In fact there was no opinion by the court. There was merely a brief statement of legal conclusions upon the facts involved without an expression of the reasons which induced them. Justice Field, on behalf of himself and Justices Miller and Bradley, merely wrote a statement of the reasons which controlled their concurrence. Three other justices, Strong, Swayne, and Harlan, dissented. But, as already observed, the question before us was not there involved. It is a curious fact that Justice Miller, for whom Justice Field spoke in the Meriwether Case, delivered the opinion in United States v. Pacific Railroad, which I will presently advert to again, in which he held that the government could maintain an action

to recover a tax, and in referring to Savings Bank v. United States said:

"In that case the Supreme Court held that for the purposes of that collection and in some senses it was a debt; that the tax—which I presume was the same kind of a tax as this is—could be so collected."

In Savings Bank v. United States the court referred to the established practice in England of actions and suits in the nature of debt being maintained by the crown for the recovery of taxes and duties, though such remedies were unauthorized by statute. The court also referred with approval to decisions in this country holding that the government was entitled to such remedy. United States v. Lyman, 1 Mason, 482, Fed. Cas. No. 15,647; Meredith v. United States, 13 Pet. 486, 10 L. Ed. 258. In the Lyman Case will be found an exhaustive discussion of the question by Justice Story and full reference to the English authorities.

The rule of Savings Bank v. United States finds abundant support, were any needed, in other decisions of the national courts. In Stockwell v. United States, 13 Wall. 531, 20 L. Ed. 491, it was said:

"Debt lies whenever a sum certain is due to the plaintiff or a sum which can readily be reduced to a certainty—a sum requiring no future valuation to settle its amount. It is not necessarily founded upon contract. It is immaterial in what manner the obligation was incurred or by what it is evidenced, if the sum owing is capable of being definitely ascertained."

See, also, Chaffee v. United States, 18 Wall. 516, 21 L. Ed. 908.

United States v. Pacific Railroad, 4 Dill. 66, Fed. Cas. No. 15,983, was a suit in equity to recover the amount of taxes claimed to be due from the railroad company under the internal revenue law and to enforce the lien of the taxes upon its property. Mr. Justice Miller, with whom Judge Dillon was associated, said:

"A good deal of argument on both sides has been presented to us upon the question whether an action to recover taxes is an action of debt, and whether an obligation to pay taxes to the government is a debt. * * * In the view that all of us here take I think, however, that this discussion is immaterial. It is immaterial what you call the obligation of a citizen to pay his taxes. It is very clearly an obligation which may be enforced by the courts."

The doctrine of Savings Bank v. United States was recognized as controlling by Justice Clifford and the district judge who sat with him in United States v. Hazard, Fed. Cas. No. 15,337. In United States v. Cobb (C. C.) 11 Fed. 76, it was said that the settled rule that import duties were personal debts of the importer for which action would lie had been applied to the internal revenue acts. In United States v. Dodge, 1 Deady, 124, Fed. Cas. No. 14,973, the Meredith Case, supra, is cited as authority for a personal liability of importer and consignee for import duties, and in the Meredith Case the liability was sustained upon general principles of law. United States v. Tilden, 9 Ben. 368, Fed. Cas. No. 16,519, was an action to recover income taxes; but it involved the questions now before us—whether the remedies specified in the act imposing the tax were exclusive, and whether an action in debt would lie. Judge Blatchford, after an exhaustive discussion of the Savings Bank Case, said that it decided every question before

him. He also disposed of the contention that certain portions of the opinion in that case were obiter. United States v. Washington Mills, 2 Cliff. 601, Fed. Cas. No. 16,647, was an action to recover a revenue tax under the act of June 30, 1864. Justice Clifford said:

"Objection is also made to the right of the plaintiffs to recover in this case, because it is insisted that the remedy by distraint as given in the act of Congress is the exclusive remedy in the case. * * * Extended argument upon this subject, however, is unnecessary, as the question is regarded as settled by the decisions of the Supreme Court. The same objection was made in the case of Meredith v. United States, 13 Pet. (38 U. S.) 493, 10 L. Ed. 258, which was a suit for duties on imports. Duties due upon all goods imported, say the court in that case, constitute a personal debt due to the United States from the importer, independently of any lien on the goods or any bond given for the duties. * * * Assumpsit for taxes imposed under the acts of Congress providing for internal revenue is also the proper form of action."

In King v. United States, 99 U. S. 229, 25 L. Ed. 373, a case not involving the question before us, Justice Miller, in speaking for the court, said:

"The court held explicitly (in the Savings Bank Case) that the obligation to pay the tax did not depend on an assessment made by any officer whatever, but that, the facts being established on which the tax rested, the law made the assessment, and an action of debt could be maintained to recover it, though no officer had made an assessment.

In United States v. Erie Railway Co., 107 U. S. 2, 2 Sup. Ct. 83, 27 L. Ed. 385, the court adverted to what had been decided in the Savings Bank Case, and not with disapproval; also in United States v. Reading Railroad, 123 U. S. 113, 8 Sup. Ct. 77, 31 L. Ed. 138, and in United States v. Snyder, 149 U. S. 210, 13 Sup. Ct. 846, 37 L. Ed. 705.

There is no decision of the Supreme Court which, when rightly regarded, impairs the controlling authority of Savings Bank v. United States. The state courts are in conflict; the majority favoring the contrary doctrine. Judge Dillon, in his work on Municipal Corporations (volume 2, § 815), says:

"When the power to levy the tax is plainly given, the right to collect by suit should not be taken to be impliedly denied, unless the intention of the Legislature, that the special mode prescribed should be the only mode, appears with reasonable certainty."

Defendants rely upon Crabtree v. Madden, 54 Fed. 426, 4 C. C. A. 408, McClain v. Fleshman, 106 Fed. 880, 46 C. C. A. 15, and Fleshman v. McClain (C. C.) 105 Fed. 610. In the first of these it is said that taxes are not debts; but it should be observed that the case was an attempt to collect in the courts of one sovereignty taxes levied under the laws of another. The other case was an action to recover from a collector of internal revenue moneys alleged to have been illegally demanded and received by him under claim that they were due by virtue of section 6 of the war revenue act. To secure payment the collector threatened the plaintiff with "proceedings." The Circuit Court and the Court of Appeals of the Third Circuit held that the penalties specifically prescribed in the act were the sole means of enforcing payment and that there was nothing in the act giving or implying author-

ity "to demand and accept money in lieu of the stamps that are required by law to be affixed." The case of Savings Bank v. United States was not called to the court's attention, nor was reference made to section 31 of the act.

In both the Lyman and Meredith Cases, supra, holding that duties were recoverable by the government in an action of debt, significance was attached to the employment in the act imposing the duties of the phrase "there shall be levied, collected and paid." The same phrase is found in that part of the war revenue act now under discussion which relates to the documents, instruments, etc., of Schedule A. In other words, Congress enacted that there shall be "levied, collected and paid for and in respect of" those documents and instruments "the several taxes or sums of money set down in figures against the same respectively." I apprehend that it is a matter of no importance at all to the question before us that for convenience in the administration of the law provision was made that the person liable to pay the money was authorized to do so by purchasing, affixing, and canceling stamps That is an administrative detail quite useful in giving evidence of compliance with the law, but having no bearing upon the inherent nature of the tax or upon the remedies of the government for default in payment. Nor does it signify anything to say that a tax or other due, duty, or obligation is a debt, or that it is not a debt, unless we are given to know the text in which the term "debt" appears. Debt has a range of meaning from the narrowest to the widest, both in the law and out of it. The text determines. Thus, a tax may be a debt within statutes concerning bankruptcy, insolvency, and the administration of estates of deceased persons, and yet not so in those relating to set-off and legal tender. That in a broad sense a tax is a debt has been recognized ever since the days of Blackstone, who said:

"Whatever, therefore, the laws order any one to pay, that becomes instantly a debt which he hath beforehand contracted to discharge." 3 Bl. Com. 158.

Again, I think it is quite clear that actions at law as means of collecting the taxes levied were expressly adopted by the war revenue act. That act imposed increased taxes upon fermented liquors, taxes termed by Congress "special taxes" on the occupations of bankers, brokers, and the like, additional taxes on tobaccos and dealers and manufacturers thereof, taxes in respect of the documents, etc., mentioned in Schedule A, and the medicines, etc., in Schedule B. It also imposed what were termed "excise taxes" on those engaged in refining petroleum and sugar, also taxes on the transmission of legacies and distributive shares of personal property and upon various other subjects of taxation. Section 31 of the act is as follows:

"That all administrative, special or stamp provisions of law, including the laws in relation to the assessment of taxes not heretofore specifically repealed are hereby made applicable to this act."

I think that my associates are in error in saying that this section is under the heading "Legacies and Distributive Shares of Personal Property"; the inference suggested being that the section should be confined in its operation to the subject-matter of that heading. The er-

ror in this seems manifest from the reading of the section itself. By the very terms of section 31 pre-existing provisions of law were made applicable to the entire war revenue act, and not merely to the preceding sections 29 and 30, which deal with legacies and distributive shares of personal property. If this method of construction is applied to other portions of the act, it must with equal reason be said that section 28 comes under the heading "Excise Taxes on Persons, Firms, Companies and Corporations Engaged in Refining Petroleum and Sugar," and is so confined in its operation; yet section 28 merely imposes a tax on every seat sold in a palace or parlor car and every berth sold in a sleeping car. At the time of the passage of this act there had existed for many years a comprehensive scheme for the collection of taxes constituting a machinery thoroughly familiar to the officers charged with its operation and to a great extent illumined by the decisions of the courts and the rulings of administrative officials. Among those provisions is section 3213 of the Revised Statutes, under the title "Internal Revenue," which provides, among other things, that taxes may be sued for and recovered in the name of the United States in any proper form of action before any Circuit or District Court of the United States for the district within which the liability to such tax is incurred or where the tax debtor resides. This provision has been upon the statute books ever since 1866. The revenue act of 1864 (13 Stat. 236, c. 173) levied stamp taxes similar to those of the act now before us. Section 41 authorized actions for the recovery of fines, penalties, and forfeitures prescribed by that act. The act of 1866 (14 Stat. 110, c. 184) left the stamp taxes in force, but amended section 41 so that the right of action extended to fines, penalties, and forfeitures prescribed by any law and also to the taxes themselves. So, as the law stood in 1866, there were stamp taxes like that in the case before us, and the government might sue for their recovery. Some years afterwards the sections imposing the stamp taxes were repealed, but the remedy applicable to all taxes has remained to this day. Then in 1898 the war revenue act restored the stamp taxes. Can there be much doubt that without express provision the old general remedy for the recovery of all taxes applied to those imposed by the new act? Can there be any doubt whatever that to make the matter certain Congress inserted section 31?

When the bill that became the war revenue act was called up for consideration in the House of Representatives April 27, 1898, Mr. Dingley, who had charge of it, said, in explaining its scope and purport, that they had restored the adhesive stamp tax which existed from 1864 to 1872, placing it in large part on the basis of the old law as it stood in 1866, with certain additions (31 Cong. Rec. part 5, p. 4298). It seems to me altogether clear that by section 31 it was the intention of Congress to expressly adopt this old provision as part of the machinery for the enforcement of the taxes then levied. It made applicable to the act all "administrative provisions of law," and if section 3213, Rev. St., is not an administrative provision, what is it? When we speak of laws relating to the administration of estates, we include laws prescribing the methods and remedies for the collection of the as-

sets and their distribution and the powers of officers in connection therewith. When we speak of administrative provisions of law in respect of taxes, I think we naturally include all those granting powers to executive officials and providing ways and means for collection. That this result was in the mind of Congress I have little doubt. Mr. Dingley also said in explaining the general scope of the bill:

"These taxes have been selected, first, because we have the machinery for the collection of them now, and they can be collected with but slight additions to the force and with but slight increase of expense. We have selected them, also, because they were a source of revenue successfully seized upon during the Civil War," etc. 31 Cong. Rec. p. 4297.

These same ideas were repeated during the progress of the bill until it finally was enacted into law. I am unable to see why the repeal in 1902 of the provisions imposing taxes on the transmission of legacies and inheritances and the retention of the machinery for the collection of those already accrued is of significance in this case. The liability for accrued taxes in respect of conveyances still remained, and so did section 31 of the act, and also section 3213 of the Revised Statutes of 1878. Those sections were not repealed. Nor can I perceive any relevancy in other acts of Congress which provide that the taxes imposed should be in addition to fines, penalties, and forfeitures prescribed for violation of particular commands of those acts, unless it is claimed that the absence of such provision in respect of the stamp taxes of the war revenue act is an argument that Congress intended that the payment of a fine under that act should operate as a payment of the tax and a release from further liability. I think that a statement of this argument is its refutation. No imprisonment was prescribed in the war revenue act for failure to stamp, except when accompanied by an intent to evade the provisions of the act. No such intent is charged in this case. That some states deny the power of Congress to disqualify an unstamped instrument as evidence was known when the act was passed, and the inefficacy of such a disqualification as a coercive means was apparent.

So much for the "fines, penalties and forfeitures" which it is claimed constitute the sole means of insuring payment of these taxes. It would be strange that Congress should so intend when it was endeavoring to provide the government with means vitally necessary for the conduct of a war—that it should not give the government the simple remedies which every individual has for the collection of a debt. If Congress has power to enact that a tax shall be levied, collected, and paid, and it does so enact, there is nothing so unusual or oppressive in an action for the recovery of the tax that such remedy should be denied, and it should not be denied, unless it is evident that it was the legislative intent to limit the means of enforcement to the penal provisions of the act.

THOMAS v. UNITED STATES.

TAGGART v. SAME.

(Circuit Court of Appeals, Eighth Circuit. October 21, 1907.)

Nos. 2,485, 2,486.

1. STATUTES—RULES OF CONSTRUCTION—COMPILATIONS.

In cases of doubt and uncertainty as to the meaning of a compiled or revised statute, resort may properly be had to the original enactments.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 312.]

2. CONSPIRACY—FEDERAL STATUTE—CONSTRUCTION.

In Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676], relating to conspiracies, the words "offenses against the United States" have the same meaning as the words "offenses against the laws of the United States" in the original act of March 2, 1867 (14 Stat. 484, c. 169) the change being merely one of phraseology made by the revision commission, and such section denounces conspiracies to commit offenses created by any of the statutes of the United States.

3. SAME.

A defendant may be prosecuted under Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676], for a conspiracy to violate a criminal or penal statute of the United States, notwithstanding the fact that the punishment prescribed for the offense created by such statute is less than that prescribed for conspiracy; the conspiracy in itself being a distinct and substantive offense.

4. SAME—CONSPIRACY TO VIOLATE INTERSTATE COMMERCE ACT—GIVING OR RECEIVING REBATES.

A conspiracy to induce the giving or receiving of rebates in violation of the Elkins act (Act Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1907, p. 880]), is punishable under Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676], where the persons charged are not limited to the giver and receiver of the rebate alone.

5. SAME—INDICTMENT—DESCRIPTION OF OFFENSE.

In an indictment under Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676], for a conspiracy to commit an offense against the United States, all facts necessary to constitute the conspiracy, including the overt act, must be averred with all the particularity required in criminal pleadings, but no high degree of particularity is required in describing the offense to which the conspiracy relates which is necessarily defined by the statute. So, where an indictment charged a conspiracy to induce a shipper to receive rebates from railroad companies in violation of the federal statute, it was not essential to aver the names of such railroad companies which were not known to the grand jury.

6. CRIMINAL LAW—EVIDENCE—ACTS OF CO-CONSPIRATORS.

On the trial of defendants charged with having conspired with a person named and with others to the grand jurors unknown to induce a partnership to accept rebates from railroad companies on shipments in violation of the interstate commerce law, where there was evidence tending to establish the conspiracy, and that the arrangement for the illegal rebates was made between defendants and one member of such partnership, entries in a private memorandum book kept by such partner, showing sums received as "freight commissions" and distributed between the partners individually, which transactions did not appear on the books of the firm, were admissible in evidence.

[Ed. Note.—Admissibility on trial of joint indictments of acts and declarations of conspirators and codefendants after accomplishment of object, see note to Sorenson v. United States, 74 C. C. A. 472.]

7. SAME—PROOF OF INTENT—SIMILAR TRANSACTIONS.
On such trial also evidence of contemporaneous contracts made by defendants with other large shippers, similar in all respects to that made with the partnership named, and that such shippers also received sums of money indirectly which they understood to come from defendants, and to be in fact rebates, was admissible on the question of intent and motive in the transaction charged in the indictment.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 830–834.]

8. CONSPIRACY—ELEMENTS OF OFFENSE.
One who comes into a conspiracy after it has been formed, with knowledge of its existence, and with a purpose of forwarding its designs, is equally as guilty as though he had participated in its original formation.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Conspiracy, § 76.]

9. CRIMINAL LAW—FORMER JEOPARDY—IDENTITY OF OFFENSES.
The acquittal of defendants on one of two indictments consolidated for the purpose of trial is not a bar to a conviction on the other where the offenses charged are distinct in point of law, although the same facts may have been relied on to a great extent in each case.

10. SAME—TRIAL—INSTRUCTIONS.
In a criminal case, the refusal of a requested instruction that defendant is presumed innocent, and that such presumption remains until overcome by the proof, is reversible error, notwithstanding the giving of a proper instruction on the subject of reasonable doubt.

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

See 145 Fed. 74.

Hale Holden, H. C. Timmonds, and John N. Baldwin (O. M. Spencer, O. H. Dean, and W. D. McLeod, on the brief), for plaintiffs in error.

A. S. Van Valkenburgh, for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

ADAMS, Circuit Judge. An indictment was found in the court below charging defendants Thomas and Taggart with conspiring with one George A. Barton, a member of the firm of Barton Bros., of Kansas City, Mo., and others to the grand jurors unknown, to commit an offense against the United States by getting that firm, which was engaged in the business of making large shipments of merchandise from New York and New Jersey to Kansas City, Mo., to accept and receive rebates and concessions from divers railroads engaged in transportation of interstate commerce between those places, in violation of the interstate commerce acts, and particularly Act Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1907, p. 880], known as the "Elkins Act." Another indictment was found in the same court and at the same time against Thomas and Taggart and one Crosby, charging them with conspiring to commit an offense against the United States by getting the Chicago, Burlington & Quincy Railroad Company, a corporation operating a railroad engaged in the transportation of interstate commerce, to offer, grant, and give rebates, concessions, and discriminations to divers favored persons and corporations engaged in interstate commerce, and particularly to such persons or corporations in Kansas City as were engaged in shipping goods from New

York or New Jersey to Kansas City. The two indictments were consolidated for the purpose of a trial. The defendants were found guilty and sentenced to pay a fine and be imprisoned on the first, and with Crosby were found not guilty and discharged on the second, indictment. Thomas and Taggart prosecuted separate writs of error, which were treated together in argument and brief of their respective counsel, and will be treated together in this opinion.

A large number of errors were originally assigned, but in conforming to the requirements of rule 24 of this court (150 Fed. xxxiii), requiring counsel to specify in their briefs the errors intended to be relied upon by them, they are greatly reduced, and will be specifically referred to as the opinion proceeds. Many of the errors claimed to have been committed by the trial court arise under the general specification that the court erred in not sustaining a demurrer to the indictment. Section 5440 of the Revised Statutes [U. S. Comp. St. 1901, p. 3676], under which the indictments were found, originated as section 30 of an act entitled "An act to amend existing laws relating to internal revenue and for other purposes," approved March 2, 1867 (14 Stat. 471, 484, c. 169), which is as follows:

"That if two or more persons conspire either to commit any offense against the laws of the United States or to defraud the United States in any manner whatsoever and one or more of said parties to said conspiracy shall do any act to effect the object thereof, the parties to said conspiracy shall be deemed guilty of a misdemeanor, and on conviction thereof shall be liable to a penalty of not less than one thousand dollars and not more than ten thousand dollars and to imprisonment not exceeding two years. * * *"

Under authority of an act approved June 27, 1866 (14 Stat. 74, c. 140), a commission was appointed to revise and consolidate the statute laws of the United States, and empowered to "make such alterations as may be necessary to reconcile the contradictions, supply the omissions, and amend the imperfections of the original text." That commission was not authorized to make any changes in the law as it stood, but only to alter the existing text so far as necessary to make clear the intention of Congress whenever that intention was found obscured by contradictions, imperfections, or omissions. The commission reported in 1873, taking the conspiracy provision out of the special class of revenue legislation, and placing it under a heading, "Crimes Against the Operations of the Government," as an independent section (5440) of the Revision. It changed the text so that, instead of reading, "If two or more persons conspire either to commit any offense against the laws of the United States or to defraud the United States in any manner whatsoever" etc., it read:

"If two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose and one or more of such parties do any act to effect the object of the conspiracy all the parties to such conspiracy shall be liable to a penalty of not less than one thousand dollars and not more than ten thousand dollars and to imprisonment not more than two years."

By an act approved May 17, 1879 (21 Stat. 4, c. 8 [U. S. Comp. St. 1901, p. 3676]), section 5440 was amended so as to provide for a fine of not more than $10,000 or imprisonment for not more than two

years, or both, in the discretion of the court, in lieu of the cumulative punishment provided for in the original section. Except for these modifications of the punishment section 5440 remains as when first incorporated into the revision as a separate section.

1. It was formerly contended that the statute, by reason of its enactment in and as a part of the revenue act, contemplated only conspiracies against the enforcement of the revenue laws of the United States (United States v. Fehrenbach, 2 Woods 175, Fed. Cas. No. 15,083), but since the decision of the Supreme Court in United States v. Hirsch, 100 U. S. 33, 36, 25 L. Ed. 539, no such contention can longer be made. Counsel for defendants practically so concede, but place reliance upon the proposition that the only conspiracies contemplated by the statute are those against the United States as such, which affect the operations of the government or tend to overthrow or impair its authority, and that it does not contemplate a conspiracy to violate simple penal provisions like those of the Elkins act against giving or receiving rebates. The case of Curley v. United States, 64 C. C. A. 369, 130 Fed. 1, is cited and relied upon by them as authority for their contention. That case mainly involves the consideration of a conspiracy to defraud the United States, and many of the expressions quoted and relied upon by counsel must be referred to the conspiracy under actual consideration by the court, namely, a conspiracy to defraud, for an accurate understanding of their meaning. As indicative that the learned court which decided that case did not intend the language to be construed as limiting conspiracies to commit an offense as claimed by the defendants, attention may be called to the following expression found on page 8 of the opinion:

"Manifestly section 5440 in its general terms contemplates wrongs other and beyond conspiracies to commit distinct statutory offenses against the United States. * * *"

If we are wrong in our interpretation of that case, and if it is, when properly understood, authority for defendants' contention now being considered, we find ourselves quite unable to adopt its conclusion. The original conspiracy act of 1867 (14 Stat. 471) made no such limitation. It denounced a conspiracy to commit an offense "against the laws of the United States" as a crime. We cannot presume that the commissioners under the act of 1866 undertook to change the meaning of the original act. They were authorized to make clear the intention of Congress, and they did it in the particular under consideration by expressing the thought that the offense denounced by the original act was one against the organized body capable of being offended, a body authorized to make rules of conduct rather than against the rules themselves. The word "offense" implies a violation of a law by which alone it can be denounced. Actuated doubtless by considerations like these, the commissioners eliminated the words "the laws of," and made the crime denounced to consist of a conspiracy to commit an offense against the United States, the maker of the laws and the body interested in and responsible for their enforcement, and in so doing they expressed more philosophically and exactly the necessary and essential meaning of the original act. In cases of doubt and uncertainty

about the meaning of a compiled or revised statute, resort may properly be had to the original enactments to ascertain their true meaning. United States v. Bowen, 100 U. S. 508, 513, 25 L. Ed. 631; United States v. Lacher, 134 U. S. 624, 10 Sup. Ct. 625, 33 L. Ed. 1080; Logan v. United States, 144 U. S. 263, 302, 12 Sup. Ct. 617, 36 L. Ed. 429; The Conqueror, 166 U. S. 110, 122, 17 Sup. Ct. 510, 41 L. Ed. 937; Barrett v. United States, 169 U. S. 218, 227, 18 Sup. Ct. 327, 42 L. Ed. 723.

A brief reference to other provisions of the statutes shows that Congress frequently employed the formula "offense against the United States," as the equivalent of "offense against the laws of the United States." Section 1014, Rev. St. [U. S. Comp. St. 1901, p. 716], providing for the arrest, imprisonment, and letting to bail of accused persons reads as follows:

"For any crime or offense against the United States the offender may," etc.

Section 731, relating to the venue in criminal cases, reads:

"When any offense against the United States is begun in one judicial circuit and completed in another it shall be deemed," etc.

Section 5541, relating to the place of imprisonment of convicts, reads:

"In every case where any person convicted of any offense against the United States is sentenced to imprisonment for a period longer than one year, the court by which the sentence is passed," etc.

Section 5542, relating to the same subject, reads:

"In every case where any criminal convicted of any offense against the United States is sentenced to imprisonment and confinement to hard labor it shall be lawful," etc.

Section 5543, relating to the same subject, reads:

"All prisoners who have been or may be convicted of any offense against the laws of the United States * * *, shall be entitled," etc.

Many other statutes might be referred to, but the foregoing are sufficient to show that Congress is in the habit of using the formula "offense against the United States" interchangeably and indiscriminately with "offense against the laws of the United States," and that both mean the same thing. It is inconceivable, and, so far as we know, has never been claimed that Congress intended by section 1014 to make provision for the arrest, imprisonment, and bailing of persons charged with offenses affecting the operations of the government only, or that by section 731 Congress did not intend to make all offenses, whatever their grade, begun in one circuit and completed in another triable in either, or that Congress did not intend by sections 5541, 5542, and 5543 to make general provisions for the place of imprisonment and credit for good behavior applicable to all convicts whatever be the character of their offenses.

In the light of the foregoing considerations, we think section 5440 was intended as a broad and comprehensive provision denouncing conspiracies to commit offenses created by any of the statutes of the United States as a crime.

2. Before the passage of the Elkins act in 1903, the interstate commerce law dealt mainly with the carrier, its officers, and agents. The act of 1903 first made it an offense for a shipper to solicit, accept, or receive a rebate, concession, or discrimination. It abolished imprisonment for offenses under the old acts, and did not impose it as punishment for offenses under the new act. In view of this state of the law, it is contended by defendants' counsel that, as the crime of conspiracy under section 5440 is punishable by imprisonment, no such crime can be imputed to one who conspires to violate the interstate commerce act for which no punishment by imprisonment is provided, because that would indirectly operate to subject him to punishment not warranted by law. In other words, that section 5440, in so far as it formerly permitted an indictment for a conspiracy to violate any of the provisions of the interstate commerce act, was to that extent superseded by the Elkins act. This contention might be tenable if the two statutes created or punished the same offense; but the conspiracy statute denounces a crime of different elements and of different gravity than those denounced by either the original or amended interstate commerce acts. In the former, two or more persons must necessarily be implicated, a conspiracy between them must be shown, an overt act in the accomplishment of the object of the conspiracy must be committed, and the offense by reason of the danger that is enhanced by combination and secrecy is peculiarly grave and serious. In the latter acts the mere conscious, intelligent giving, or receiving a rebate, concession, or discrimination and nothing more constitutes a separate offense by the persons so giving or receiving the same. Congress undoubtedly had the power to denounce only the completed act as an offense and to withdraw it from the class of offenses subject to the general conspiracy act, but it would seem, considering the radical difference between a subtantive offense denounced by law and a conspiracy to commit such an offense, that, if Congress had intended that offenses against the interstate commerce act should not continue to be the basis of a conspiracy charge, it would have said so in some clear and unambiguous way, and would not have left a matter so important to the offender and to the government to the uncertain test of repeal by implication. By repeated adjudications of the Supreme Court and other courts a conspiracy to commit a criminal offense has been held to be an entirely different thing from the substantive offense itself, and prosecutions for conspiracies to defeat the provisions of the interstate commerce act have been frequently upheld.

In Clune v. United States, 159 U. S. 590, 595, 16 Sup. Ct. 125, 40 L. Ed. 269, Mr. Justice Brewer speaking for the Supreme Court in expounding the meaning of section 5440 in connection with section 3995, said:

"[It is] contended that a conspiracy to commit an offense cannot be punished more severely than the offense itself, and also that when the principal offense is, in fact, committed, the mere conspiracy is merged in it. The language of the sections is plain, and not open to doubt. A conspiracy to commit an offense is denounced as itself a separate offense and the punishment therefor fixed by the statute, and we know of no lack of power in Congress to thus deal with a conspiracy. Whatever may be thought of the wisdom or pro-

priety of a statute making a conspiracy to do an act punishable more severely than the doing of the act itself, it is a matter to be considered solely by the legislative body. Callan v. Wilson, 127 U. S. 540, 555, 8 Sup. Ct. 1301, 32 L. Ed. 223. The power exists to separate the conspiracy from the act itself and to affix distinct and independent penalties to each."

See, also, United States v. Hirsch, supra; United States v. Britton, 108 U. S. 199, 2 Sup. Ct. 525, 27 L. Ed. 703.

In the following cases persons conspiring to defeat the provisions of the interstate commerce law have been held amenable to the conspiracy statute: Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co. (C. C.) 54 Fed. 730, 19 L. R. A. 387; Waterhouse v. Comer (C. C.) 55 Fed. 149, 19 L. R. A. 403; United States v. Howell (D. C.) 56 Fed. 21; United States v. Cassidy (D. C.) 67 Fed. 698; Wabash R. Co. v. Hannahan (C. C.) 121 Fed. 563. In the light of these authoritative decisions denouncing a conspiracy to commit an offense as peculiarly dangerous and in itself totally separate from those involved in the mere violations of the law and of the other decisions referred to, recognizing violations of the interstate commerce law as bases of charges of conspiracy, it would be highly unreasonable to impute to Congress a purpose not to recognize the doctrine of these cases, and by silence merely to deny the applicability of section 5440 to violations of an important act like the interstate commerce law; and we unhesitatingly conclude that, notwithstanding the offense of violating provisions of the interstate commerce law is punishable with less severity than the conspiracy to commit that offense, section 5440 is in no way repealed or superseded by the provisions of the interstate commerce law in question. The two may well and harmoniously stand together, and in such circumstances repeal by implication or supersession of either cannot be presumed. Great Northern Railway Co. v. United States, 155 Fed. 945.

3. Again, it is argued that an indictment will not lie in this case for a conspiracy because a concert and plurality of agents are necessary elements of the substantive offense for the commission of which a conspiracy is charged to have been formed; and because it required the intelligent co-operation of two or more persons to commit the offense of receiving a rebate, the giver or givers, on the one hand, and the receiver or receivers, on the other, that every element of the offense of conspiracy is involved in the completed offense of receiving a rebate from the one who gave it and is merged in it. Attention is directed to 2 Wharton's Crim. Law, § 1339, United States v. Dietrich (C. C.) 126 Fed. 664, and United States v. New York Cent. & H. R. R. Co. (C. C.) 146 Fed. 298, as authority for the contention. The rule broadly laid down by Wharton if applied as written justifies the contention made. He says:

"When to the idea of an offense plurality of agents is logically necessary, conspiracy, which assumes the voluntary accession of a person to a crime of such a character that it is aggravated by a plurality of agents, cannot be maintained," etc.

It is to be noted that the learned author fails to state or make it clearly appear whether he limits immunity from the charge of conspiracy to those who are the sole and necessary actors in the com-

mission of the substantive offense, or whether he includes in his rule of immunity conspiracies against persons who may have conspired to induce others to commit the offense. If he limits the applicability of his doctrine to the former, he would be clearly right. It cannot be if (using one of his illustrations) the crime of bigamy be punishable in a certain way that the two parties who alone could commit it can be subjected to a charge of conspiracy for committing the same crime, and thereby made to suffer twice for exactly the same offense, or be subjected to a severer punishment on a conviction for the conspiracy than is imposed upon the substantive offense itself. But, if persons combine to induce others to commit bigamy, they, according to the same learned author, may be punished as for a conspiracy. We think counsel for defendants have erroneously interpreted Wharton's meaning as manifest from the context. As we understand the Dietrich and the New York Central Railroad Cases, they each involve facts of the kind just referred to in the illustration. In the former case Dietrich alone was to receive a bribe and Fisher alone was to give it to him. The conspiracy charged consisted of the unlawful combination between the two to that effect. The indictment being against those two persons alone was held bad. To show that Judge Van Devanter understood the Wharton rule to be limited to cases in which the necessary parties to the substantive offense only were charged with conspiring, a brief quotation from his opinion will suffice. He said (page 666 of 126 Fed.):

"As the transaction is stated in the indictment, it was Dietrich who agreed to receive the bribe, not Dietrich and Fisher, and it was Fisher who agreed to give the bribe, not Fisher and Dietrich. The charge is not that two or more persons agreed among themselves to corruptly obtain the aid of another, a member of Congress, in securing the appointment of some aspirant to a federal office, nor is it that two or more members of Congress agreed among themselves to obtain from another person a reward or compensation for their services or aid in securing such an appointment. Such an agreement would constitute a conspiracy to commit an offense against the United States, and, if followed by the doing of any act by one of the conspirators to effect its object, would be punishable under section 5440."

In the New York Central Railroad Case the court was dealing with facts like those in the Dietrich Case. The crime charged was a conspiracy to commit the offense of receiving a rebate, and the only persons indicated for the conspiracy were those representing on the one hand the giver and on the other hand the receiver of the rebate, and those were the sole persons whose concert and co-action constituted the substantive offense denounced by the interstate commerce law. That Judge Holt who sat in the case so regarded it a brief extract from his opinion will show. He said (page 304 of 146 Fed.):

"The counsel for the government assert that the Dietrich Case is to be distinguished from this case because in the Dietrich Case but two persons, the giver and taker of the bribe, were charged with the conspiracy in the indictment, while in the case at bar the indictment charges that seven persons named, and others to the jurors unknown, were parties to the conspiracy. But only four of the seven persons named are indicted, and of those four Guilford and Pomeroy represent simply the giver, and Edgar and Earle simply the receiver of the rebate."

The case now before us differs radically from either of the foregoing. Thomas and Taggart, who are the sole defendants and who alone are indicted, were neither givers nor receivers of the unlawful rebates in question. Neither did they stand for them as representatives. They occupied the position of irresponsible intermediaries. They are neither charged nor shown in proof to have given or received the rebate in question, nor are they charged with conspiring to give or receive a rebate. They are charged with conspiring to bring about the commission of the offense of receiving rebates by others, namely, by Barton Bros. If, when the co-action of two or more persons is necessary to constitute the commission of a crime, no outside persons, however effectually and wickedly they may have conspired with them or either of them to bring about the violation of the law, can be held for a conspiracy, immunity from a most salutary criminal provision is found for many of the worst violators of the law. It is the schemers who set afoot the infractions of the law that are most dangerous to the public weal, and we cannot believe that Congress ever intended, except in cases of a clear doubling of punishment of the same persons for the same offense, to relieve them from amenability to the conspiracy statute.

4. The indictment is also assailed (1) for insufficiency in averment of facts constituting the conspiracy; (2) for want of such certainty in describing the offense which the conspiracy was formed to commit as makes it appear that it was an offense against the United States; (3) for want of such certainty in describing the offense as fairly informs the defendants of its nature and of what they were called upon to meet; (4) for duplicity. The indictment charges in clear and unequivocal language that defendants conspired together and with George A. Barton, one of the members of the firm of Barton Bros., of Kansas City, to commit an offense specifically denounced by the interstate commerce law of getting the firm of Barton Bros., who were large shippers of interstate commerce from New York to Kansas City, to accept and receive rebates as defined in that law from railroads over which their freight might be routed from New York to Kansas City. The indictment charges with great particularity the different steps taken in the formation of the conspiracy, and that its object was to bring about the commission of that offense. It is averred that Thomas, who was then operating a transportation bureau in New York City routing shipments and procuring freight rates for those who might employ him (defendant Taggart being in his employ), should first enter into a contract with Barton Bros. securing the right to place or route all their west-bound freight from New York or New Jersey to Kansas City over such railroads as he might select, and should make an arrangement with divers railroad companies engaged in transportation of interstate commerce freight between New York and Kansas City and other railroad companies to the grand jurors unknown for the carriage of their freight from New York to Kansas City, and should secure from such companies, "in the way of pretended claims, commissions, and allowances," large sums of money to be used in part in making payments of rebates to Barton Bros., thereby lessening their freight rate below that es-

tablished and fixed for the time being according to law, and from time to time to pay the same to Barton Bros. as such rebates and concessions. Little, if any, claim is or can be made that the charge of conspiracy is not well and sufficiently laid, but it is urged that the indictment is bad because it does not set out with sufficient clearness the facts constituting the offense to commit which the conspiracy was formed, and particularly that there is no allegation as to what railroad company, if any, was a party to the conspiracy, or that any railroad company had agreed or promised to give Barton Bros. any rebates or that it knew, or understood it had done so. To properly weigh this argument it should be borne in mind that the particular conspiracy charged to have been formed by defendants was to get Barton Bros. to accept and receive rebates, and thereby to violate a criminal statute. The acceptance of secret rebates by one shipper gives him an undue advantage in business and stands in the way of fair, open, and equal competition, which it is the beneficent design of the interstate commerce act to promote. The conspiracy under consideration was to defeat that design by getting Barton Bros. to receive rebates, and not by getting carriers to give them. But it is said that the receipt of a rebate necessarily implies a giver, and that to properly advise the defendants of the crime charged against them the name of the proposed giver should have been stated and the fact made to appear that they were to act knowingly and intentionally in doing so. In other words, the contention is that facts should be averred with such accuracy as would show, not only an intention to commit the substantive crime, but all facts necessary to constitute that crime. We think that is not the law. All facts necessary to constitute the conspiracy, including the overt act, must be averred with all the particularity required in criminal pleadings because the conspiracy is the crime with which the defendants stand charged, and with the nature and character of which they, under constitutional safeguard, are entitled to be advised. But, when the conspiracy charged is one to commit an offense, and that offense (as is the case in all offenses against the United States) is clearly defined by statute, no high degree of particularity is required in describing it. If enough is shown to make it appear that an offense against the United States has been committed, it is sufficient.

Wharton says (2 Wharton's Crim. Law, § 1343):

"It is enough to set out the offense aimed at by such apt words as will describe it as a conclusion of law."

In State v. Ripley, 31 Me. 386, it is said:

"In an indictment for a conspiracy at common law, if the conspiracy charged is an unlawful combination and agreement of two or more persons to commit a deed which if done would be an offense well known and acknowledged, the nature of which is perfectly understood by the name by which it is designated, no further description of the crime is required."

In State v. Noyes, 25 Vt. 415, it is held:

"As the object of the conspiracy was to commit an offense punishable by law, it was not necessary to set out the means to be used to effect it; and it is not necessary that there should be the same certainty in setting out the

object of the conspiracy as there must be in an indictment for the offense which the respondents conspired to commit."

In State v. Grant, 86 Iowa, 216, 53 N. W. 120, the Supreme Court of Iowa uses the following language:

"It is said that the indictment is defective, in that it fails to fully disclose the means by which the crime was to be accomplished. It is well settled in this state, and is the law in many states, that, where the indictment charges a conspiracy to do an act which is a crime, it is sufficient if it be described by the proper name or terms by which it is generally known in law. It is only where the charge is that an act in itself not criminal is sought to be accomplished in an illegal manner, or by illegal means, that the means used for its accomplishment must be averred."

In Ching v. United States, 55 C. C. A. 304, 118 Fed. 538, 540, the Circuit Court of Appeals for the Fourth Circuit in discussing this subject said:

"As to the sufficiency of the indictment, it must be first noted that the gist of the offense charged is that of conspiracy, which we think is properly pleaded. In such cases the offense which is intended to be committed as the result of the conspiracy need not be described as fully as would be required in an indictment in which such matter was charged as a substantive crime."

See, also, United States v. Stevens (D. C.) 44 Fed. 132, 141.

Measured by these rules of pleading, the indictment abundantly shows that the conspiracy had for its object the commission of a well-known criminal offense against the United States; that, in the absence of definite knowledge, a sufficient description of the railroads which were to be involved in the execution of the conspiracy is given, and that the defendants were sufficiently informed of the nature and character of the offense with which they were charged. The offense was one clearly denounced in the Elkins act, and sufficiently described in the indictment. The railroads involved were not known to the grand jury, but were described as those which, with their connecting lines, were engaged in carrying interstate commerce from New York to Kansas City, and were the ones which defendants were to designate and determine by exercising the power given them by Barton Bros. to route their freight. Besides definitely averring that the conspiracy was to bring about the commission of a well-known criminal offense, the indictment adds by way of showing more particularly the nature and character of the offense, and the means to be resorted to for its commission, that the money was to be demanded, solicited, and received from the railroads so to be determined by the defendants "in the way or guise of pretended claims, commissions, and allowances," and, when so received, was to be paid over to Barton Bros. as rebates. The words just quoted found in the indictment are general, but, if they "make clear to common understanding" the matter to which they refer, it is sufficient. Evans v. United States, 153 U. S. 584, 592, 14 Sup. Ct. 934, 38 L. Ed. 830. To get money from the railroads "in the way or in the guise of pretended claims, commissions and allowances" plainly suggests to the "common understanding" that some subterfuge was to be practiced not to get the money, but to make the money apparently appropriated for one purpose intentionally serve another.

In the recent case of Armour Packing Co. v. United States (C. C. A.) 153 Fed. 1, we held, that:

"The substance of the crime of receiving a rebate or concession under the Elkins act is the solicitation, acceptance, or receipt thereof whereby property in interstate or foreign commerce is transported at less than the regular rate. The device whereby the receipt and transportation are obtained is not an essential element of the crime and it is unnecessary to plead it in the indictment."

Much more is it true that in a charge of conspiracy to bring about the receipt of a rebate or concession the particular device or method by which it is to be accomplished need not be pleaded with all the particularity which would be required in pleading the commission of the substantive offense.

The contention that the indictment is bad for duplicity because it contains the charge that defendants conspired to commit the offense of getting Barton Bros. *"to accept and receive"* rebates, etc., is without merit. The words underscored are obviously used to express one and the same act, and the fact that the pleader employed them conjointly is not objectionable. It results that the various objections to the indictment for insufficiency are not well taken.

5. Was there error in the introduction of evidence? Without intending to deal with the facts in detail or to make a demonstration from the record of what we have concluded, we content ourselves by stating the result of a patient and careful examination of all the proof. It is the theory of the government, and there is ample evidence tending to show, that some time before November 14, 1903, Thomas, who resided in New York, went to Kansas City and there made arrangements orally with Kimber L. Barton, senior member of the firm of Barton Bros., for the purpose, which subsequent evidence tended to show, of securing rebates from the fixed and lawful tariff rates from New York to Kansas City for Barton Bros., and after securing them to pay the same over to Barton Bros. as unlawful concessions in their favor.

The others members of the firm, William and George A. Barton, if not shown to have been actually cognizant of the arrangement made by Kimber L. at the time it was made, afterwards knowingly participated in the fruits of that arrangement, and fully ratified all that was done by the senior member. On November 14th a contract was executed between Thomas and Barton Bros. This was fair and lawful on its face. It purported to obligate Barton Bros. to give Thomas the exclusive right to route all of their west-bound freight from New York, and to give him a certain minimum amount for his services in so doing, and obligated Thomas, among other things, to collect from the carrier any claims for loss and damage to merchandise and overcharges which Barton Bros. might have. The term of this contract was to expire in January, 1905, and on January 10th of that year another formal contract purporting to obligate the parties to the performance of the same obligations for another year was executed between them. There is evidence tending to show that these contracts did not express the real purpose of the parties, but were subterfuges intended by them to conceal and mystify their real purpose, and to make evi-

dence against the time of possible need. The then recent enactment of the Elkins law, approved February 19, 1903 (32 Stat. 847, c. 708), had for the first time made the receiving of rebates by a shipper a criminal act, and had rendered any direct contract between the carrier and shipper providing for the giving or receiving of an unlawful rebate exceedingly hazardous. Hence the occasion and supposed prudence of operating, if at all, through the medium of an intermediary who should be neither carrier nor shipper, nor subject to the penalties for the misdeeds of either under the interstate commerce law.

With the foregoing scheme claimed by the government to have existed between Thomas and Barton Bros. in mind, we proceed to a consideration of the errors assigned in the introduction of evidence. During the two years in question the firm of Barton Bros. received from the carriers at the hands of Thomas about $3,900 on legitimate claims for loss, damage, and overcharge, and in addition the individual members received each one-third of $10,300 from some source and on some account. These facts are undisputed. With a view of getting at the source of and reason for these individual receipts, George A. Barton, one of the partners, who was called as a witness by the government, was asked whether any of this money came from Thomas. He answered "No." He was then asked if it was received from anybody else acting for Thomas. After objections and rulings by the court, the witness answered and the testimony proceeded as follows:

"A. Our firm has received money from sources. Shall I state from whom?

"Q. Certainly. A. I think we received remittances from Mr. Kelby. [Kelby was clerk for Thomas.]

"Q. Do you mean by his hand or through him? A. We received remittances by express and through the mail, and I think Mr. Kelby was here once and left a draft. * * *

"Q. Now, what were those remittances? In what form and in what amount and on what dates? A. Well, I have a record book made up by K. L. Barton of our firm, memoranda that he handed to me. They are not on our regular books. * * *

"Q. Have you that record with you? A. Yes, sir.

"Q. You may state what that book shows with reference to these payments."

To this question the defendants objected, and, upon the objection being overruled, duly excepted. The contents of the book read in evidence showed that from time to time during the year 1904 amounts were received under a notation of "freight commissions" aggregating about $8,000 and in the year 1905 aggregating about $2,300. The proof showed that the money so entered in the private book by the senior member of the firm was equally divided between the three members, Kimber, George, and William, and that the amounts so received and divided did not include the legitimate amounts received by the firm for loss, damage, and overcharge which were regularly entered on the books of the firm. We think the court committed no error in receiving in evidence the contents of this private book. Sufficient evidence had already been introduced, to say nothing of evidence afterwards offered, to make a prima facie case of the conspiracy charged—evidence sufficient when considered with all the inferences naturally deducible from it to justify a finding by the jury that the conspiracy as charged had been entered into. Kimber L. Barton was its moving

spirit. He made the preliminary arrangements and collected the unlawful proceeds. Although he was not expressly charged in the indictment as one of the conspirators, he falls well within the class of those "to the grand jurors unknown" who are so charged. He was engaged with Thomas and his copartners in the unlawful purpose, and his acts in furtherance of it, including the fact that he received the moneys, entered the same in a private book, and not in the regular books of the firm, and afterwards distributed them between the members of his firm, were clearly admissible against the defendants, his co-conspirators. We are not unmindful of the contention of defendants' counsel that there was no direct evidence of any unlawful undertaking with Thomas, and no direct evidence that Thomas paid Barton Bros. any money as rebates or concessions on freight charges. For argument's sake, this might be conceded. Conspirators do not act that way. Fraud is not often proven by direct testimony. A preconcerted plan to do an unlawful act must from the nature of the case be usually established by inferences drawn from the relation of the parties from the acts done and from the results achieved.

"It is not necessary to constitute a conspiracy that two or more persons should meet together and enter into an explicit or formal agreement for an unlawful scheme. * * * It is sufficient if two or more persons in any manner or through any contrivance positively or tacitly come to a mutual understanding to accomplish a common and unlawful design." United States v. Babcock, 3 Dillon, 581, 585, Fed. Cas. No. 14,487.

"If the evidence shows a detail of facts and circumstances in which the alleged conspirators are involved, separately or collectively, and which are clearly referable to a preconcert of the actors and there is a moral probability that they would not have occurred as they did without such preconcert, that is sufficient if it satisfies the jury of the conspiracy beyond a reasonable doubt." Davis v. United States, 46 C. C. A. 619, 107 Fed. 753, 755.

"It is often that the intentions of a wrongdoer are ascertained entirely by acts done which are the natural effects of unlawful designs. The acts and circumstances which accompany them showing the connection between the acts, and the motives which produced them, are generally the mosts convincing evidence which can be adduced." State v. Ripley, 31 Me. 386, 388.

Looking at the proof in the light of the foregoing well-understood rules, we entertain no doubt that the money which Kimber L. Barton received, entered in his book, and subsequently divided equally between his other partners and himself came from Thomas; that Thomas got the same from the railroad which carried Barton Bros.' freight through the colorable pretense of collecting exaggerated claims for loss, damage, and overcharge or commissions, and that all these things are clearly referable to a prearrangement to that end entered into between Thomas and the members of the firm and others. If there were any doubt about the unlawful intent of the defendants in their business relations with Barton Bros., that doubt is dispelled by the evidence of contemporaneous contracts and transactions made by

Thomas with other merchants doing business in St. Louis, Kansas City, and Omaha. Those contracts were all equally fair and innocent on their face, calling for actual service by Thomas in the way of routing the shippers' freight, prosecuting, and collecting claims for loss, damages, and overcharges, but the merchants, by their evidence, disclose the unreality or comparative unimportance of any such service. One admitted that as a result of his firm's contracts with Thomas they expected to get a cheaper rate than the usual shipper. Another said it was "inferred without discussion that his house was to get certain money * * * that Thomas understood very well that I understood," and, again, that "the results were beneficial to us * * * in the sense of refunds which we were to receive." Another testified that Thomas "was to look after all the claims we had for freight, and we were to receive a certain rebate on freights from west of the Mississippi river." Notwithstanding the explicit provision in the contracts that Thomas should attend to claims for loss, damage, and overcharge, some of the shippers testified that they took care of them and handled them for themselves without the intervention of Thomas. The evidence of all of them shows that the feature requiring Thomas to attend to their claims for loss, damage, and overcharge was treated with much indifference. Their testimony discloses, when read with discrimination and fair regard to the circumstances, that the real purpose of all of them in making contracts with Thomas was to secure rebates or refunds from the railroads on freight charges. In fact, they did receive money as a result of their arrangement. It came mysteriously to them, generally from unknown sources, sometimes by special messenger, sometimes by express, sometimes by deposit in bank to the credit of a fictitious name agreed upon, and always in currency. When received it was charged to some individual account out of the regular course of bookkeeping. It was obviously intended that the money received by them should not be traceable to any source. Tracks were covered as well as they could be, but the humiliating confession had to be made, and was made by some, that their real purpose was to secure unlawful rebates, and others are left by the proof in the uncomfortable attitude of receiving large sums of money in currency without knowing or inquiring whence it came or on what account it was paid to them. The conduct of the latter is consistent alone with the fact that they thought they were receiving money unlawfully, and all the circumstances point with much certainty to the conclusion that they actually received unlawful rebates or concessions on freight shipments as an intentional result of the contracts made between them and Thomas.

Objection was made to the introduction of evidence showing dealings between Thomas and the merchants other than Barton Bros., and the action of the court in admitting that evidence is assigned for error. There is no merit in that assignment. Nothing is better settled in the law of evidence in any case involving fraudulent intent than that other acts and dealings of the accused of a kindred character to those charged in the case in hand and performed at or about the same time are admissible to illustrate and establish the intent or motive in the particular act directly in judgment. Wood v. United

States, 16 Pet. 342, 10 L. Ed. 987; Chitwood v. United States (C. C. A.) 153 Fed. 551; Exchange Bank v. Moss, 79 C. C. A. 278, 149 Fed. 340. The present case fitly illustrates the value of the rule in question. The same ostensible contracts, the same mystery, the same results appear in all the collateral transactions. They tell the same story of an attempted evasion of the law under the thin disguise of a formally executed contract and afford very persuasive evidence of the real intent and purpose of the accused in similar dealings with Barton Bros. in this case.

6. The contention is made that the evidence fails to disclose the formation of a conspiracy within the jurisdiction of the court below. This position under the proof to which attention has already been sufficiently called cannot be sustained. The fraudulent scheme seems to have been first devised and agreed upon in Kansas City, and it makes little difference where the misleading and deceptive formal contracts were executed. They were merely a step taken in carrying out the scheme and designed doubtless to make it more effectual.

7. It is earnestly contended that there was not sufficient evidence to connect defendant Taggart with the particular conspiracy charged in the indictment. While the proof does not connect him with the incipiency of that conspiracy, it is claimed by the government that facts appear from which it may be reasonably inferred that he came into it after it was concocted with full knowledge of its existence and character and with a purpose of furthering its design. If such are the facts, he was as much a conspirator as if he participated in its original formation. United States v. Newton (D. C.) 52 Fed. 280; United States v. Barrett (C. C.) 65 Fed. 62; United States v. Cassidy (D. C.) 67 Fed. 698. This contention presents a doubtful question of fact, and as the case, for reasons hereafter stated, must be remanded for another trial when new evidence may be presented on the issue, it is not deemed necessary or wise to further consider it at the present time.

8. Because of the verdict of not guilty and the judgment discharging the defendants Thomas, Taggart, and Crosby on the indictment against them which was consolidated with the present indictment against Thomas and Taggart for trial, the last-named defendants interposed a plea of former jeopardy as a bar to their conviction in the present case. This plea was disallowed, and defendants assigned that action of the court as error. A brief reference to the facts will dispose of the question. The indictment against defendants and Crosby was for a conspiracy to get the Chicago, Burlington & Quincy Railway Company to give rebates to divers shippers in Kansas City. The indictment against the defendants in this case (not including Crosby) was for a conspiracy to get Barton Bros. to receive rebates from divers railroads. Notwithstanding the similarity of evidence introduced in support and defense of the two prosecutions, the offenses charged in the two indictments were totally different as a matter of law. They were grounded on different provisions of the interstate commerce act of 1903, and the acquittal in one affords no ground for discharge in the other. There had been no jeopardy on the charge contained in the present indictment. "A plea of autrefois acquit"

must be upon a prosecution for the same identical offense. 4 Bl. 336. It must appear that the offense charged, using the words of Chief Justice Shaw, was the same in law and in fact. The plea will be vicious if the offenses charged in the two indictments be perfectly distinct in point of law, however nearly they may be connected in point of fact. Burton v. United States, 202 U. S. 344, 378, 26 Sup. Ct. 688, 50 L. Ed. 1057.

Other criticisms are made of the proceedings below, and error is claimed to have been committed in the charge to the jury and in refusing to give certain declarations of law requested by defendants, but, in view of the conclusions already reached and expressed on fundamental and important questions, it is not deemed necessary for the guidance of the trial court at the next trial to express our opinion on the several incidental and less important questions presented by the assignment of errors. Most of them are answered by the proper application of the principles already laid down.

As we have already indicated, the judgment must be reversed, and we will now proceed to a consideration of one error which renders that result inevitable. The court was duly and properly asked to instruct the jury that the defendants were presumed to be innocent of the crime charged against them, and that such presumption remained with them until it was overcome by the proof. This instruction the court refused to give and exception was duly saved. It is not claimed that the request was improper, or that it should not have been given, but it is claimed that its equivalent was given to the jury in the general charge. We have critically examined the charge with a view of extracting from it, if possible, some equivalent for the instruction asked and refused, but we fail to find it. All that counsel for the government point out and claim to be such equivalent is the repeated declaration found in the general charge that the jury must find the defendant guilty beyond a reasonable doubt before a verdict of guilty can be rendered. It is earnestly contended that such instruction is the full equivalent of the one asked and refused. However interesting an original discussion of this question might be, it is not open to us. The Supreme Court has conclusively settled it. In the two cases of Coffin v. United States, 156 U. S. 432, 15 Sup. Ct. 394, 39 L. Ed. 481, and Cochran & Sayre v. United States, 157 U. S. 286, 299, 15 Sup. Ct. 628, 39 L. Ed. 704, that court has unequivocally held that a proper instruction concerning the subject of reasonable doubt was not the equivalent of an instruction concerning the presumption of innocence, and judgments of conviction in both of those cases were reversed because of refusal to give a requested instruction upon defendant's presumption of innocence like that asked in this case, notwithstanding the fact that in each the trial court properly instructed on the subject of reasonable doubt.

On the authority of those cases, we have no alternative but to reverse the judgments, and remand the causes to the court below for a new trial; and it is so ordered.

SANBORN, Circuit Judge (concurring). I concur in the reversal of the judgments in these cases for the reason stated in the foregoing

opinion, and also because it seems to me that the testimony of George A. Barton to the contents of the record book, or of the memoranda, which he swore that Kimber L. Barton kept of the moneys received for Barton Bros., was hearsay evidence, and its reception fatal error. Conceding that Kimber L. Barton was a co-conspirator with the defendants below, and that his overt acts in the execution of the conspiracy were admissible against them, the proof of those overt acts was still subject to the established rules of evidence. Whether or not he or his firm received the sums of money which George A. Barton read from that book from the defendants, or either of them, whether or not he correctly entered in that book what he or his firm received, were questions of fact which were decisive in the trial of this action. If George A. Barton had testified that Kimber L. Barton had told him that Kimber, or his firm, had received the moneys entered in that book, that testimony would have been hearsay. The mere fact that those amounts were written in the book by a person other than the witness does not change their character. Written hearsay is not more competent than oral hearsay. Before the contents of that book could become admissible evidence against the defendants, competent proof that the moneys there entered were received from the defendants, or one of them, and that Kimber L. Barton correctly wrote down in that book the amounts which he, or his firm, so received, was indispensable. Even if the concession were made, and it is not, that Kimber's statements were admissions of all the conspirators, and hence of the defendants, still the book was incompetent because there was no evidence in the case that Kimber ever said or admitted that he had correctly entered in the book, or in the memoranda, the amount of moneys which he, or his firm, had received, and George A. Barton did not testify that those moneys were correctly entered. The fact is, however, that those entries were not acts in execution of the conspiracy. The making of those entries did nothing toward the accomplishment of the purpose of the conspiracy. . This purpose either had or had not been accomplished before the entries were made, hence these entries were not admissible, either as overt acts, or admissions of a conspirator, nor as independent testimony of verified writings. They were nothing but the unverified, and hence incompetent evidence of that which Kimber L. Barton happened to write.

The chief reason for the rule which excludes hearsay testimony is that its obedience subjects, while its disregard relieves, the parties whose statements are offered, from the cross-examination of opposing parties. The right of cross-examination is the great safeguard against fraud, false statements, and half truths resulting from statements of parts and omissions of other parts of conversations and transactions, which are frequently more misleading and dangerous than direct falsehoods. It furnishes the cardinal and most effective means to discover and disclose the whole truth in all judicial investigations, and, under the English and American systems of jurisprudence, the opportunity to exercise the right of cross-examination is a condition precedent to the reception of the direct evidence of the witness. Heath v. Waters, 40 Mich. 457, 471; Sperry v. Moore's Estate, 42 Mich. 353, 361, 4

N. W. 13. If the unsworn written statements of witnesses may be received in evidence upon the testimony of a third party that the witnesses told him they were true, then the witnesses who know the facts may make their written statements thereof, and tell one who knows them not that those statements are true, and the accused may be deprived of the privilege of being confronted by, and of all opportunity to cross-examine, the real witnesses against him, for, as in the case at bar, they may be conveniently absent and the witness who produces their written statements may know nothing, but that they told him they were true.

No rule of law is more salutary, or more indispensable to the security of the life, liberty, and property of the citizen, than that which prohibits the repetition of the written or oral statements of absent persons to determine issues between litigants, and commands that only after due notice, after opportunity for cross-examination of the very parties whose statements are offered, and then only under the solemnity of an oath or affirmation shall their stories be evidence. Disregard this rule, and the most sacred rights of persons and property are at the mercy of the whimsical and pernicious gossip of the reckless, the irresponsible, and the vicious. Mima Queen, etc., v. Hepburn, 7 Cranch, 290, 295, 3 L. Ed. 348; Board of Com'rs v. Keene Five Cents Sav. Bank, 47 C. C. A. 464, 470, 108 Fed. 505, 510; Resurrection Gold Min. Co. v. Fortune Gold Min. Co., 64 C. C. A. 180, 186, 188, 129 Fed. 668, 674, 676; National Masonic Acc. Ass'n, etc., v. Shryock, 20 C. C. A. 3, 7, 73 Fed. 774, 777. In the case in hand one of the most important, if not the most important, fact in issue was permitted to be proved to the jury by the unverified written statement of one who was either a stranger or a criminal and who was permitted to be absent from the trial, so that the defendants were deprived of all opportunity to cross-examine him on this crucial question, and of the right to be confronted with one of the principal witnesses against them. A conviction in this case ought never to be permitted to stand upon such evidence.

The other questions discussed in the opinion of the majority are not determinative of the case as it is now presented to this court, and I do not desire to be deemed to have expressed any opinion upon them.

DAVIDSON et ux. v. WOODWARD.

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

No. 1,450.

HUSBAND AND WIFE—COMMUNITY PROPERTY—WASHINGTON STATUTE.

Defendant entered into a contract with one having a preferential right to purchase tide lots from the state of Washington, and who had applied for such purchase, by which the right to purchase a portion of the lots was assigned to him, and he made a payment therefor. Subsequently, the state commissioners granted the application to purchase as to certain of the lots, but denied it as to others, and in consequence the contract was abandoned. Defendant married, and shortly afterward, the amount he had paid on the contract not having been returned, a new agreement

was made, by which he was given a quitclaim deed to certain of the lots in consideration of such payment, and acquired title thereto from the state; the payments being made in part with money of his wife and in part with community funds. *Held*, that under the law of the state that land acquired after marriage by a deed expressing a money consideration is presumptively community property, and that it requires clear and convincing proof to overcome the presumption, such facts were not sufficient to establish the individual ownership of defendant, nor to support a decree for the specific performance by him of a contract for the sale of one of the lots in which his wife did not join, as required by the law of the state, to make a valid contract for a sale of community property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, §§ 913, 914.

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.]

Hunt, District Judge, dissenting.

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

For opinion below, see 150 Fed. 840.

William Martin, for appellants.

H. H. Field, Blaine, Tucker & Hyland, and Hughes, McMicken, Dovell & Ramsey, for appellee.

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

GILBERT, Circuit Judge. The appeal in this case is taken from a decree ordering the specific performance of a contract to sell land, made by the appellant James D. Davidson. One of the grounds of defense to the suit was that the land was the community property of the appellants, who are husband and wife, and could not be sold without the wife's consent. The court below found that the land was the separate property of James D. Davidson. That finding is assigned as error. The land in controversy was tide land adjoining property owned by one Wm. Laack, and which he had the preferential right to purchase from the state. The appellants intermarried on January 19, 1897. On January 27, 1897, Wm. Laack made a quitclaim deed to James D. Davidson, whereby he assigned to him the right to acquire from the state certain described lots, including the tide land which is the subject of the present controversy. On February 9, 1897, the appellants made their application to purchase said land from the state and made their first payment thereon. At the time of the marriage, Annie Davidson had about $400 of her own money, and the first payment was made out of this money. That and the subsequent payments were made under an understanding and agreement between the appellants that all the property possessed by each at the time of the marriage was to be community property. On October 6th, all the payments having been made, amounting in all to $732.73, the state of Washington conveyed to James D. Davidson the said property.

It is the general rule in the states in which community property is recognized, and the rule has been expressly affirmed in the state of Washington, that land acquired after marriage by a deed expressing a money consideration is presumptively community property, and that

it requires clear and convincing proof to overcome the presumption. Dormitzer v. German, etc., Co., 23 Wash. 132, 62 Pac. 862. It is contended that the presumption is overcome in this case, and the court below so held by reason of the fact that James D. Davidson's right was initiated and his first payment was made to Laack prior to the marriage. There is no dispute in the testimony as to the nature of the steps taken by Davidson to acquire the title, and his relation to the property before his marriage. The controversy is only as to the legal effect of the established facts. In March, 1895, Wm. Laack, claiming to have the preferential right to purchase about 24 lots of tide lands, made application to the Board of State Land Commissioners for leave to purchase the same, and soon thereafter proposed to James D. Davidson that he take some of the lots, as there were more than he (Laack) "could handle." Davidson accepted the proposition, and an agreement was executed upon which Davidson paid Laack $80. The written agreement was subsequently lost or destroyed and could not be produced in evidence. Laack, who was called as a witness for the appellee, testified that the agreement was to the effect that he (Laack) was to have the first 8 lots fronting the shore lots, and that thereafter the remaining 16 lots were to be divided equally between him and Davidson. It would appear from Laack's testimony that the agreement was not binding upon him, for he testified:

"I could give him eight and if I wanted to, and if I didn't want to give him any I should not give him any. It was my option."

In 1896 the Board of State Land Commissioners decided adversely to Laack's application as to a considerable portion of the property involved therein, and thereafter, according to the testimony of both Laack and Davidson, the agreement which they had made was canceled, and a new agreement was made on or about January 27, 1897, when Laack executed the quitclaim deed to Davidson above referred to. The testimony is that the former agreement was not canceled by any formal act of cancellation, but was by both parties thereto considered no longer in force, for the reason that the decision of the Board of State Land Commissioners, above referred to, had rendered its performance impossible. The $80 paid by Davidson to Laack was retained by the latter, and it constituted the consideration for the quitclaim deed, although that instrument recited a consideration of $1 and other good and valuable considerations. The question arises whether these facts are sufficient in law to overcome the presumption that the land is community property.

If one marries after initiating a title, it is his separate property in all cases wherein, by the doctrine of relation, the title takes effect as of the time of the first act initiating it, as in the case of a settlement under the homestead or pre-emption laws of the United States. Harris v. Harris, 71 Cal. 314, 12 Pac. 274; Forker v. Henry, 21 Wash. 235, 57 Pac. 811; Gardner v. Burkhart, 4 Tex. Civ. App. 590, 23 S. W. 709. Property purchased by a contract before marriage but not paid for until after marriage, is also separate property. Lawson v. Ripley, 17 La. 238; Medlenka v. Downing, 59 Tex. 32; Wade's Succession, 21 La. Ann. 343. In Medlenka v. Downing, land was purchased in

1853 by one whose wife died soon after the purchase. In 1854 he married again. It was held that the payment of a portion of the purchase money soon after the second marriage would raise no presumption that the money used was the community fund of the husband and his second wife. In Wade's Succession, it was held that where an unmarried woman enters into an agreement in writing before a notary public for the purpose of purchasing real property, makes a cash payment for a portion of the price, and gives her notes for the balance, due at a future date, and she marries before the maturity of the notes, the property thus acquired will, as between the husband and wife, form a portion of her separate estate.

The case principally relied on by the appellee is Barbet v. Langlois, 5 La. Ann. 212. In that case the plaintiff and Andre Langlois intermarried in the year 1818. At the time of the marriage Langlois owned and possessed a tract of land fronting on a bayou. During the marriage he purchased from the United States, by virtue of his right of preference as a front proprietor, the lands lying in the rear of his estate, which he was allowed to purchase under the act of 1811, giving to every person in Louisiana who owned a tract of land bordering on a river, creek, bayou, or water course the right to purchase the vacant land adjacent to and back of his tract to a depth of 40 arpents. It was held that, since the right of acquisition of the adjoining lands existed in Langlois prior to the marriage, the land became his separate property although paid for during the marriage. That doctrine was affirmed in Succession of Morgan, 12 La. Ann. 153, in which it was held that, where the front tract on a river belonged to the husband before the marriage, the double concession purchased by him after the marriage under the act of Congress of June 15, 1822, which was enacted after the marriage, became the property of the husband, and that the only right of the community was to claim reimbursement of the sum paid therefor if the payment was made out of the community funds. The court, following Barbet v. Langlois, said:

"That the cause of the acquisition preceded the marriage is a matter which can hardly admit of any doubt."

But in the present case it cannot be said that the cause of the acquisition preceded the marriage, or that at the time of the marriage J. D. Davidson possessed any right to purchase the property in controversy, or had any contract for the acquisition of such a right or had taken any step back to which the title related. The agreement which he made with Laack in 1896, it would seem from the evidence, created no binding obligation upon the latter. But if, indeed, it were otherwise, the result would be the same, for that agreement had been abandoned by both the parties thereto before the marriage took place, and at the time of the marriage there was no agreement in existence.

Again, it is to be observed that that agreement did not describe or mention the property which is in controversy. If it had been carried into effect, it cannot be known that any of that property could have been acquired by Davidson. It is true that the consideration

upon which the quitclaim deed from Laack to Davidson was made had been paid some time prior to the marriage, but neither that payment nor its retention by Laack up to and after the date of the marriage created any right in Davidson as to the land involved herein, or imposed any obligation upon Laack except to repay the money, and Laack testified that he would have paid it back if he had not made the new agreement. The earliest date at which, in the history of the title, Davidson possessed any right as to the land, was January 27, 1897, the date of the quitclaim deed.

A case in point is Aken v. Jefferson, 65 Tex. 137. In that case the husband had purchased certain land before the marriage. After the marriage he compromised a suit brought against him for the land by paying half of its value. The original purchase money was his separate property. The compromise money was community property. The court ruled that if the husband acquired a good title by the first purchase or by limitation, before his marriage, all the land was his separate property; but that if he did not have title at the time of his marriage, it was all community property. In Johnson v. Johnson, 11 Cal. 200, 70 Am. Dec. 774, the husband at the time of the marriage was in possession of certain lots to which he had no title; his claim being based upon an instrument not under seal. After the marriage he purchased the lots, paying therefor from the common funds. It was held that the land was community property. While in some of the states in which the law of community property obtains, the husband may dispose of the community property, the rule is otherwise in the state of Washington, where, although the husband has the management and control of the community property, he cannot convey or incumber it unless the wife joins with him in executing the deed or the instrument of incumbrance. 1 Hill's Ann. St. & Codes, § 1400; Holyoke v. Jackson, 3 Wash. T. 239, 3 Pac. 841.

The decree is reversed, and the cause remanded, with instructions to dismiss the bill.

HUNT, District Judge (dissenting). I am constrained to dissent, and deem it proper to give my reasons briefly.

The preference right to buy the land involved in this suit. together with other lands, was in Laack prior to March 25, 1895. This preference right, together with the right of assignment thereof, was expressly conferred by the statutes of the state of Washington. Sections 2175, 2176, Ballinger's Ann. Codes & St. It was pursuant to these statutory provisions that Laack on March 25, 1895, filed application to acquire title to abutting lands, including the particular lands affected by this litigation. Thereafter, on September 9, 1896, the Board of State Land Commissioners, referring to the application of Laack, made formal finding that Laack was entitled to purchase certain lands, including these particular lots. Within a few months thereafter, Laack orally agreed to sell to James D. Davidson a right to buy part of the lands which he was entitled to purchase, and Davidson then paid him eighty dollars as a consideration. The understanding seems to have been that Laack should have the first eight shore lots to be obtained, and then Davidson should have eight,

if they were there, and if there were any still remaining they were to select lots alternately, with a view to sharing equally. They then went to the office of Mr. Bronson, Laack's counsel, and made a writing of their agreement, whereby Laack bound himself to convey portion of the lots to Davidson. The loss of this contract is unfortunate, but that a written contract of sale existed is clearly proven. There is no failure to prove a writing of sale, but lack of proof of exactly what lots were specified in the writing. But a lack of proof of description should not defeat appellee's rights, if Davidson's rights to the lots were acquired under the written contract with Laack, and provided Davidson's rights thereafter passed to appellee. The statutes of Washington prescribe that where no application for purchase was pending, sales of shore lands should be made as school and granted lands are sold. As it is not contended, however, that Davidson bought as he would have had to buy if there had been no application to purchase the lots pending, it follows that he must tie to some application for purchase, or his whole case falls. Now, in the course of events, Laack had directed the release of rights to buy certain of the lots embraced within his original application, so that when title was to be conveyed by the state, there were not as many lots to be divided between Davidson and Laack as were applied for in the application of Laack. Laack and Davidson, however, agreed on a distribution of what there was, and on January 27, 1897, Laack quitclaimed to Davidson his interest in certain parcels applied for, including the lots in question, and assigned all his rights to purchase the same from the state. Meanwhile Davidson had married on January 19, 1897. Laack never asked for, and Davidson never offered, any new consideration for the quitclaim deed. Laack, who seems to have had a high idea of the obligations he was under by his first written agreement, says that the only change between the new and old contracts was "different lots were given to Davidson," and that this was "because Davidson told me there was nothing left." The evidence is also that Laack said to Davidson that they would take what was left; and the deed was made. Laack was not very definite in his testimony as to the circumstances under which the quitclaim deed was passed. In part of his testimony he said that he and Davidson had made a new agreement, and in another part he said that the money was paid under the old agreement. The witness was apparently confused by the many questions put to him in the endeavor to elicit from him statements which would justify the conclusion that the old agreement was canceled or abandoned. Toward the close of his examination, when asked whether it was not under the "new bargain" and "new arrangement" that Davidson purchased these lots from the state, the witness replied: "Well, I will tell you. Of course we made a new bargain, but the old bargain was there, and the money was there on the old bargain; the money was right with it, so I don't know whether it was a new bargain or old bargain." And, again, when asked if he had not acted under "the old agreement," the witness said: "It was the same thing. I don't see what is the difference between the old and the new. It is all the same thing, anyhow, pretty near." Without quoting further from the testimony

of the witness himself, it is plain that his right to purchase was the only basis of Davidson's right, and I think that the most reasonable construction to be put upon his evidence, when considered with the record facts, is that the quitclaim deed to Davidson was made in fulfillment of the contract to convey, which was drawn by Mr. Bronson, and for which Davidson paid Laack the eighty dollars paid, which Laack had retained. If the parties had intended to abandon the old agreement, nothing would have been so natural as for Davidson to have paid additional money, or for Davidson to have waited and purchased for a new consideration from Laack, after the state had conveyed to Laack. But he held hard to the preference right of Laack by availing himself of his rights obtained in consideration of the money originally paid to Laack. I am therefore forced to the opinion that in the whole transaction Davidson dealt with Laack in reliance upon his right to purchase, initiated under the lost agreement, and that he received his quitclaim deed in the carrying out of that agreement.

Believing then that the rights of Davidson to the property are founded upon the first agreement, and that the subsequent deed by Laack to him was but the perfecting of such original rights, and was meant to be such by both parties, and it appearing that Davidson was a single man when these rights were initiated, the law regards the property as separate, and prescribes that title thereto took effect as of a time before community. I am in accord with the opinion of the court, laying down the doctrine of community property generally, that property acquired by either spouse where "the title or cause of the acquisition" precedes the marriage is separate and not community property; but I would not exclude this case from within the application of the rule.

The preferential right of Laack was valuable and legally assignable, and I cannot agree with the conclusion that there was an abandonment of the contract made by Laack with Davidson, assigning an interest in property, to be acquired under this preferential right.

As a result of what I have said, it should follow, in my judgment, that Davidson's rights should be held to have initiated before marriage, and though perfected after marriage were not such as were merged into community ownership, but were capable of being passed by him. I think, too, that the evidence shows that he offered the property for sale, received a fair market price therefor, and ought to be held to his contract.

OMAHA WATER CO. v. CITY OF OMAHA. SAME v. CITY OF OMAHA et al.

(Circuit Court of Appeals, Eighth Circuit. November 8, 1907.)

Nos. 2,499, 2,500.

1. CONTRACTS—CONSTRUCTION—CONTRACT BETWEEN CITY AND WATER COMPANY —ACCEPTANCE OF PERFORMANCE.

Where the ordinances and contract with a city under which a water company constructed its plant contained full specifications for the system, furnished by the city, including the source of supply, specifications for the settling basins, location and size of mains, location of fire hydrants, etc., leaving practically nothing to the discretion of the company so far as the efficiency of the system depended upon engineering problems, and the works when completed were tested and accepted by the city as in compliance with the contract, and were operated for a number of years without complaint on its part, provisions of the contract requiring the company to furnish sufficient pressure for fire protection through the hydrants, and to furnish pure water for domestic uses, must be construed in the light of such facts, and after the lapse of 25 years, during which the company has substantially complied with such requirements, it cannot be charged with violation of the contract because of objections to the quality of the water made after a controversy has arisen between the parties, nor because of a failure to maintain the required pressure, where, owing to the large extension of service pipes, that cannot be done without injury to such pipes and the plumbing in buildings supplied.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 1468.]

2. SAME—ACTION FOR CONTRACT COMPENSATION—SUBSTANTIAL PERFORMANCE.

Substantial performance of a contract by one party, coupled with retention of the benefits thereof by the other, will authorize an action by the former to recover the contract compensation, and in such case recovery may be had on an averment of full performance, though the proof falls short of showing it; the remedy of the latter being by counterclaim or by an independent action for damages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 1361, 1731.]

3. MUNICIPAL CORPORATIONS—CONTRACT OBLIGATIONS.

A municipal corporation in respect of its purely business relations as distinguished from those that are governmental is held to the same standard of just dealing that the law prescribes for private individuals.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 695.]

4. CONTRACTS—DUTY OF PERFORMANCE—DEFAULT OF OTHER PARTY.

One party to a continuing contract of mutual and dependent covenants cannot require the other to perform executory stipulations, while he persists in defaults and compels the other to seek the aid of the courts for compensation due for those he has already executed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 1207–1215.]

5. SAME.

By a contract between a city and a water company the city was required to pay the company rentals for fire hydrants on the 1st of January and July of each year, and the company was required to install additional hydrants whenever ordered by the city, no time being fixed, however, within which it should comply with such orders. From August to December of one year the council ordered the installation of 117 new hydrants, and the company by January 1st following had installed 49 of the same and in doing so laid four miles of new mains. January 1st the city made default in payment of the rentals then due, and had also made pre-

vious defaults, and by failing to provide for raising money for such rentals and by transferring the balance remaining in the fund to another fund had clearly indicated its intention not to pay the same. *Held* that, under the contract, the company was entitled to a reasonable time in which to install new hydrants when ordered, and that, so far as appeared, it had used reasonable diligence in that respect up to January 1st, that the default of the city on that date, and the previous defaults and acts indicative of the purpose of the city not to pay in the future, justified it in refusing to install the remaining number ordered, and that its action neither before nor after that date constituted a breach of the contract which precluded it from recovering the rentals due then or thereafter.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 1207–1215.]

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

See 147 Fed. 1, 77 C. C. A. 267.

R. S. Hall and Howard Mansfield (Herbert C. Lakin, on the brief), for plaintiff in error.

John Lee Webster and Carl C. Wright (Harry E. Burnam, on the brief), for defendants in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

HOOK, Circuit Judge. The Omaha Water Company brought two actions against the city of Omaha, the first for hydrant rentals for the six months ending December 31, 1904, and the other for like rentals for the six months ending June 30, 1905. They were brought shortly after the accrual of the sums sued for respectively. The water board of the city of Omaha which had recently been created a corporation by legislative act, and vested with certain powers respecting the municipal water supply, was joined as a defendant in the second action. The aggregate amount claimed was $94,240.48. It was not denied that, aside from the specific defenses in the answers, the sums sued for were due and owing. The answers of the city set forth that the contract between it and the company which was the basis of the actions required of the latter the continued performance of certain duties, and that it had failed in three material particulars: (1) To furnish ample fire protection through hydrants without the aid of hand or steam engines. (2) To furnish pure, wholesome, clear water suitable for culinary and drinking purposes. (3) To install new hydrants upon new mains as ordered by the municipal authorities. The answer in the second action also contained a counterclaim for $81,645.68 for damages for the failure of the company in the first of the particulars mentioned, it being averred that, because of the inadequate fire protection, the city had been compelled to expend that sum in the purchase and maintenance of fire engines, etc. The actions were tried together. At the conclusion of the evidence, the trial court upon motion for directed verdicts held that the city had not made out its first and second defenses, and therefore denied recovery upon the counterclaim predicated upon the matters set out in the first defense. On the other hand it held that the company had failed to install new hydrants ordered by the city, that no legal excuse therefor had been shown, and that, while in the position

of violating the contract, it could not recover upon the contract for the rentals of the hydrants it had installed. Verdicts for the defendants were directed and judgments rendered against the company on its causes of action and a judgment against the city on its counterclaim. The city acquiesced in the result, but the company prosecuted these writs of error.

Upon the theory that if the trial court should have directed the verdicts upon any ground its action should be affirmed, though it selected the wrong one, we have considered all three of the defenses of the city, and have reached the conclusion that the court was right in its decision upon the first two of them. By the contract and ordinances pursuant to which the waterworks were built in 1880–83 by predecessors in title of the water company, and in which the municipal franchise was granted, the character and style of the works and the source from which the water supply was to be obtained were definitely prescribed. The contract and ordinances left very little to the judgment and discretion of the builder, and practically nothing so far as the efficiency of the system depended upon the correct solution of engineering problems. Before the ordinances were adopted and the contract was made, a hydraulic engineer was employed by the municipal authorities to study the topography of the city and devise a plan for a system of waterworks. In May, 1880, he submitted to the city council an exhaustive report describing with much detail the results of his labors. The report and an amendment thereto were afterwards embodied in the contract, and referred to and made a part of the ordinances. The material features of the report were as follows: The water for all purposes was to be secured from the Missouri river and the point of intake where the pumping station was to be installed was designated. The character of the buildings at the pumping station and the capacity of the pumps were specified. The storage and settling reservoirs were located, their number and capacity given, and the elevations of the former above low water-mark of the river and above the various portions of the city were set forth. The main or pipe system was described in minute detail. The names of the streets in which the pipes were to be laid, the distances to be traversed, the size of the pipes in each street, and the precise location of the first 247 fire hydrants were shown. The report also contained tables showing the discharge capacity of water mains or pipes of specified diameters and lengths, and also the distances fire streams could be thrown with stated pressures at the hydrant heads through hose of different lengths, and nozzles of different diameters. The character of Missouri river water, its excellence for drinking and domestic purposes, and the ease of clarifying it were discussed. In short, the report which concluded with an itemized statement of the estimated cost furnished almost complete plans and specifications for the entire works. The distribution system was designed for both fire protection and private consumption. In other words, there was not to be a separate system of mains and pipes for each. The difficulties in depending wholly upon direct hydrant pressure for fire protection were pointed out. It was said that in a large, densely populated city it could scarcely

be considered a safe reliance; that the friction caused by the transmission of the water through an extensive pipe distribution and the depletion by daily consumption would necessitate an immense initial pressure as the city grew. It was said that the experience in many cities was that reliability upon direct hydrant service was diminished proportionately to the increase of the demand for current supply. Hydrant service as a sole reliance for fire protection depended upon one or both of two things, namely, the gravity pressure resulting from the elevation of the reservoirs and direct pressure from the pumps of the waterworks. The maximum gravity pressure was fixed by the elevation of the reservoirs, and therefore not the subject of increase, though its efficiency depended greatly upon the judicious arrangement of the pipe system and the location of the hydrants. As the city grew, this pressure was subject to great impairment by the increase of friction in the increase of the pipes and by the constant withdrawal of water by consumers. On the other hand, it was stated that direct pressure from the pumps was always more or less objectionable. The contract and ordinances required that the works should be of capacity and power to throw streams of water to specified heights from hydrants at designated points. When the works were completed in 1883, they were subjected to these tests, and were accepted by the city as complying with all requirements. In the fall of 1905, after these actions were begun, the city authorities made tests of the pressure at the hydrants, and it is contended that they disclosed that the pressure was deficient, and did not reach the contract standard. On the other hand, the company claims that it was not contemplated that the pressure specified in the contract should be maintained longer than a year after the completion of the works, also, that the last tests of the city were ex parte, without participation on the part of the company; and that it was not requested to and did not re-enforce the gravity pressure by direct pressure from the pumps. However this may be, we think that the trial court was right in holding the evidence showed that the maintenance of the pressure sought by the city would be injurious to the service pipes and the plumbing in the buildings of the city, and that, as private consumers were furnished through the same mains that afforded fire protection, it could not have been contemplated that a pressure should be maintained for one which would be destructive of the other; and this notwithstanding there was language in the contract and ordinances tending to the contrary. This seems to have been the construction voluntarily put by the city upon the contract and ordinances as early as 1885, when it purchased a fire engine and commenced the establishment of a fire department. Other engines were purchased from time to time thereafter, and by such means the pressure that was lacking at the hydrant heads was supplied by the engines on occasions of fire.

It was also claimed that the company failed to perform its obligation to furnish pure, wholesome, clear water, and therefore there could be no recovery upon the contract. No special damages were alleged to have been sustained by the city on this account, but performance by the company was asserted as a condition precedent to its re-

covery upon the contract. It is conceded that the water was taken from the source prescribed, namely, the Missouri river, and it was shown that settling basins, also prescribed, were used by the company, and were the means employed to purify and clarify the water ever since the works were installed. It may be admitted that it was a continuing duty of the company to make the water as clear and potable as was reasonably practicable, and to that end to adopt such new and approved methods as came into use from time to time, yet it appeared that but twice in more than 20 years did the municipal authorities make complaint of the character of the water that was being furnished. In 1896 the city brought suit to forfeit the franchise upon the precise grounds set up in the first and second defenses now under review, namely, insufficiency of pressure and impurity of water. In the following year the suit was determined against the city on the merits. For nearly eight years thereafter no further complaint was made. In June, 1905, near the end of the rental period covered by the second action now under review, the water board served upon the company a notice to increase the pressure and to furnish clear water. This notice was evidently a mere tactical move in the midst of controversy and litigation. It required compliance within 10 days, though manifestly if the means employed for many years, without objection, to make the water clear, had been insufficient, the adoption of new processes would have taken much more time than that allowed. Moreover, the notice was given while proceedings, commenced by the city, were on foot for the acquisition of the works under a right of purchase. The notice does not lessen the substantial accuracy of the statement that during the period covered by the actions and for years prior the city accepted the service without complaint either of the quantum of pressure or of the character of the water itself. There was a substantial performance by the company of its contract obligation to furnish clear and wholesome water coupled with retention of the benefits, and silent acquiescence on the part of the city. Even if it were true, as contended, that the company did not in full measure perform its duty, nevertheless under the facts shown it may maintain an action upon the contract to recover the accrued hydrant rentals, and the city is remitted to an affirmative assertion and proof of damages sustained. It is well settled that substantial performance of a contract by one party coupled with retention of the benefits thereof by the other will authorize an action by the former to recover the contract compensation; that in such case recovery may be had upon an averment of full performance though the proof falls short of showing it; and that the remedy of the latter is by counterclaim for his damages or by an independent action before he is sued. City of St. Charles v. Stookey (C. C. A.) 154 Fed. 772.

The remaining question arises from the failure of the company to install the additional hydrants ordered by the city. The hydrant rentals sued for were for the last six months of 1904 and the first six months of 1905. During the former period, the city ordered the company to place 117 new hydrants, to do which involved the laying of a large amount of new water mains. The company obeyed the orders to the extent of 49 hydrants and the requisite mains. On January 1,

1905, the remaining 68 hydrants had not been placed. The city asserted the failure of the company as a complete defense to the actions for rentals of hydrants previously placed and in service. The company replied, denying that it had defaulted in its duty, and asserting that the city first broke the contract by failing to make payments due and owing it, also that the orders for more hydrants were beyond the lawful authority of the city, and entailed indebtedness it had no legal power to contract. The trial court held that the failure of the company to install all the hydrants ordered, being a failure to perform a duty imposed by the contract, was without sufficient excuse, that its actions upon the contract could not be maintained, and that since it did not seek a recovery upon the quantum meruit verdicts should go for the city.

The facts pertaining to this feature of the case are as follows: The original contract of 1880 between the city and a predecessor of the company provided for the installation of 250 hydrants at designated places, and that others on new mains might thereafter be required by the city, and, when so required, should be placed and maintained by the company at an annual rental of $60 per hydrant. As the city grew, the number of hydrants put in service greatly increased, until on July 1, 1904, there were about 1,500 of them, requiring payment to the company of about $90,000 a year, payable on the 1st days of January and July. From the time the contract of 1880 was made to 1903 there was power in the city, expressly conferred by legislative act, to levy and collect taxes for the payment of the hydrant rentals. One of the ordinances incorporated in the contract provided that after 20 years the city should have the right to purchase the waterworks at an appraisal by three engineers. The Legislature of Nebraska passed an act, which was approved February 2, 1903, authorizing the city to acquire the works, creating a water board for the management thereof, and repealing every provision of law for the levy and collection of taxes for hydrant rentals. Of course, this act could not impair the obligation of the city in respect of hydrants theretofore installed. But it is, in effect, contended by the company that since the city was not required by the contract of 1880 to order the location of additional hydrants, since it might do so or not as it pleased, it was in respect of the exercise of its discretion subject to the dominant control of the Legislature; that the company had no vested contract right to have new hydrants ordered, and, if the city could say it would not order them, the Legislature could say it should not; finally, that the withdrawal from the city of the means of payment was equivalent to a prohibition against incurring the new indebtedness. We have not, however, found it necessary to determine this question.

Pursuant to the act of 1903, the mayor and council adopted an ordinance February 24, 1903, electing to purchase the waterworks. An appraiser was appointed for the city, the company appointed one, and the two chose a third. During the progress of this litigation and the causes that led to it the appraisers were engaged in the performance of their duties, an appraisement not having been finally agreed upon. When the hydrant rentals became due July 1, 1903, the city defaulted in payment, and the company had to sue for them. Like default was

made January 1, 1904, and again the company sued. Judgments were confessed, and, after mandamus proceedings to compel the city to levy taxes to pay them, they were paid in February, 1904. The rentals due July 1, 1904, were paid a few days later. The mayor of the city in an official communication to the city council said that the moneys with which the payment was made were raised under the mandatory order of a court. This left a small balance in the water fund. The city levied no tax to pay future hydrant rentals, though necessarily provision for funds should have been made in advance. Not only this, but in November, 1904, while the city council was ordering many new hydrants, the balance in the water fund, then amounting to about $10,000, was by the order of that body transferred to the general fund. As ordinances ordering the company to install new hydrants were passed, the mayor vetoed them, calling attention in one instance to the fact that there was no money in the water fund, no money in sight, and no provision of law for the levy of taxes, also that it would cost the company over $27,000 to install the 55 hydrants required by the ordinances then in question. The ordinances were passed over the mayor's veto.

We pass the question whether the company could lawfully be required to make extensive additions and improvements after the election of the city to purchase and while proceedings for its consummation were under way, or whether the duty of the company in such case was merely to preserve the integrity of the works and efficiently operate them as they stood when the election was made. There was substantial evidence that the city did not intend voluntarily to pay the rentals either of the old hydrants or of the new ones it ordered. It had recently defaulted in payments, and had compelled the company to engage in litigation. It diverted the balance in the fund specially collected for the purpose, and it made no definite provision, as the law required, for the indebtedness that was accruing from month to month. When the rentals for the last half of 1904 fell due, the city did not pay them, and the company brought one of these actions for their recovery. We do not think the contention that the city was justified in refusing to pay because the remaining hydrants had not been placed can be sustained. The contract prescribed no time within which new hydrants should be installed on new mains after being ordered by the city, and the company was therefore entitled to a reasonable time for performance of its duty in that particular. Whether the company committed a breach of its contract by failing to install all of the hydrants involves a consideration of the number ordered, and what would be a reasonable time in view of the season of the year. There were 117 ordered between July 12 and December 20, 1904. Of these the company installed 49, and to do so laid about four miles of new mains before January 1, 1905. We find no evidence that this was not a reasonable performance by the company of its duty. It cannot be assumed that the company broke its contract merely because on January 1, 1905, 68 of the hydrants ordered during the preceding six months had not yet been placed. No contract or ordinance imposed upon the company the duty to place all hydrants ordered within any fixed and limited time. The company not appearing to have been in

default on January 1, 1905, the city should have paid the rentals due on that day, but it did not do so and the first of the actions now under review was brought. The failures of the city to pay were not unimportant in their relation to the contract as an entirety, nor can they be ascribed to mere chance or oversight. There was manifested a purpose to withhold performance of stipulations that were material to the interests of the company.

A municipal corporation, in respect of its purely business relations as distinguished from those that are governmental, is held to the same standard of just dealing that the law prescribes for private individuals. One party to a continuing contract of mutual and dependent covenants cannot require the other to perform executory stipulations while he persists in defaults and compels the other to seek the aid of the courts for compensation due for those he has already executed. Construction Co. v. Seymour, 91 U. S. 646, 23 L. Ed. 341; Cort v. Ambergate, etc., Ry., 17 Q. B. 127.

When the company declined to install the remaining hydrants after the series of defaults in payment by the city, it did not thereby wholly discard the contract and deprive itself of its right of action upon the contract for the rentals previously earned. When there is part performance, an action upon the contract will lie if absolute performance has been dispensed with. District of Columbia v. Camden Iron Works, 181 U. S. 453, 21 Sup. Ct. 680, 45 L. Ed. 948.

The judgments are reversed, and the causes remanded for a new trial.

HARRIS & CO. v. CHIPMAN.

CHIPMAN v. HARRIS & CO.

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

Nos. 2,343, 2,344.

1. BANKS AND BANKING—WRONGFUL DEPOSIT BY AGENT—LIABILITY OF BANK TO PRINCIPAL.

A banker, who knowingly permitted an agent to deposit money of his principal to his own account and mingle the same with his own funds in violation of his contract, which required the deposit to be in the name of his principal, if for that reason chargeable with liability to the principal, in the absence of fraud or conspiracy, is accountable only for losses resulting directly from such wrongful deposit, such as for sums applied by the agent to his own use, and not for losses resulting from the use of the money by the agent as contemplated by the contract of agency.

2. SAME—ACCOUNTING.

In such case the banker cannot be held to account for a sum originally advanced by the principal to the agent to be used for the purposes of the agency, and so deposited by the agent to his own credit, but which was afterwards treated by the principal as a loan to the agent, and for which his note was taken, nor for a sum lent by the banker to the agent personally, and which, having been used for agency purposes, was repaid by the principal with knowledge of the facts.

3. EVIDENCE—ADMISSIONS IN PLEADING.

Where plaintiff sued defendant, a banker, for losses sustained through an agent, on the ground that defendant knowingly permitted the agent

to deposit money advanced to him by plaintiff to his own credit in violation of his contract, an allegation in the answer that plaintiff had previously sued the agent for such losses and recovered judgment for a much smaller sum than that demanded from defendant was not an admission by defendant of his liability for the amount of such judgment, to which he was not a party.

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

Ralph W. Breckenridge and Charles J. Greene (Andrew L. Hoppaugh, on the brief), for plaintiff.

Waldemar Van Cott (George Sutherland and E. M. Allison, Jr., on the brief), for defendant.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

HOOK, Circuit Judge. Harris & Co., incorporated, sued James Chipman to compel him to account for $75,967 as a trustee ex maleficio, and secured a decree for $2,368.45 and some accrued interest. Both parties appealed. Harris & Co. was engaged in the live stock business, with main offices at South Omaha, Neb. James Chipman was a banker, and lived in Utah. The controversy arose out of the operations of John F. and Richard W. Bradshaw, who were engaged in buying and selling live stock in Utah and neighboring states under the firm name of Bradshaw Bros. Harris & Co. employed the Bradshaws as agents to purchase sheep and cattle for it and with its funds, and intrusted to them from time to time upwards of $150,000, of which $75,967 went into Chipman's bank to the credit of "Bradshaw Bros." Harris & Co. sustained losses and sought to recover of Chipman upon three grounds: (1) That Chipman and the Bradshaws conspired to defraud Harris & Co. of its moneys, and its loss was the result of the conspiracy. (2) That before employing the Bradshaws, Harris & Co. sought of Chipman information regarding their financial responsibility, and that Chipman intentionally gave them a false standing. (3) That the contract between the Bradshaws and Harris & Co. required the former to keep the moneys advanced as the moneys of Harris & Co. and in its name in bank, and that the stock purchased should be purchased in the name of Harris & Co.; that Chipman knew this, but that nevertheless he allowed the Bradshaws to deposit the moneys received from Harris & Co. to the credit of their own account in his bank, to intermingle them with their own funds, and to check indiscriminately upon the account for their own expenditures and business operations, as well as for those in which Harris & Co. was interested. This, it is claimed, was equivalent to a conversion by Chipman of $75,967 of the funds of Harris & Co.

It will serve no useful purpose to give in detail the evidence appearing in the voluminous record touching the first and second of the grounds enumerated. In our opinion they were wholly unsubstantiated. There is no evidence from which it can fairly be inferred that Chipman and the Bradshaws engaged in any conspiracy to defraud Harris & Co. of its money or property. An analysis of the Bradshaw Bros.' account in Chipman's bank, whereby the credit items coming from Harris & Co. are segregated from those in which it had

no interest, and whereby the disposition of them is accurately traced, disproves all claim that the bank dishonestly profited by the admixture of the funds; and, as full opportunity to so profit presented itself and was not availed of, it is highly improbable that a purpose to do so was ever entertained. Neither does the evidence justify the assertion that the recommendation given by Chipman as to the Bradshaws' responsibility was not in good faith. Their previous dealings were sufficient to justify it, and a continued extension of credit by Chipman to the Bradshaws personally is persuasive evidence of his sincerity. That the Bradshaws were indebted to Chipman at the time is without material significance, in view of the fact that there was stock on hand, undisposed of, representing unclosed transactions between them.

The third ground upon which recovery is sought requires a more extended statement of our conclusions. As already observed, $75,967 belonging to Harris & Co., instead of being kept separately in its name, went to the credit of Bradshaw Bros. and became mixed with funds of that firm in Chipman's bank. The trial court in reaching its decree charged Chipman with that entire amount and credited him with the sums actually drawn out and used by the Bradshaws in paying for sheep and cattle purchased for Harris & Co., and also with two other items debited to the account before Chipman learned of the contract restriction upon the keeping of the funds. The accounting on this basis resulted in the balance of $2,368.45 specified in the decree. The decree proceeded upon the theory that Chipman became a participant in a misapplication of the funds from the time he became aware of the contract. We may here observe that the court credited Chipman with no disbursement on account of sheep or cattle purchases which the evidence did not show was made. Harris & Co. now contend that Chipman should not be credited with sums withdrawn and actually applied to purchases on its account, but only with the net results of each particular transaction. In other words, they say in substance that, if any resale by Harris & Co. of stock purchased resulted in a loss to it, that loss should have been charged to Chipman. Of course, this contention is inadmissible in view of what we have said concerning the freedom of Chipman from the imputation of fraud and conspiracy. If the fact were that all of the money intrusted to the Bradshaws under the contract had been actually used for the purposes of the contract, the mere deposit to the wrong account would have resulted in no damage. If the moneys were checked out of the bank and used for a proper purpose, Chipman could not be held responsible for errors of business judgment of Harris & Co. or its agents, nor for losses sustained by subsequent improper conduct of the latter. Such losses have no proximate connection with the keeping of the funds in the wrong account. Also, if part of the moneys went out of the bank to the personal use of the Bradshaws, the recovery could not be for more than the amount so misapplied.

Assuming that the theory adopted by the trial court was right, generally speaking, there were three items charged to Chipman which in our opinion should have been eliminated from the accounting. For some time prior to June 26, 1899, Harris & Co. and the Bradshaws

had extensive transactions in cattle, some of which were cleared through Chipman's bank. On the day mentioned the contract was entered into whereby the character of their relations was changed, and the Bradshaws agreed to act as agents and to handle the moneys advanced them as the moneys of their employer. The Bradshaws and Chipman had also had extensive dealings in sheep and cattle, and the former maintained a personal account in the bank of the latter. On July 6, 1899, Bradshaw Bros. drew a draft upon Harris & Co. for $5,000, deposited it with Chipman, and received credit for the amount in their personal account. On July 10th a similar transaction occurred. These drafts were for the first moneys advanced by Harris & Co. under the contract; but when Chipman credited them to the Bradshaw Bros. account he was not aware of the limitation imposed upon their authority. Counsel for Chipman say in this state of affairs that he had no power to compel the Bradshaws to open a new account in the name of Harris & Co. and to transfer the items in question to its credit, that the relation of banker and customer gave him no authority to do so without their assent, that under the circumstances it was not his duty to exercise a supervisory control over their disposition of the funds in their personal account, and, had he attempted to do so, they had the right to close their account and transfer their business elsewhere (Mr. Justice White in Randolph v. Allen, 19 C. C. A. 353, 73 Fed. 23). We need not consider whether the doctrine of the case cited applies to the facts before us, for we are clearly of the opinion that the character of the transaction, so far as it relates to the two drafts, was subsequently changed by mutual agreement from that of an advancement under the contract to that of a time loan. Some differences which arose between the parties to the contract as to the right construction of it were adjusted at Omaha, Neb., between the 21st and 25th of July, 1899. Prior to July 22d, the Bradshaws stood charged upon the books of Harris & Co. with the two $5,000 drafts. On that day they gave Harris & Co. a 90-day note for $10,000, bearing 10 per cent. interest and dated July 8th, which was the average of the dates of the two drafts. It was credited to the Bradshaws, and in effect eliminated the drafts from the account. On August 10, 1899, Harris & Co. rendered to the Bradshaws a statement of their dealings to that date. It showed the note to the credit of the Bradshaws, and also that there was a balance of $766.29 due them. A few days later Harris & Co. paid this balance, though the note unmatured was still outstanding. Under these circumstances the moneys represented by the two drafts should not have been treated at the accounting as the moneys of Harris & Co. wrongfully converted by the Bradshaws with Chipman's participation.

As to the other item: About the middle of July, 1899, J. F. Bradshaw was in Idaho buying sheep for Harris & Co. He had made some purchases, and in doing so had checked on the firm account with Chipman for about $7,000. He was about to make another purchase, which called for nearly $20,000. Some telegraphic correspondence then ensued between Bradshaw and Harris & Co. The latter demanded that the bill of lading of the sheep should be attached to the draft for the purchase price. Bradshaw contended this was not ac-

cording to the contract. The seller of the sheep refused to take such a draft. Thereupon Bradshaw, after advising Harris & Co. that he would have to procure the money elsewhere, wired to Chipman and procured a credit of $20,000 and completed the purchase. The sheep came to $18,275.70. They were shipped by the Bradshaws as their own sheep to Nebraska, where they were taken off of their hands by Harris & Co., who authorized a draft upon them for $20,000 to repay Chipman. The claim that this draft should be charged to Chipman in the accounting between him and Harris & Co. as for moneys misappropriated is foreclosed by the admission of the president of the latter that it was to repay Chipman and that he did not think that the proceeds of it went to the credit of any account of Harris & Co. in Chipman's bank.

It was claimed by the Bradshaws that the provision of the contract that the moneys furnished by Harris & Co. should be kept in an account in its name had been abrogated. Chipman was so informed by one of the Bradshaws, and we think he was warranted in believing so in view of a letter of date July 25, 1899, sent by Harris & Co. to Chipman's bank, the fact that it was arranged that thereafter an agent of Harris & Co. should accompany the Bradshaws and be present at the receiving and payment for stock purchased, and the further fact that at no time thereafter, as long as the relations between the Bradshaws and Harris & Co. continued, did the latter ever ask for or receive from Chipman a statement of any account in his bank in which its moneys were deposited. There is the further fact that Harris & Co. knew that about half of the moneys advanced to the Bradshaws did not go through Chipman's bank. These considerations apply to those items placed to the credit of Bradshaw Bros.' account after the date of the letter above referred to. But if the two drafts for $5,000 each and the one for $20,000, with the corresponding disbursements from the proceeds, are eliminated from the accounting, as we think they should be, nothing would be left for recovery.

Before answering, Chipman interposed a plea in bar, wherein he claimed that Harris & Co., being a Nebraska corporation, was not authorized to do business in Utah, because it had not complied with the laws of the latter state. Issue was taken, and upon a trial the plea was falsified. It is now contended by counsel that the trial court should not have allowed Chipman to answer, but should at once have entered a decree for Harris & Co. As to this we need say no more than that the action of the trial court was not challenged in the assignment of errors, as required by the rules.

In answer to the charge in the bill that Harris & Co. had lost $75,000 by the Bradshaws' acts and Chipman's participation, the latter averred that Harris & Co. had previously sued the Bradshaws for what they owed it, and had recovered judgment for $25,446.64, and, further, that no other sum was due from the Bradshaws, and that the judgment was for the same moneys that Chipman was then being sued for. Counsel claim that this was an admission of an indebtedness, conclusive upon Chipman, and that Harris & Co. were entitled to a decree accordingly. But Chipman was not a party to that action, and was not bound by the judgment. The averments in the answer were

by way of evidence that Harris & Co. was consciously overstating its claim. Moreover, if it were true that the losses of that company were of moneys that went through Chipman's bank, it would not follow that Chipman was responsible for them. Under the contract the Bradshaws guaranteed the financial success of the ventures in which the moneys of Harris & Co. were invested; but, as we have seen, the liability of Chipman stands upon a narrower ground. The Bradshaws' liability for the outcome of the moneys that went through the bank of Chipman and the latter's right conduct and good faith are not inconsistent.

The decree of the Circuit Court is reversed, with direction to enter a decree dismissing the bill upon the merits

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In re WILLIAMS' ESTATE.

ANHEUSER-BUSCH BREWING ASS'N v. HARRISON (two cases).

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

No. 1,339.

1. BANKRUPTCY—APPELLATE JURISDICTION—MODE OF REVIEW.
   Where an appeal taken in a bankruptcy proceeding under Bankr. Act July 1, 1898, c. 541, § 25a, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432], involves only a question of law, it may be treated by the appellate court as a petition to revise.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 929.]

2. SAME—LIENS—ENFORCEMENT IN BANKRUPTCY COURT—COSTS CHARGEABLE TO PROCEEDS.
   The proceeds of property of a bankrupt, covered by valid liens and sold by the court of bankruptcy by request or consent of the lien holders, who subsequently filed their claims in such court, which were allowed as secured claims in an amount in excess of such proceeds, are properly chargeable with the costs of such court appropriate to the enforcement of the liens, but not with general costs of the administration of the estate, such as the general fees of the trustee and his attorney, or for the services of a receiver in carrying on the business of the bankrupt and his attorney, or for the expenses and losses of such business.

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

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

Willett & Willett, W. H. Chickering, Warren Gregory, and Allen L. Chickering, for petitioner and appellant.

John H. Allen, for respondent and appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. The question involved in these proceedings is one of law and arises upon the record. The appellant and petitioner, being uncertain in respect to the proper procedure, sought and was by the court below allowed an appeal from the ruling of that court complained of, and also filed therein a petition for the revision

of the same order. The two proceedings were by this court consolidated, and were heard and submitted on one record. If it be conceded that the petition for revision was filed in the wrong court, the appeal, involving as it does only a question of law, may be treated as a petition for revision. In re Abraham, 93 Fed. 767, 783, 784, 35 C. C. A. 592; In re Blair, 106 Fed. 662, 665, 45 C. C. A. 530; In re Jacobs, 99 Fed. 539, 39 C. C. A. 647.

In brief, these, among other, facts, are made to appear by the original and supplemental records filed herein: On the 16th day of September, 1905, Williams, who was at the time conducting a saloon and café in the city of Seattle, was adjudged a bankrupt. The matter was duly referred to one of the referees in bankruptcy, and one Murray was appointed receiver of the bankrupt's estate. The receiver qualified as such and proceeded to carry on the business in much the same way that the bankrupt did—at a loss. On the 11th of October, 1905, the Anheuser-Busch Brewing Association and Pacific & Puget Sound Bottling Works, corporations, presented to the referee a petition setting forth various loans made by the association to Williams, secured by certain chattel mortgages executed by him upon the contents of his saloon and café, and by the assignment of the leases of the premises and insurance policies thereon, and also by the bottling company, under certain agreements with Williams, all of which were specifically set forth in the petition, together with the alleged failure of the trustee in bankruptcy to pay certain installments of the rent due, and the alleged payment by the brewing association of the premium upon the insurance and its payment of the rent in order to protect the premises, and setting forth the maturity of the respective loans so secured by the mortgages, assignments, and other agreements set forth in the petition, and alleging that all of the assets of the bankrupt's estate, except such as were held by other preferred creditors, were contained in the saloon and café in the city of Seattle known as "The Pike," which place had been running and doing a good business up to the time of Williams' adjudication in bankruptcy; that it had acquired a valuable good will, which was becoming less every day the place remained closed; that it was impracticable to conduct the place under the trustee in bankruptcy, for the reason that the stock that would have to be sold by him was covered by the chattel mortgages, and that the place could not be made to pay under a trustee in any event; that a purchaser could be had at the time, if the place could be sold immediately, who would pay what the place was reasonably worth, and more than it would bring if such sale were postponed; that arrangements could probably be made between the petitioners and any purchaser who might take the place at the time that would make it possible for the purchaser to pay something for the equity of the estate over and above all claims of the petitioners; that the general creditors had little or no interest in the estate, and could get nothing on their amounts if a sale should be postponed; that the property was depreciating in value, and would continue to depreciate so long as it remained unsold; that the assets were uninsured, and there was imminent danger of total loss; that it would be necessary, if the sale should be postponed, to have the property insured and extra expense

incurred therefor; that the trustee had no funds with which to pay the rent of said premises, and the owners thereof were threatening to declare a forfeiture of the leases; that an emergency existed such as would justify the court in ordering an immediate sale of "The Pike," together with the stock therein and its license, without the usual notice to creditors; that the petitioners were entitled to have their securities foreclosed and the proceeds applied to the payment of their preferred claims, as set forth in the petition, and insisted on the same being done. The petitioners therefore prayed an order of the District Court directing the trustee to sell all of the assets of the estate covered by the alleged securities at public or private sale, as the court might deem best; that such sale be made absolute and free from any and all liens or incumbrances; that the court declare that an emergency existed and order the trustee to make such sale forthwith; that the proceeds thereof be paid into court to be applied to the preferred liens of the petitioners as set forth in the petition; that they be declared joint creditors as to one-half of the $3,000 loan set forth in the petition, which was not secured to either of them; that the trustee be required to keep the place known as "The Pike" and all assets therein covered by insurance, and in a sum equal to its value, pending the sale, and that the rights of the petitioners therein be properly protected; that a proper order be made concerning the payment of the rent of the premises; that no property covered by the mortgages set out in the petition be removed by the trustee from "The Pike" pending the sale, and that attorney's fees, as provided for in the notes and mortgages set out by the petitioners, be allowed.

On the 17th day of October, 1905, the trustee of the bankrupt estate also petitioned the court for a sale of all of the property of the bankrupt at private sale, subject to the amount due upon the debt secured by the $5,000 mortgage held by the brewing association and free and clear of any lien or claim of the $4,000 mortgage held by that association. The petition of the trustee stated that he had filed in court an inventory of all of the property of the bankrupt, except the two leases held by him of a portion of the Eitel Building, and that those leasehold interests and the personal property mentioned in the inventory constituted all of the property of the bankrupt, or in which he had any interest, that had come to the knowledge of the trustee. The petition of the trustee also contained the following:

"That the bankrupt was in the saloon business; that he had a place on First avenue, which he had disposed of just prior to the filing of the petition in bankruptcy herein; that his other place was on Pike street, in the Eitel Building, and was known as 'The Pike'; that upon disposing of the First Avenue place the bankrupt retained therefrom a large amount of stock and property, and the same has at all times been kept separate and apart from the property at 'The Pike'; that some of the creditors hold claims solely for goods sold at First avenue and others hold claims solely for goods sold at 'The Pike.' Therefore your trustee thought it for the best interests of all parties concerned to keep said property separate, and has inventoried the same separately as appears from said inventory. That upon the property at 'The Pike' and upon the leasehold interests there appears to be two mortgages, both held by the Anheuser-Busch Brewing Association, one being to secure a supposed claim of five thousand dollars ($5,000.00), and the other for a supposed claim of four thousand dollars ($4,000.00); that so far as your trustee has been

able to ascertain thus far the $5,000 mortgage is a valid and subsisting lien for such amount as may be due upon the debt secured thereby, but your trustee is informed and believes that there is some question as to the validity of the lien of the $4,000 mortgage, and creditors holding claims aggregating large amounts have requested your trustee to contest the lien and validity of the $4,000 mortgage."

The petitions for the sale came on for hearing before the District Court on the 17th day of October, 1905, and resulted in the making of an order for such sale in accordance with the agreement of the respective parties, which agreement is recited in the order of the court as follows:

"It was agreed by all parties concerned that the interests of the bankrupt's estate and of all of his creditors would be best subserved and protected if an immediate sale of all the property of the said bankrupt now in possession and under the control of the trustee be had, and it appearing that the costs and expenses of keeping said property are great and are accumulating rapidly, and that unless an immediate sale of all of the property be had the property will be greatly reduced by reason of such expense and there being no objection made to an immediate sale thereof, all parties consenting thereto; and it further appearing to the court that it will be for the best interests of the bankrupt, of his estate, and of all of his creditors, and of all parties concerned if said sale be made at private sale on sealed bids, and if (that) the said property and all thereof be sold free and clear of any supposed claim of mortgage or mortgages held by the Anheuser-Busch Brewing Association or by the Puget Sound Bottling Works, or by both or either of them, and the said Anheuser-Busch Brewing Association and the said Puget Sound Bottling Works and all parties present consenting that such be done, and further consenting that in making said sale the property inventoried as being the property at the First Avenue place be sold separate and apart, and the proceeds derived therefrom be kept separate and apart from that obtained from the sale of the leasehold interests and the property inventoried as being 'The Pike' stock."

The order of sale concluded with this paragraph:

"It is hereby further ordered that the proceeds of said sale shall be held by the court subject to the same preferences, liens, and mortgages as now exist against the property aforesaid."

On the 30th day of October, 1905, the property was sold, according to the certificate of the referee, "for about $10,000." The certificate of the referee further states that the—

"amount of alleged claims of said Anheuser-Busch Brewing Association filed herein, ten thousand four hundred and twenty-five dollars ($10,425); amount of secured claims of the said Anheuser-Busch Brewing Association, which now stand as allowed and uncontested, eleven hundred and twenty-five dollars ($1,125); that as to the remainder of said alleged claims a contest is pending which has not been heard; that it is claimed on the part of said Anheuser-Busch Brewing Association that their lien attached to all of the property which has been sold, as above stated; that a meeting of creditors was regularly called for the purpose of passing upon the accounts of the receiver and trustee and the adjustment of expenses of administration, and continued from time to time until the date of the order sought to be reviewed, on which date and at the meeting so adjourned the said order was made and the items allowed as shown by the minutes of the meeting or order sought to be reviewed and authorized to be paid out of the funds in the hands of the trustee derived from the sale above set forth."

At one of those meetings, held January 9, 1906, the following proceedings were had:

"The report and account of receiver was approved and allowed, and the unpaid expenses of administration incurred by the receiver directed to be paid as follows:

Seattle-Tacoma Power Co., light and steam heat	$ 30 04
Haswell & Co., one ton coal	6 25
Pacific & P. S. Bottling Co., soda water and beer	44 25
T. H. Wagner, band	133 58
J. N. Damon, services	10 00
J. Garrick, services	3 00
	$227 12

"Upon consideration of the matter of fees of the receiver and his attorneys, the trustee was ordered, directed, and empowered to pay same as follows:

Wm. H. Murray, services as receiver	$ 70 00
McClure & McClure, attorneys for receiver	100 00
	$170 00

"The Pacific & Puget Sound Bottling Company and the Anheuser-Busch Brewing Association, by their said attorneys, excepted to same allowances, and all and every part thereof, and the exception was allowed by the court."

At another of the meetings, held March 2, 1906, the following proceedings were had:

"At a meeting of the creditors regularly called for the purpose of making allowances in said estate on account of fees of the attorneys and the trustee and paying the expenses of the said trusteeship, regularly adjourned to this date, it is now here ordered that the said trustee, A. H. Harrison, pay as follows, to wit:

The garbage man	$ 2 00
Appraisers for the liquors	10 00
Appraisers for the other goods	10 00
Times Printing Co., printing notice of sale	6 00
Post-Intelligencer, printing notice of sale	3 30
The Star, printing notice of sale	3 00
Watchman for said goods	60 00

"That he pay his attorneys, Allen, Allen & Stratton, the sum of three hundred ($300.00) dollars as temporary allowance on account of their fees herein, and himself as a temporary allowance as trustee herein the sum of two hundred and one ($201.00) dollars. To all of which said orders, and to each thereof, the Anheuser-Busch Brewing Association, by its attorneys, Willett & Willett, excepts. Exception noted."

By the supplemental record filed herein on the 21st day of October, 1907, it appears that the receiver subsequently allowed all of the secured claims as made by the brewing association and that his action in that regard was by the court below approved on the 23d day of August, 1907, those secured claims being specified in the order of the court below as follows:

"One claim for $4,100 and interest, one claim for $4,000 and interest, one claim for $1,500 and interest, and one claim for $825 and interest, be and the same hereby are allowed as secured claims, as alleged in the proofs of said claims on file. One unsecured claim of said claimant for $3,000, having been heretofore allowed by the receiver and not included in the petition for review, is not affected by this order."

It thus appears that all of the property of the bankrupt was covered by the brewing association's liens, and that the total amount realized from the sale of the property upon which the petitioner had valid liens was less than the amount of those liens. The real question for

decision, therefore, is to what extent, if at all, funds realized by the sale of property upon which a creditor of a bankrupt has valid liens, proof of which secured claims is filed in the bankruptcy court after the making of such sale, and when the proceeds of the sale are insufficient to pay the liens in full, may be used to pay the general costs of administration of the bankrupt's estate.

It is true that the record in the case shows that the lienholder voluntarily came into the bankruptcy court and asked that the property covered by its liens be sold by that court. The bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]), in terms declares that none of its provisions shall affect a valid lien. But the estate of a bankrupt is interested in any excess that may exist over and above the amount of such liens. So it was held by this court in the case entitled In re Jersey Island Packing Co., 138 Fed. 625, 627, 71 C. C. A. 75, 2 L. R. A. (N. S.) 560, that "property on which there is a mortgage or other lien passes to the trustee in bankruptcy, and is therefore in the custody of the court of bankruptcy," and, further, in the same case, that "the provision of the bankruptcy act that such a lien shall not be affected by the bankruptcy proceedings has reference only to the validity of the lienholder's contract. It does not have reference to his remedy to enforce his rights. The remedy may be altered without impairing the obligation of his contract, so long as an equally efficient and adequate remedy is substituted."

By coming into the bankruptcy court, therefore, the holder of a valid lien upon the estate of a bankrupt comes into an appropriate place and into a court amply able to enforce and protect his rights. By doing so the lienholder waives none of his rights. The enforcement of his lien in another court would entail upon the proceeds of the property upon which the lien exists the payment of the appropriate court costs; and so, in the enforcement of such lien in a court of bankruptcy, the proceeds of the property of the bankrupt upon which such lien exists is properly chargeable with the costs of such court appropriate to such enforcement, but with no other or further costs. They are not chargeable with the general costs of the administration of the bankrupt's estate, such as the services of a receiver in carrying on the business of the bankrupt, the expenses and losses of such business, the fees of the attorney for such receiver, the general fees of the trustee or those of his attorney. If so, the valid lien upon the estate of the bankrupt, which the bankruptcy act expressly declares shall be unaffected by any of its provisions, might very readily be destroyed, as it would unquestionably be, should such costs equal or exceed the proceeds in cases like the present, where the aggregate amount of the valid liens exceeds the proceeds of the entire estate of the bankrupt. In line with this ruling are the cases of Stewart v. Platt, 101 U. S. 731, 739, 25 L. Ed. 816; In re Utt, 105 Fed. 754, 45 C. C. A. 32; In re Prince & Walter (D. C.) 131 Fed. 546, 552; In re Bourlier Cornice & Roofing Co. (D. C.) 133 Fed. 958, 963; Loveland on Bankruptcy (3d Ed.) p. 775. See, also, Collier on Bankruptcy (6th Ed.) p. 497.

The cause is remanded to the court below, with directions to modify the order in accordance with the views above expressed.

UNITED STATES v. SCRUGGS, VANDERVOORT & BARNEY DRY GOODS CO.

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

No. 2,521 (1,793).

1. CUSTOMS DUTIES—CLASSIFICATION—SILK AND WOOL GOODS.
In Tariff Act July 24, 1897, c. 11, § 1, Schedule L, par. 391, 30 Stat. 187 [U. S. Comp. St. 1901, p. 1670], the proviso that "all manufacturers, of which wool is a component material, shall be classified and assessed for duty as manufactures of wool," is not limited to the goods containing silk which are the subject of said paragraph, but extends to all silk and wool goods; and dress goods in chief value of silk, but in part of wool, become by virtue of this proviso subject to the duty on wool goods, rather than that on silks.

2. STATUTES—PROVISO—EXTENT OF SCOPE.
The scope of a proviso is to be determined by its words and import, rather than by its connection with subdivision of the statute; and a proviso contained in a paragraph of a tariff act may be construed to relate to other provisions also.

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

For decision below, see 147 Fed. 888, in which the Circuit Court affirmed a decision of the Board of United States General Appraisers, which had reversed the assessment of duty by the surveyor of customs at the port of St. Louis.

Edward P. Johnson (Henry W. Blodgett, on the brief), for appellant.

Everit Brown (Ralph Pierson, on the brief), for appellee.

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

ADAMS, Circuit Judge. This case involves the correct classification for duty under Tariff Act July 24, 1897, c. 11, § 1, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1626], of certain imported merchandise consisting of woven fabrics in the piece; the same being women's and childern's dress goods composed of silk and wool. The question is whether the merchandise comes within the purview of paragraph 369 of "Schedule K, Wool and Manufactures of Wool," or paragraph 387 of "Schedule L, Silks and Silk Goods." The collector of customs at St. Louis classified it under the wool schedule. The Board of General Appraisers, on protest filed and due procedure taken by the importers, disapproved of that classification, and held that the goods should be classified under paragraph 387 of the silk schedule. An appeal was taken to the court below from the decision of the Board of General Appraisers. It affirmed the decision of the Board, and ordered the collector to reliquidate the entry accordingly. From that decision an appeal was prosecuted to this court.

Paragraph 369 imposes upon women's and children's dress goods and other goods composed wholly or in part of wool a certain duty. Paragraph 387 imposes upon woven fabrics in the piece of certain

designated weight and containing more than 30 per cent. in weight of silk a certain duty less in the aggregate than that provided for in paragraph 369. The important and distinguishing feature of the goods embraced in the two paragraphs is that those embraced in paragraph 369 must be composed in part at least of wool, while those embraced in paragraph 387 must be composed in part at least of silk. The weight and other specific features of the goods described in the two are unimportant for our present purpose. Paragraph 369 is more general in its description, and undoubtedly covers the merchandise in question. Paragraph 387 is more specific in description, but not so much so as to exclude the merchandise in question. In other words, the importation comes well within the narrow and more specific description of that paragraph. A large part of the argument before us was on the contention that because of the limitation which narrowed the classification in paragraph 387, and because the importation in question falls within that narrow description, it should, under the authority of Hartranft v. Meyer, 135 U. S. 237, 10 Sup. Ct. 751, 34 L. Ed. 110, and other cases cited, be classified for duty under that paragraph. But in the view we take of other provisions of the act our conclusion is not at all dependent upon that consideration.

The silk schedule is embraced within paragraphs 384 to 391, both inclusive, of the act. 30 Stat. 185 et seq. It includes both unmanufactured and manufactured silk; silk in the process of conversion, from raw silk to singles, trams, organize, sewing silk, twist, floss and silk threads or yarns of every kind, and silk in manufactured fabrics of different weights and proportions. Whatever other materials may be in the manufactures, silk must be a component part of each; and in many instances it is the component material of chief value. Paragraph 391, which closes the schedule so far as the enumeration of articles subject to duty is concerned, is in the following words:

"All manufactures of silk, or of which silk is the component material of chief value, including such as have India rubber as a component material, not specially provided for in this act, and all Jacquard figured goods in the piece, made on looms, of which silk is the component material of chief value, dyed in the yarn, and containing two or more colors in the filling, fifty per centum ad valorem: Provided, that all manufactures, of which wool is a component material shall be classified and assessed for duty as manufactures of wool."

The government contends that the proviso just quoted is determinative of this case; that its clear intent and purpose is to relegate every manufacture of silk of which wool forms a component material of any value at once to the wool schedule, and to make it subject to a duty under the appropriate paragraph of that schedule. The importer, on the other hand, contends that the proviso in question is limited in its operation to section 391. Which of these contentions is correct? The answer to this question depends upon the legislative intent, as manifested by the whole act. The proviso in question in the language employed is broad enough to fairly cover the imported articles in question, of which silk and wool are component materials; and Congress is presumed to intend what the language employed fairly imports. Brun v. Mann, 151 Fed. 145, 147, 80 C. C. A. 513.

But it is contended that it relates only to those manufactures refer-

red to in the paragraph (391) of which it is a part, and has no relation to manufactures which afford the subject-matter of some of the other immediately preceding paragraphs of the silk schedule, such as the woven fabrics in the piece, the handkerchiefs or mufflers, etc., found in 387 and 388, respectively. We cannot agree to this contention. The proviso is found at the end of the silk schedule, after an enumeration of many manufactured articles composed in whole or in part of silk, including woven fabrics in the piece. Congress was dealing with manufactures of silk generally. Its mind was dwelling on that subject, and we have no doubt that the word "manufactures," employed in the proviso, refers to any and all manufactures of silk specified in the schedule then under consideration. The contention that, if the proviso is given operation beyond the confines of the particular paragraph in which it appears, it cannot be stopped by the limits of the silk schedule, but must operate throughout the entire act on all the schedules, and would create interminable confusion, is not sound or persuasive. See cases infra. It fails to regard the subject on which the legislative mind was dwelling. General language is often employed in treating of a given subject, and in its interpretation is necessarily and rationally limited to that subject.

But it is said that there is a well-settled rule that a proviso is to be construed with reference to the immediately preceding parts of the clause to which it is attached, and limits only the passage to which it is appended. We do not think there is any mechanical limitation of that kind. Endlich, in his work on the Interpretation of Statutes, invoked by counsel for the importer as his authority, in section 185 lays down the rule that a reasonable operation must be given to the proviso consistent with the principal object of the act; and in section 186 he says:

"The question whether a proviso * * * restrains or operates upon the immediately preceding provisions only of the statute, or whether it must be taken to extend in whole or in part to all the preceding matters contained in the statute, must depend * * * upon its words and import, and not upon the division into sections that may be made for convenience of reference in the printed copies of the statute."

In United States v. Babbitt, 1 Black, 55, 61, 17 L. Ed. 94, the Supreme Court had under consideration a proviso to an act. It was confronted with the same argument as was made before us. It was answered thus:

"We are of the opinion that the proviso referred to is not limited in its effect to the section where it is found, but that it was affirmed by Congress as an independent proposition, and applies alike to all officers in this class."

The conclusion that the proviso was intended to operate upon the whole silk schedule is in harmony with and in execution of the general legislative intent disclosed in the wool schedule, namely, that all imported articles containing any part of wool should be taxed in a certain way. To avoid the possibility of silk articles containing some part of wool being taxed under the silk schedule, instead of under the general wool schedule, the proviso, in our opinion, was enacted. District (and later Circuit) Judge Coxe, in Arnold v. United States

(C. C.) 113 Fed. 1004, had under consideration a similar proviso in the silk schedule of the customs act of 1890 (26 Stat. 567), and reached the conclusion which we now reach. The cases of United States v. Slazenger (C. C.) 113 Fed. 524, and United States v. Walsh (C. C. A.) 154 Fed. 770, recently decided, which are relied on by the importer's counsel, are, in our opinion, not in conflict with the conclusion we have reached, but rather in full harmony with it. District (and later Circuit) Judge Townsend in the first-mentioned case had under consideration the proper classification of tennis balls made of wool and rubber, of which silk did not constitute a component material. He held that the proviso in question did not extend to such a manufacture. The question there in judgment was whether the proviso was so independent of all the provisions of the silk schedule as to apply to any and all manufactures of which wool was a component material whether they contain silk or not. He held it was not. The Walsh Case raised the same question. Putnam, Circuit Judge, in delivering the opinion of the Circuit Court of Appeals said:

"This case turns on the construction of the proviso which concludes paragraph 391 of the customs act of 1897. * * * The United States maintained that this paragraph is to be construed to cover all manufactures of which wool is a component material to the same extent as though the paragraph was a separate section of the act in question, and disconnected from the position which it occupies in 'Schedule L, Silks and Silk Goods.' * * * A full statement of the circumstances is found in the opinion of the learned judge of the Circuit Court, to which we refer for any additional information required, and in which we concur."

The imported merchandise there in judgment was classified under "Schedule J, Flax, Hemp, Jute and Manufactures of." It contained no silk, and, of course, had no place in "Schedule L, Silks and Silk Goods," and the Circuit Court of Appeals held that the proviso was not such an independent section as to cover any manufactures whether containing silk or not, but that it must be read as a proviso to the silk schedule only. Judge Lowell, who presided at the trial in the Circuit Court, held that the proviso relates only to goods composed of wool and silk, and does not require that fabrics in chief value of flax should be removed from their appropriate schedule, and, because of the proviso, be made dutiable under the wool schedule, merely because they were composed in part of wool. He said:

"Whatever interpretation be given to the proviso of paragraph 391, I cannot think that it was intended to control the language of all the other paragraphs of the tariff act, and to make many of them nugatory, as is contended by the government. Probably the proviso will be construed best in accordance with the intention of Congress if it be limited to fabrics part of silk and part of wool. T. D. 27,921."

Judge Putnam, after expressing his concurrence in Judge Lowell's opinion, said:

"In view of the sweeping results explained by the learned judge of the Circuit Court which would follow from not applying the general rule to the present case, we must hold that it does apply, and that the words 'all manufactures,' found in the proviso, should be held to be only a repetition of the same words with which the paragraph begins, and as having absolute relation thereto."

These opinions, instead of making against the contention of the government in this case, make strongly for it. We fully agree with them. The words "all manufactures," in the proviso, mean all manufactures of silk embraced within the silk schedule of which wool is a component material.

The Circuit Court erred in affirming the decision of the Board of General Appraisers. It should have classified the merchandise in question as "manufactures of wool," as was done by the collector of customs.

The decree of the Circuit Court is reversed, and the cause remanded, with directions to proceed in accordance with this opinion.

ALPENA PORTLAND CEMENT CO. v. BACKUS.

(Circuit Court of Appeals, Eighth Circuit. November 8, 1907.)

No. 2,515.

1. SALES—CONSTRUCTION OF CONTRACT FOR FUTURE DELIVERY—RIGHT OF RESCISSION FOR BREACH.

Defendant sold and agreed to deliver to plaintiff 100,000 barrels of cement, and plaintiff to receive and pay for the same. One-half was to be delivered the first year, and the remainder the following year, at either one of two ports on Lake Superior, at plaintiff's option. The contract contained the following provision: "Shipments to be made [by defendant] after navigation opens and continue throughout the season in 5,000 to 10,000 barrel lots as required by said second party [plaintiff]; shipments to be made on or before October 15th of each year. Said second party shall give 30 days' notice of shipments to be made, in advance." *Held*, that such provision contemplated shipments by water in 5,000 to 10,000 barrel lots throughout the season; that the provision for notice was for the benefit of both parties, and required plaintiff to give 30 days' notice in advance of each of such shipments, especially in view of another provision for tests of the cement requiring 28 days' time, and the taking of samples for such tests at the factory "approximately on the date that notice of shipment is given"; that the failure of plaintiff to order and give such notices covering the quantity deliverable the first season at least 30 days before October 15th was equivalent to a failure to take and receive, and justified defendant in rescinding the contract.

2. SAME—WAIVER OF BREACH.

Defendant was not estopped to rescind because of letters, written after plaintiff's default, expressing a desire for performance during the following season, where plaintiff did not accede, but insisted on immediate further shipments without the notice to which defendant was entitled.

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

Joseph H. Cobb (James D. Shearer and Martin Monaghan, on the brief), for plaintiff in error.

C. J. Rockwood (Harris Richardson and Harold C. Kerr, on the brief), for defendant in error.

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

HOOK, Circuit Judge. Backus sued the cement company to recover damages for breach of contract in failing to deliver cement it

had sold him. He recovered judgment. The case turned upon the construction of the writing which fixed the relations of the parties, and the company claims that the trial court erred in that particular. By a written contract made in January, 1905, the company which was engaged in manufacturing cement at Alpena, Mich., sold and agreed to deliver 100,000 barrels of its product, and Backus purchased and agreed to receive and pay for the same. It was provided that one-half of the number of barrels of cement should be delivered in 1905, and the other half in 1906, and that the deliveries should be made at either Duluth, Minn., or Port Arthur, Ontario, at the option of Backus. The contract contained this provision:

"Shipments to be made [by the company] after navigation opens and continue throughout the season in 5,000 to 10,000 barrel lots as required by said second party [Backus]; shipments to be made on or before October 15th of each year. Said second party shall give 30 days' notice of shipments to be made, in advance."

In the latter part of July, 1905, 5,000 barrels were ordered and duly delivered; and at the request of Backus and with consent of the company the delivery of 25,000 barrels was postponed from 1905 to the season of 1906. This left 20,000 barrels to be delivered in 1905 and 75,000 barrels in the following year. In June and July, 1905, the company wrote Backus for orders for shipment of partial lots, assuming the contract was to be filled in installments, and stating that it was hampered as to storage capacity and was being pressed by boats in which transportation had been engaged. Backus, without denying the correctness of the assumption, gave reasons connected with his business for failing to give the orders. Backus gave no orders for shipment, excepting as mentioned, until September 26, 1905, when he ordered 5,000 barrels to be shipped to Duluth, one of the points named in the contract. The company refused to ship, claiming Backus had delayed too long—that it was entitled to 30 days' notice in advance, which could not then be given before October 15th, the close of the season for shipment. In November, 1905, the company notified Backus it had declared the contract forfeited for the reason that he had committed a breach of it and that it would make no more deliveries. Shortly afterwards Backus brought the action. There was much correspondence between the parties, but all the facts material to our inquiry have been stated. We may add, however, that a letter from Backus, dated September 14, 1905, is not regarded as containing a direction for shipment under the contract.

Did the contract contemplate fulfillment by continuous shipments throughout the season of 5,000 to 10,000 barrel lots, and that Backus should give 30 days' notice in advance of each shipment ordered? If so, Backus was in default in September when he pressed the company for delivery. On the other hand, was the provision for shipments in the lots specified for the benefit and convenience of Backus alone, and was the company obligated to ship on October 15th, without previous notice, all of the 1905 cement not previously sent on orders from Backus? If so, Backus was not in default. The trial court adopted the latter view, and so instructed the jury that, after disposing of an-

other question not necessary to mention, nothing was left them but the assessment of damages. The court held that the words "in advance," at the end of the above excerpt from the contract, applied to the shipments and not to the notice, and as so construed it provided that 30 days' notice should be given of advance shipments required; that is to say, only such shipments as were ordered to be made prior to October 15th.

It was contemplated that the company should make shipments by water, and the period therefor was limited from the opening of navigation to the 15th of October. It could not have been required to ship earlier or later than the time mentioned. Two places of delivery were specified, the option of selection being with Backus; but he could not require delivery elsewhere. It was provided that shipments were to be made, after navigation opened and to continue throughout the season, in 5,000 to 10,000 barrel lots as required by Backus. There is reason for saying that the option of Backus in this respect was as to the size of the shipments within the limits specified, and perhaps, also, as to just when they should be made, but not whether there should be shipments at all before the end of the season. Otherwise, why should it have been provided that the shipments were to continue throughout the season? If Backus alone had control of the matter of time, he could have required continuous shipments without definite provision to that effect in the contract. Backus was required to "give 30 days' notice of shipments to be made, in advance." It can as well be said that the notice was to be in advance of shipments required as that it applied only to advance shipments. We do not think the structure of the sentence makes the latter construction preferable. It is said that "in advance" would be unnecessary to the notice as it would be implied—that 30 days' notice means 30 days' notice in advance. It is common practice, however, in drafting instruments providing for notice, to say that it shall be given before or prior to or in advance of the day or happening to which it relates. It is certain that some sort of notice by Backus was always and in every event necessary; otherwise, the company would not know whether to ship to Duluth or to Port Arthur. The warehousing of such a large quantity of cement at the factory after it was manufactured and the securing of space in vessels for water carriage furnish substantial arguments that the provision for shipments from time to time during the season and notice was in part at least for the benefit of the company.

But there are other provisions which we think make the construction altogether clear. It was provided in the contract that the cement should "bear the test and specifications according to the specifications hereto attached," and it was provided in the specifications attached that the cement should be sampled for test at the factory "approximately on the date that notice of shipment is given" by Backus. The sampling for a test was not the test itself. The sampling was but a preliminary step. The test came afterwards. The samples were to be tested either at the laboratory of the company, or at the office of Backus' engineer in New York City, or elsewhere, as he might elect. To test the soundness of the cement, and to determine whether it would

show distortion or cracks in use, it was specified that a pat of neat cement mixed with water should be allowed to set and then be placed in fresh water for 28 days. It appeared from the evidence that different lots of cement manufactured by a single concern were not always of uniform, unvarying quality. After being ground, the cement had to be cured and ripened to fit it for the market, and weather conditions had an effect upon the duration of that process. It was important to the company that the quality of the cement, which was required to be of a fixed standard, should be determined before it was shipped to distant points; otherwise, it might be rejected there and left upon its hands. So it was provided that the cement should be sampled, approximately on the day that notice of shipment was given, and this, being 30 days in advance, opportunity was given for the tests required. That in the course of performance of the contract Backus might waive the tests does not affect the relevance of these provisions to the construction of the language employed. Notice in advance was of benefit to the company, and it was indispensable to compliance with positive requirements of the contract. We think that the company was entitled to 30 days' notice in advance of every shipment ordered. This was the position it consistently maintained in its correspondence, and it was not until September that Backus took exception to it. When he did so, it appeared from his letter that the market for cement had stiffened.

A failure to order and give notice as required by the contract was equivalent to a failure to take and receive. The contract was a sale and purchase of 100,000 barrels of cement. It was not divisible into separate contracts for lots of 5,000 to 10,000 barrels each, or for 25,000 barrels in 1905 and 75,000 in 1906. The failure of Backus to take and receive 20,000 barrels in 1905 in the manner and during the time prescribed by the contract set the company free, and it seasonably asserted its right.

In Norrington v. Wright, 115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 366, a contract was made for the sale and delivery at Philadelphia of 5,000 tons of iron rails to be shipped from European ports at the rate of "about 1,000 tons" per month, beginning February; shipments to be completed not later than July. The seller shipped 400 tons in February and 885 tons in March, when about the time of the receipt of the March shipments the purchaser rescinded the contract for failure to deliver in the quantity contracted for. The court, after observing that time is of essence in the contracts of merchants, held that:

"A statement descriptive of the subject-matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty, in the sense in which that term is used in insurance and maritime law; that is to say, a condition precedent, upon the failure or nonperformance of which the party aggrieved may repudiate the whole contract."

It was also said:

"The plaintiff, instead of shipping about 1,000 tons in February and about 1,000 tons in March, as stipulated in contract, shipped only 400 tons in February and 885 tons in March. His failure to fulfill the contract on his part in respect of these first two installments justified the defendants in rescinding the whole contract, provided they distinctly and seasonably asserted the right of rescission."

See, also, Cleveland Rolling Mills v. Rhodes, 121 U. S. 255, 7 Sup. Ct. 882, 30 L. Ed. 920.

In Hoare v. Rennie, 5 H. & N. 19, a leading case, cited with approval in Norrington v. Wright, there was a contract whereby plaintiffs sold to defendants for delivery in London 6,660 tons of iron to be shipped from Sweden in the months of June, July, August, and September in about equal portions each month. In June plaintiffs shipped but a small quantity, and the defendants refused to receive the same, and also gave notice that they refused to receive the residue of the iron. It was held that the plaintiffs could not recover.

In Honck v. Muller, 7 Q. B. D. 92, there was a contract for the sale of 2,000 tons of pig iron to be delivered "in November, or equally over November, December, and January next." The purchaser failed to take any iron in November, but demanded delivery of one-third in December and one-third in January. It was held that the seller was justified in rescinding the contract. This case is also cited with approval in Norrington v. Wright, while Mersey Co. v. Naylor, 9 App. Cas. 434, decided by the House of Lords was distinguished. This latter case and those following its doctrine are relied on by counsel for Backus in the case at bar. The rule of Norrington v. Wright has been applied many times by our courts, national and state.

It is contended that by expressions in letters commencing with one written September 18, 1905, the company waived the right to declare the contract at an end. It does appear that at first the company was averse to canceling the contract, meaning in its entirety, especially in view of the basis of cancellation demanded by Backus a few days previous. Shortly afterwards it expressed a desire to keep the contract alive for the deliveries of 1906; but Backus, who had already defaulted, did not accept or act upon the suggestion. Then was the time for adjustment; but his position was wholly antagonistic. He insisted upon immediate further shipments, without the notice upon which alone the company was called upon to make them, and threatened to buy in the open market for its account. While he was in that attitude the company asserted its right to full rescission. It had not precluded itself from doing so.

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

LEE v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. November 5, 1907.)

No. 1,306.

1. CRIMINAL LAW—PLEA OF MISNOMER—TIME FOR FILING.

A defendant cannot interpose a plea of misnomer after having challenged the sufficiency of the indictment by a motion to quash.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 643.]

2. SAME—WAIVER OF OBJECTIONS.

Objection to the overruling or striking out of a plea of misnomer is waived by the subsequent filing of a demurrer to the indictment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 644; vol. 27, Indictment and Information, § 634.]

8. INDICTMENT—DUPLICITY—POST OFFICE—MAILING UNMAILABLE MATTER—SUFFICIENCY OF INDICTMENT.

An indictment under Rev. St. § 3893, as amended by Act Sept. 26, 1888, c. 1039, § 2, 25 Stat. 496 [U. S. Comp. St. 1901, p. 2658], charging the defendant with having mailed a letter giving information where and how, and of whom and by what means, articles and things designed and intended "for the prevention of conception and for the procuring of abortion" might be obtained, does not charge two offenses.

[Ed. Note.—Nonmailable matter, see note to Timmons v. United States, 30 C. C. A. 79.]

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

Louis P. Boardman and Wm. H. H. Hart, for plaintiff in error.

Robt. T. Devlin, U. S. Atty., and Benj. L. McKinley, Asst. U. S. Atty.

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

ROSS, Circuit Judge. The indictment in this case was against "B. Brooks Lee, alias R. Brooke Sterling, whose true name is to the grand jurors aforesaid unknown." It charged that person with willfully, knowingly, and feloniously depositing at a certain stated time in the post office at San Francisco, for mailing and delivery, a certain letter inclosed in a sealed envelope, upon which the postage was prepaid, addressed to Miss Jennie Meredith, Goshen, Ind., R. R. 8, which letter was in these words and figures:

"Telephone South 946. Office Hours: 10 a. m. to 12 m., 2 to 5 and 7 to 8 p. m. R. Brooke Sterling, M. D., Specialist for the Diseases of Women, 1140 Market Street.

"San Francisco, Jan. 9th, 1905.

"Jennie Meredith, R. R. 8, Goshen, Ind.—Dear Miss: In answer to yours of the 2d inst. will say that upon receipt of ten ($10.00) dollars from you I will send per express necessary treatment with full instructions.

"Respectfully, R. Brooke Sterling, M. D., per L."

The indictment further charged that the letter so deposited "then and there gave information where and how, and of whom, and by what means, divers articles and things designed and intended for the prevention of conception and for the procuring of abortion might be obtained," contrary to the provisions of section 3893 of the Revised Statutes, as amended by Act Cong. Sept. 26, 1888, c. 1039, § 2, 25 Stat. 496 [U. S. Comp. St. 1901, p. 2658]. On the 1st day of April succeeding the finding of the indictment a motion to quash it on various grounds was filed in the court below, entitled, "The United States of America, Plaintiff, v. B. Brooks Lee, Defendant," the opening clause of which motion is as follows:

"Now comes the defendant above named, by Louis P. Boardman, his attorney, and objects to the indictment in the above-entitled action, and moves the court to quash, set aside, and dismiss said indictment, upon the following grounds"

—and specifying various grounds, among others, that the indictment charges two offenses in one count. The motion to quash was over-

ruled by the court, after which, to wit, on the 19th day of April, 18 days after the motion was made, the defendant filed what he denominated a "Plea of Misnomer," and which is as follows:

"Benjamin Brooks Lee, who is indicted by the name of B. Brooks Lee, alias 'R. Brooke Sterling,' in his own proper person now comes into court, and, having heard the said indictment read, says that he was named by the name of Benjamin Brooks Lee, to wit, at the city of Columbia, in the state of South Carolina, and by the Christian name of Benjamin Brooks, and has also, since his naming, been called and known by the name of Benjamin Brooks Lee; without this, that he, the said Benjamin Brooks Lee, is not now, nor at any time hitherto, has been called or known by the Christian name of B. Brooks, or by the said alias name of 'R. Brooke Sterling,' as by the said indictment is alleged, and that this, the said Benjamin Brooks Lee is ready to verify. Wherefore, he prays judgment of the said indictment and that the same may be quashed, and that he be permitted to go hence without day."

On motion of the government's attorney this plea was stricken from the files, but after a demurrer thereto interposed by the government had been overruled. Subsequent to the striking out of the plea the plaintiff in error interposed a demurrer to the indictment, and substantially on the same grounds that were stated in his motion to quash, which demurrer was also overruled by the court. The plea was properly stricken out, first, because, after having challenged the sufficiency of the indictment by a motion to quash it, it was too late for the defendant to interpose a plea of misnomer. Grimes v. State, 105 Ala. 86, 17 South. 184; State v. Winstrand, 37 Iowa, 110; Ellis v. State, 25 Fla. 702, 6 South. 768. In the next place, the defendant by subsequently filing his demurrer to the indictment waived his plea of misnomer. Haley v. State, 63 Ala. 89. Lastly, the plea interposed shows upon its face that it was not in substance and legal effect a plea of misnomer.

Upon the merits of the case but little need be said. The indictment does not charge two offenses. The charge relates to but a single letter, alleged to have contained prohibited matter and to have been deposited by the plaintiff in error in the mail for transmission therein. We cannot at all agree with counsel for the plaintiff in error that the letter counted on by the government was innocent on its face. On the contrary, the plain inference to be drawn from its wording and caption was that charged in the indictment.

The judgment is affirmed.

PRICE v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. November 5, 1907.)

No. 1,429.

1. CRIMINAL LAW—PLEA OF FORMER ACQUITTAL.

The facts averred in a plea in bar *held* not to sustain the defense of former acquittal, where it did not appear that defendant was tried for the same offense or one included therein.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 668–671.]

2. ASSAULT—CRIMINAL OFFENSES—ASSAULT WITH DANGEROUS WEAPON.
The mere pointing of an unloaded pistol at another does not constitute the crime of assault with a dangerous weapon.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assault and Battery, §§ 80, 81.]

3. SAME—CRIMINAL ASSAULT—POINTING PISTOL AT ANOTHER.
One who, within shooting distance of another, points at him a pistol apparently loaded, and believed to be loaded by the person at whom it is pointed, commits a criminal assault, although the pistol is not in fact loaded.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assault and Battery, §§ 80, 81.]

Appeal from United States Court for China, and Upon Return to Mandate of United States Circuit Court of Appeals.

Bert Schlesinger, for appellant.
Robert T. Devlin, U. S. Atty.

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

DE HAVEN, District Judge. The defendant was charged by information, filed in the United States Court for China, with the crime of assault with a dangerous weapon, was tried, convicted, and sentenced to imprisonment for the term of six months in the jail of the American Consul at Shanghai. The case is before us on an appeal by the defendant from this judgment.

1. The court did not err in overruling the defendant's "plea in bar," in which he alleged facts in support of a plea of former acquittal of the same offense by the United States Consular Court at Shanghai. In overruling this plea, the judge of the court below, said:

"From the allegation of the plea it is evident that the accused was not placed on trial on a valid information, since it appears that the information contained three distinct charges, in no one of which was defendant charged with assault.

"The Consul General has no jurisdiction of the offense charged in the information on which the accused is now on trial. If he had any jurisdiction at all, it was to hold a preliminary examination with view to holding the accused for trial by a higher court. It appears from the allegations of the complaint (plea in bar?) that the Consul General exercised only this jurisdiction. The proceedings before him, therefore, cannot be pleaded in bar to this action."

We cannot say from the record before us that the court erred in its construction of defendant's plea, and the exhibits attached thereto showing the proceedings before the Consul General at Shanghai. The allegation that, after hearing the testimony in the proceeding relied on as a bar, the Consular Court "dismissed all the charges against the defendant and discharged defendant therefrom, and at the same time served upon the defendant new charges," upon which he was held to answer before the United States Court for China, is not an averment that the defendant was in that proceeding tried upon the present charge, or of any offense included therein, and adjudged not guilty by the Consular Court, and is entirely consistent with the conclusion that that court did not in the proceeding before it determine the guilt or innocence of the defendant, but, after hearing evi-

dence, required a new complaint to be filed, charging him with an assault with a deadly weapon, and held him to answer for that offense before the United States Court for China.

2. The court found, and there is evidence to justify the finding, that the defendant at the time and place stated in the information, while engaged in an angry altercation with the complaining witness, without justification, and within shooting distance, drew a revolver and pointed it toward the witness in a threatening manner, putting him in such fear that he got under a table for safety. The court also found, and, indeed, the fact is undisputed, that the pistol was unloaded, but this was not known to the complaining witness. We think, upon the facts stated, the judgment of the court, convicting the defendant of the offense of an assault with a dangerous weapon, cannot be sustained. In order to constitute that offense, a dangerous weapon must be used in making the assault. The use of a dangerous weapon is what distinguishes the crime of an assault with a dangerous weapon from a simple assault. A dangerous weapon "is one likely to produce death or great bodily injury." U. S. v. Williams (C. C.) 2 Fed. 64. Or perhaps it is more accurately described as a weapon which in the manner in which it is used or attempted to be used may endanger life or inflict great bodily harm. And it is perfectly clear that an unloaded pistol, when used in the manner shown by the evidence in this case, is not, in fact, a dangerous weapon. If the defendant had struck or attempted to strike with it, the question whether it was or was not a dangerous weapon in the manner used, or attempted to be used, would be one of fact; but the courts quite uniformly hold as a matter of law that an unloaded pistol, when there is no attempt to use it otherwise than by pointing it in a threatening manner at another, is not a dangerous weapon.

But, while the evidence does not show that the defendant committed the crime of an assault with a dangerous weapon, it is yet sufficient to prove him guilty of the minor offense of assault. It is true, as contended by counsel for appellant, that it has been adjudged in many cases that pointing an unloaded pistol at another accompanied by a threat to shoot, does not constitute an assault. This was so held in Klein v. State, 9 Ind. App. 161, 36 N. E. 763, 53 Am. St. Rep. 354; Chapman v. State, 78 Ala. 463, 56 Am. Rep. 42, and People v. Sylva, 143 Cal. 62, 76 Pac. 814, relied upon by defendant, and other cases may be cited to the same effect. The cases from Indiana and California are based upon a statute in force in each of these states, defining an assault as "an unlawful attempt coupled with a present ability to commit a violent injury upon the person of another." Chapman v. State, 78 Ala. 463, 56 Am. Rep. 42, does not rest upon any statute, but lays down the broad rule "that there can be no criminal assault without a present intention, as well as present ability, of using some violence against the person of another." We do not concur in this statement of the law, and in our opinion the true rule is stated by Mr. Bishop in his work on Criminal Law (volume 2 [3d Ed.] § 53), in the following language:

"There is no need for the party assailed to be put in actual peril, if only a well-founded apprehension is created; for his suffering is the same in the one

case as in the other, and the breach of the public peace is the same. Therefore, if within shooting distance one menacingly points at another with a gun, apparently loaded, not loaded in fact, he commits an assault the same as if it were loaded. There must in such a case be some power actual or apparent, of doing bodily harm; but apparent power is sufficient."

This view is sustained by many cases, only two of which will be cited: Commonwealth v. White, 110 Mass. 407; Beach v. Hancock, 27 N. H. 223, 59 Am. Dec. 373. In Commonwealth v. White, the defendant had been convicted of an assault. The trial court instructed the jury:

"That if the defendant, within shooting distance, menacingly pointed at Harrington a gun, which Harrington had reasonable cause to believe was loaded, and Harrington was actually put in fear of immediate bodily injury therefrom, and the circumstances of the case were such as ordinarily to induce such fear in the mind of a reasonable man, that then an assault was committed, whether the gun was in fact loaded or not."

In sustaining this instruction, the Supreme Court of Massachusetts said:

"It is not the secret intent of the assaulting party, nor the undisclosed fact of his ability or inability to commit a battery, that is material; but what his conduct and the attending circumstances denote at the time to the party assaulted. If to him they indicate an attack, he is justified in resorting to defensive action. The same rule applies to the proof necessary to sustain a criminal complaint for an assault. It is the outward demonstration that constitutes the mischief which is punished as a breach of the peace."

In Beach v. Hancock, 27 N. H. 223, 59 Am. Dec. 373, the action was trespass for an assault. It appears from the statement of facts that:

"The evidence tended to show that the defendant snapped the gun twice at the plaintiff, and that the plaintiff did not know whether the gun was loaded or not, and that, in fact, the gun was not loaded."

The court ruled that the pointing of a gun, in an angry and threatening manner, at a person three or four rods distant, who was ignorant whether the gun was loaded or not, was an assault, though it should appear that the gun was not loaded. In upholding this instruction the Supreme Court of New Hampshire, thus forcibly states the rule, which justified it:

"We have a right to live in society without being put in fear of personal harm. But it must be a reasonable fear of which we complain. And it surely is not unreasonable for a person to entertain a fear of personal injury when a pistol is pointed at him in a threatening manner, when, for aught he knows, it may be loaded, and may occasion his immediate death. The business of the world could not be carried on with comfort if such things could be done with impunity."

Our conclusion is that when the court gave credit to the testimony of the witnesses for the prosecution, as it did, and also found from the evidence offered by defendant that the pistol was unloaded, it should have found the defendant guilty of a simple assault.

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

EAGLE IRON CO. v. COLYAR (two cases)

(Circuit Court of Appeals, Fifth Circuit. November 18, 1907.)

Nos. 1,736, 1,739.

1. CORPORATIONS—ELECTION OF DIRECTORS—VALIDITY.
The stockholders of a corporation present at a regular annual meeting duly called by the secretary, although not a majority of all the stockholders, may legally elect directors, and such directors have power to institute and prosecute a suit in the name of the corporation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 1216.]

2. SAME—SUIT BY CORPORATION—RIGHT TO CONTROL.
A board of directors regularly elected by a majority of the stockholders of a corporation has power to control a pending suit instituted in a federal court on behalf of the corporation by a former board; but, where it asks a dismissal of such suit, minority stockholders, at whose instance it was commenced and who desire its prosecution, should be given leave to file a supplemental bill setting up the facts, and to continue the suit in their own right as stockholders and at their own expense on a proper compliance with equity rule 94.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 791.]

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

Petition for Mandamus to the Circuit Court of the United States for the Northern District of Alabama.

B. P. Crum, for appellant.
W. A. Gunter, for petitioner.
J. B. Martin, for appellee.

Before PARDEE and SHELBY, Circuit Judges, and BURNS, District Judge.

PER CURIAM. The first-entitled case is an appeal in a suit in equity brought in the name of the Eagle Iron Company against its former president; charging mismanagement and conversion of the company property, and praying for restitution and an accounting. On a hearing, the Circuit Court dismissed the bill because it was not brought with sufficient authorization of the company, in that the persons claiming to be president and directors of the company and directing the suit were not legally chosen by the stockholders nor legally authorized to control the corporation. The court, however, allowed said parties this appeal in the name of the company.

The second entitled case is by petition brought in this court in the name of the corporation by counsel claiming to represent the minority stockholders, praying a mandamus to require the Circuit Court to reinstate the first-mentioned suit and proceed to judgment (and as suggested by counsel) under the direction of the minority stockholders and counsel of their selection.

It seems that at the regular annual meeting of the company held in April, 1906, a minority only of the stockholders of the company attended and participated in the election of the directors who author-

ized the institution of the first suit, and that at the next annual meeting, occurring after the suit was dismissed and the appeal was taken, a majority of the stockholders attended and elected the present board of directors, which board authorizes and requests the dismissal of the appeal pending in this court, and also the mandamus case, and counsel authorized by the present board and as representing the Eagle Iron Company, appellant in No. 1,736, and the Eagle Iron Company, petitioner in No. 1,739, now move to dismiss both of said cases.

We conclude as follows:

1. The stockholders of the Eagle Iron Company present at the regular annual meeting in April, 1906, duly called by the secretary, although not a majority of all the stockholders, could legally elect directors.

2. The directors so elected could legally direct suit No. 1,736 to be prosecuted in the Circuit Court, and after dismissal could legally prosecute an appeal in the name of the Eagle Iron Company.

3. The suit having been brought pursuant to such direction, the majority of the stockholders could, at a subsequent regularly called annual meeting in April, 1907, elect other directors, and the new board, on assuming control, could direct and control the further prosecution of the aforesaid suit.

4. But, when dismissal of such suit is moved for by the new board representing the majority stockholders, the minority stockholders, who first elected directors and brought the suit in the name of the company, should be permitted to file a supplemental bill stating the facts which occurred subsequent to the filing of the bill as to the control of the corporation and proposed dismissal of the suit, and praying for the relief sought by the original bill; and on such supplemental bill the court should grant leave to the minority stockholders to further prosecute the suit at their own expense, the same as if the suit had been originally instituted by them as stockholders suing in the name and right of the company.

It follows that the motion made in this court October 28, 1907, on the day the case was set down for argument to dismiss the appeal, should be overruled, and the case should be remanded and reinstated on the docket of the Circuit Court, with leave to renew the motion to dismiss the cause in the Circuit Court, which motion, if made, should be granted, unless within a reasonable time, with leave of the court, a supplemental bill as above indicated, and complying with the ninety-fourth equity rule, except as to the last paragraph thereof, shall be filed by the minority stockholders who are interested in the further prosecution of the suit; the costs of appeal to be paid by the Eagle Iron Company.

The petition for a mandamus, No. 1,739, should be dismissed at the costs of the parties (other than the Eagle Iron Company) who filed the same.

And it is so ordered.

HESSIAN v. PATTEN et al.

(Circuit Court of Appeals, Eighth Circuit. October 21, 1907.)

No. 2,503.

APPEAL AND ERROR—REVIEW—QUESTIONS CONSIDERED.

A question not put in issue by the pleadings, nor covered by the decree of the court below, and the determination of which was not necessary to the decision made, will not be determined by the appellate court, although the trial court may have made a finding thereon.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3331, 3341.]

On motion for rehearing. Denied.

For former opinion, see 154 Fed. 829.

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

SANBORN, Circuit Judge. A petition for a rehearing or for a modification of the opinion in this case, so that it may indicate the status of the claim made by William H. Patten to a homestead in his life estate in the lot and store building which he conveyed to Mrs. Taylor, has been submitted. The purpose and the prayer of the bill were that the deed from Patten to Mrs. Taylor, whereby he reserved his life estate and conveyed the remainder to her, which was made on February 15, 1902, should be adjudged fraudulent and void against the creditors of his estate in bankruptcy, and against the complainant, their trustee. The bill did not mention his claim for a homestead, nor did it seek any relief against it. The answer was that the deed assailed was valid, and the prayer of the defendants was that the relief sought by the complainant should be denied, that the deed should be declared valid, and that they should have general relief. They did not pray for any adjudication or affirmance of any homestead claim of William H. Patten. To this answer the complainant filed a general replication. The defendants filed no cross-bill to establish or obtain an adjudication of Patten's claim to the homestead. There was, it is true, an averment in the answer that on October 23, 1903, Patten moved into the store building, that he occupied the lot on which it stood as his homestead, and that he had then and subsequently claimed it as such. The judge who heard the case below filed findings of fact and conclusions of law in which he declared that Patten occupied and claimed the property as a homestead, and that he had a valid homestead in it, before the proceedings in bankruptcy were instituted; but they were never carried forward to, nor embodied in, the decree which determined the suit, nor was an adjudication of the homestead issue necessary to the decree that was rendered. That decree was that the bill be dismissed, and that the defendants recover their costs, and it contained no other adjudication. The result is that the question whether or not Patten had a homestead in his life estate in this property was not presented for adjudication by proper pleadings, it was not adjudicated in the court below, it was not presented to this court for review, nor was it here decided.

The proceedings in this suit do not render that question res adjudicata, and the motion for a rehearing, or for a modification of the opinion, is denied.

SCHROEDER v. UNITED STATES.

ENGELHARD v. SAME.

(Circuit Court of Appeals, Second Circuit. November 8, 1907.)

Nos. 76, 77 (4,242, 4,243).

CUSTOMS DUTIES—CLASSIFICATION—FLINT TILES—SPECIFIC DESIGNATION.

Of the provisions in Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 88, 30 Stat. 155 [U. S. Comp. St. 1901, p. 1632], (1) for "tiles, plain unglazed, one color, exceeding two square inches in size," and (2) for "tiles * * * semi-vitrified, flint," etc., the latter is more specific; and tiles embraced in both descriptions are dutiable under the latter.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Customs Duties, § 43.]

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

These are appeals by Rudolph Schroeder and Charles Engelhard from a decision of the Circuit Court, affirming decisions of the Board of United States General Appraisers, which had affirmed the assessment of duty by the collector of customs at the port of New York. The opinion rendered in the Circuit Court is as follows:

HOUGH, District Judge. No importance can be attached to the use of the word "vitrous" by the witnesses. They evidently regard the word as synonymous with "vitrified." The very matter here litigated seems to have been considered in G. A. 4,281 (T. D. 20,127) very shortly after the present tariff act went into effect. Tiles of the same kind as are now under consideration were also investigated in G. A. 3,704 (T. D. 17,656) shortly before the passage of the act of 1897. Comparing these two decisions with the testimony in this case, I am convinced that the articles in question were, prior to 1897, known as "flint tiles," and were inserted in the act of 1897 by their trade designation. I think therefore that the sort of tile shown by the illustrative Exhibit A (November 8, 1906) was properly classified as a flint tile. I am in some doubt as to whether said Exhibit A is semi-vitrified, but the testimony on that head is not sufficiently strong to disturb the finding of the Appraisers.

The subject of protest in the second suit, as shown by Exhibit 1 (175,685, February 16, 1906), seems to me to be clearly semi-vitrified.

The decision of the Appraisers is sustained.

The case involves the construction of Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 88, 30 Stat. 155 [U. S. Comp. St. 1901, p. 1632], reading as follows:

"Par. 88. Tiles, plain unglazed, one color, exceeding two square inches in size, four cents per square foot; glazed, encaustic, ceramic mosaic, vitrified, semi-vitrified, flint, spar embossed, enameled, ornamental, hand painted, gold decorated, and all other earthenware tiles, valued at not exceeding forty cents per square foot, eight cents per square foot; exceeding forty cents per square foot, ten cents per square foot and twenty-five per centum ad valorem."

The articles in controversy were plain unglazed tiles of one color, exceeding two square inches in size. The Board of General Appraisers and the Circuit Court found them to be flint or semivitrified,

and held them to have been properly classified as such under the second subdivision of said paragraph. The importers disputed the correctness of the finding that they were either flint or semivitrified tiles, and contended further that, even if they were tiles of those classes, they were more specifically designated under the provision in the first subdivision for "tiles, plain, unglazed, one color," etc.

Hatch & Clute (Walter F. Welch, of counsel), for importers.

J. Osgood Nichols, Asst. U. S. Atty.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

PER CURIAM. Decision affirmed.

JOHN BROMLEY & SONS v. UNITED STATES.

(Circuit Court of Appeals, Third Circuit. November 11, 1907.)

No. 9 (1,773).

CUSTOMS DUTIES—CLASSIFICATION—FINISHED CASTINGS.

Iron castings, which by careful additional work have been fitted as parts of machines, are no longer dutiable as "castings," under Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 148, 30 Stat. 162 [U. S. Comp. St. 1901, p. 1640], but have been advanced to the condition of "articles * * * of iron * * * partly * * * manufactured," under paragraph 193, 30 Stat. 167 [U. S. Comp. St. 1901, p. 1645].

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

For decision below, see 154 Fed. 399, affirming a decision of the Board of United States General Appraisers, which had affirmed the assessment of duty by the collector of customs at the port of Philadelphia.

Hatch & Clute (Walter F. Welch, of counsel), for importers.

Jasper Yeates Brinton (J. Whitaker Thompson, U. S. Atty., on the brief), Asst. U. S. Atty.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

BUFFINGTON, Circuit Judge. John Bromley & Sons, the appellants, bought certain lace machines from one Jardine, an English lace machine manufacturer. The machines were shipped in parts, each of which parts was numbered with the individual number of the machine for which it was made. The parts here in question are standards for shafts and bed plates supporting such standards, and were described by Jardine in his invoice affidavits as "castings forming parts of machines sold by me to John Bromley & Sons, Philadelphia." The collector, and his action has been sustained by the Board of Appraisers and the Circuit Court, classified them, under paragraph 193 of the tariff act (Act July 24, 1897, c. 11, § 1, Schedule C, 30 Stat. 167 [U. S. Comp. St. 1901, p. 1645]) as "Articles * * * composed wholly * * * of iron * * * partly * * * manufactured." From the decree of the Circuit Court so holding, the importers have ap-

pealed, claiming they should be classified, under paragraph 148, as "Castings of iron not specially provided for."

We find no error in the Circuit Court's decree. While a cast-iron article always remains a casting of iron, no matter to what further process it may be subjected, and so falls under the general term of castings of iron, yet, under the proofs in this case, we are clear that these standards and bed plates are not "castings of iron not specially provided for" in the tariff law, but fall within the letter and spirit of section 193 as being articles composed wholly of iron partly manufactured. They were found by the board to be "parts of the machines of which they formed integral parts and in the values of which their values are included." They were cast by patterns and drawings to form parts of a machine; the standards were drilled to receive shafts and to provide for bolting to the plates; and the plates were cut or machined across their faces to level them as standard seats. Holes were drilled and threaded in the plates so as to align with the bolts of the standards, and other holes were drilled, through which the machine as a whole was clamped to the floor. Indeed, the testimony on behalf of the importer shows:

"The order for the machinery is given and all these articles are supposed to come to complete the machine." The work in this country is to "just fit and level them up." "No boring is done here." They are "all fitted and ready to be put up." "The exhibit belongs to the finished castings class."

In view of the careful work thus expended on them to fit them as parts of valuable machines, we are clear their character as mere castings had merged into the higher mechanical plane of a manufactured article.

The appeal is dismissed.

MASON et al. v. CHICAGO, B. & Q. RY. CO.

(Circuit Court of Appeals, Seventh Circuit. October 9, 1907. Rehearing Denied November 19, 1907.)

No. 1,330.

CORPORATIONS—SALE OF STOCK.

The acceptance by defendant of a written offer by plaintiffs, who were brokers, to sell certain stock and bonds of a railroad company, which offer was expressly stated therein to be made by authority of a third person named who controlled such stock and bonds, did not create a contract of sale between plaintiffs and defendant which would support an action by plaintiffs on defendant's refusal to accept and pay for the securities from them, and its purchase of the same direct from their principal.

In Error to the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois.

Merritt Starr, for plaintiffs in error.

John J. Herrick, for defendant in error.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

BAKER, Circuit Judge. Plaintiffs in error, plaintiffs below, were defeated by the court's giving a peremptory instruction to the jury to return a verdict for defendant.

The general situation out of which this controversy arose was shown by undisputed evidence to be this: Dunn, at Philadelphia, had in his control, with authority to sell, practically all the stocks and bonds of a small railway in Illinois. Defendant wanted to buy the road. Plaintiffs were brokers at Chicago. After communications between plaintiffs and Dunn, plaintiffs made a proposal to defendant that it should buy the stocks and bonds at certain prices. Defendant accepted, but later refused to have anything further to do with plaintiffs, and purchased the stocks and bonds directly from Dunn.

The declaration consisted of the common and four special counts. It is unnecessary to note the divergences of the special counts. They agreed in the foundational and characteristic averment that the parties had entered into a contract whereby plaintiffs had covenanted to sell to defendant and defendant to buy from plaintiffs the stocks and bonds. The evidence in support of the alleged contractual relation between these parties was in the form of letters. Plaintiffs wrote to defendant:

"We are advised by J. H. Dunn, president of J. & St. L. R. R., that the securities covering the property are as follows * * * and that he has received from the owners of the above securities consents to sell the following * * * which we are authorized to offer on the following terms. * * *"

Defendant answered:

"We will accept the offer of the securities of the J. & St. L. made by you."

Plaintiffs did not offer to sell on their own account. They merely covenanted that they had authority to offer to sell. In our judgment the trial court did not err in holding that this evidence failed to support the above-mentioned averment of the special counts.

The common count for goods sold and delivered is without support in the evidence. There was no express contract of sale by plaintiffs as sellers; and no contract between plaintiffs as sellers and defendant as buyer can be implied from defendant's receipt of the stocks and bonds, for they were taken directly from Dunn, as Dunn's, on Dunn's account, and in pursuance of a separate contract with Dunn.

If anything is owing to plaintiffs for services rendered, they must pursue some one else, for there is no evidence whatever to sustain that count against defendant.

The trial was not stopped at the close of plaintiffs' evidence in chief, and numerous assignments of error are predicated on rulings respecting the admission and exclusion of evidence during defense and rebuttal, and concerning the rejection of proffered instructions. As plaintiffs legally had no standing in court when their declaration was left unproven, the other proceedings are of no concern.

The judgment is affirmed.

correct. Pickhardt v. United States, 67 Fed. 111, 14 C. C. A. 341. And the collector's classification was supported by the findings of the Board of Appraisers. These findings, unless unsupported, against the weight of the evidence, or where additional evidence is before the court, will not be disturbed on appeal. Apgar v. United States, 78 Fed. 332, 24 C. C. A. 113; In re Van Blankensteyn, 56 Fed. 475, 5 C. C. A. 579.

The evidence warranted the Board's finding, and the appeal is therefore dismissed.

HARDISON et al. v. BRINKMAN.

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

No. 1,421.

1. PATENTS—INFRINGEMENT—CASING PERFORATOR FOR WELLS.

The Hardison patents, No. 650,318 and No. 686,691, for automatic casing perforators for deep wells, are neither of them for a pioneer invention, but both cover combinations of old elements only; the combinations being patentable improvements on the prior art and entitled to protection against infringement, but not such as to entitle the claims to a broad construction. As so construed, neither patent is infringed by the machine of the Brinkman patent, No. 726,625, which contains no friction device; that being an essential element in the combination of both the Hardison patents.

2. SAME—CONSTRUCTION OF CLAIMS—IMPROVEMENT PATENTS.

In a combination patent for an improvement in the arrangement or adaptation of old elements, the inventor is not entitled to a broad interpretation of the doctrine of mechanical equivalents, so as to cover a device not specifically included in his claims and specification.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, §§ 249, 254½.]

3. SAME—LIMITATION BY SPECIFIC DESCRIPTION.

A patentee is bound by his claims, and cannot claim a broader invention than that which he has specifically described therein, even though he may have been entitled to make broader claims.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 241.]

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

The appellants brought suit in the court below to enjoin the alleged infringement of two letters patent issued to E. A. Hardison on May 22, 1900, and November 12, 1901, numbered respectively, 650,318 and 686,691, for improvements in automatic casing perforators for deep wells. The earlier of these two patents, which will be herein referred to as the "first Hardison patent," is described as follows: A wheel-carrier slide, B, in a slideway, a, in the body, A; the upper ends of the carrier being provided with a transverse slot in which is mounted the axle, c, of the perforating wheel, C, the body of the perforator being provided with a diagonal slot, a'. The lower end of the slot, a', forms the seat for the axle of the perforating-wheel when in an operating position. A latch is pivoted to the carrier-slide, B. The latch is provided with a finger, d, and with a catch, d'. On one side of the latch is a flat spring, fixed on the carrier, B, and pressing against the edge of the latch. The bottom of the body portion of the perforator is provided with a seat or socket, a''', adapted to receive this finger, d, of the latch when the perforator is set to be lowered into the well, and with a shoulder or latch catch, a'', to receive the hook, d', of the latch when the perforator is to be

VANDIVER v. UNITED STATES.

(Circuit Court of Appeals, Third Circuit. November 11, 1907.)

No. 3 (1,856).

1. CUSTOMS DUTIES—APPEAL FROM GENERAL APPRAISERS—CONCLUSIVENESS OF FINDINGS.

Findings of the Board of General Appraisers, unless unsupported or against the weight of evidence, or additional evidence has been taken, will not be disturbed by the courts on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Customs Duties, § 205.]

2. SAME—DECISION BY COLLECTOR OF CUSTOMS—PRESUMPTION OF CORRECTNESS.

The classification by a collector of customs of imported goods under a tariff law is presumably correct.

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

There was no opinion below. The Circuit Court affirmed a decision of the Board of United States General Appraisers, which had affirmed the assessment of duty by the collector of customs at the port of Philadelphia. The subject of the controversy consisted of sulphur, which was shown by chemical analysis to contain in one instance .0015 per cent. of nonvolatile impurities, and in another instance .00437 per cent. of ash.

S. Morris Waln, for the importer.

Jasper Yeates Brinton, Asst. U. S. Atty., and J. Whitaker Thompson, U. S. Atty.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

BUFFINGTON, Circuit Judge. The appellant, John L. Vandiver, imported certain sulphur and contended it was dutiable under paragraph 674 of the tariff act (Act July 24, 1897, c. 11, § 2, Free List, 30 Stat. 201 [U. S. Comp. St. 1901, p. 1688]), viz.:

"Sulphur, lac or precipitated, and sulphur of brimstone, crude, in bulk, sulphur ore as pyrites, or sulphuret of iron in its natural state, containing in excess of twenty-five per centum of sulphur, and sulphur not otherwise provid ed for."

The collector classified it as refined sulphur, under paragraph 84, viz.:

"Sulphur, refined or sublimed, or flowers of, eight dollars per ton."

On appeal by Vandiver, the Board of General Appraisers, and thereafter the Circuit Court, approved the collector's action. The case turns on the question whether this sulphur was refined. Being invoiced by the shipper as "refined roll sulphur," it would seem the burden was on the importer to show the importation was not refined, as thus invoiced. The General Appraisers, after referring to the large mass of testimony, state that:

"A careful consideration of it strengthens the opinion that the sulphur is not crude, but is in fact refined."

We are of opinion the court below committed no error in adopting this view. The presumption was that the collector's classification was

drawn out of the well. Attached to the lower end of the carrier, B, are bow springs, b, designated in the specification and claims as a friction device, the office of which is to engage the casing to temporarily hold the slide stationary with relation to the body of the perforator. In practical operation, when the tool is to be lowered into the casing, the friction device, b, will be inserted into the casing and the tool lowered somewhat, thus causing the body to descend along the slide, B, and at the same time the latch, D, is held to cause the finger, d, to engage the latch-holding catch, a'', so that the latch is held out of its catching position. When the tool has reached the desired place in the casing, the body, A, will be drawn up and the weight of the slide and the friction device, b, will hold the slide from immediately following the body of the tool, and as the latter rises the wheel, C, being acted upon by the wall of the guideway, a', is driven to one side, thus to project the spurs of the perforating-wheel outward to perforate the casing. It is then drawn up, and the points of the wheel pierce the casing at intervals, until the line of perforation has been made to the proper height. Then the tool is lowered a short distance, and the friction device will temporarily hold the slide, thus allowing the body to come down and to engage the latch which locks the slide to the body of the perforator. Then the tool may be drawn upward out of the casing. It will be observed that this device operates upon an upward movement only.

Hardison's second patent is for a perforator which operates upon a downward movement of the tool, thereby obtaining the advantage of the weight of the tool in making the perforation. In the second patent, the body of the perforator is the same as in the first, except that the diagonal slot has its position reversed, and is provided with an extension running parallel with the length of the body. The bottom of the oblique portion of the slot is at the center of the body of the perforator, and the top of the oblique portion thereof is to the side of the center. The result is that the axle of the perforating-wheel occupied by the oblique slide is projected outward towards the periphery of the body and operates to perforate on the downward stroke. In the second patent a latch is pivoted on the carrier as in the first, but it is provided only with a finger, in place of a finger and hook as in the first patent. At the lower end a friction device is used as in the first patent. Owing to the change of operation whereby the perforation is done upon the downward stroke, it is no longer necessary to lock the wheel-carrier to the body when it is desired to withdraw the perforator from the well; for the friction device by its contact with the interior of the casing holds the carrier in such a position as to cause the perforating-wheel to be drawn into the body of the perforator, so that in withdrawing the same there is no contact of the points of the perforating-wheel with the casing.

The perforator used by the appellee was patented to him on April 28, 1903, by letters patent No. 726,625, for an improvement in well-tube apparatus. This invention has a pointed wheel, a wheel carrier, sliding grooves in the body of the perforator, and diagonal slots, as in both the patents of Hardison. It has no friction device, however. The tool carrier has the opposite side arms thereof connected at their lower end by a plate, B^2, from which a depending rod, B^3, extends; said rod being provided between its ends with a holding groove, B^4, and at its lower end with a contact plate, B^5. The portion of the rod, B^3, beyond the head, A^5, of the cylinder, is surrounded by a spring clasp, B^6, adapted to seat in the groove, B^4, and retain the spring under compression. In the operation of the invention the spring, C, is placed under tension by compressing the same, and is held in such position by the spring-clasp upon the rod of the tool-carrier, and the perforator is then lowered into the well tube. When it reaches the bottom thereof the contact plate bears upon the support there found, and the weight of the perforator and its connected parts forces the spring-clasp from the groove in the rod, thus tripping the spring, which by its expansion throws the cutter-wheel toward the top of the inclined slot and upward against the casing. The perforator is then raised from the bottom of the well to the point where it is desired to form the apertures, and the cutter-wheel rolls against the side of the casing in such upward movement without perforating the same. When the point to be cut has been reached, the tool is again lowered, and the tension-spring, by

holding the wheel in contact with the well-tube, permits the weight of the perforator by the inclined slot connection with the axis of the wheel to force the latter outward through the tube, so that each cutter upon the wheel forms an aperture as it contacts with the tube. When the perforating has been effected, the tube may be raised from the well, as such movement releases the cutting tool from the tubing.

The claims involved in the suit are the first claim of each of the Hardison patents. The first claim of the first patent reads as follows:

"1. A casing perforator comprising a body provided with an oblique way, a perforating wheel having its axle mounted to run in such way, a sliding wheel carrier in which the axle of the wheel is journaled to rotate, a friction device connected with the wheel carrier to engage the casing to temporarily hold the wheel carrier stationary with relation to the body of the perforator, a latch pivoted to the wheel carrier to hold the wheel carrier in its elevated position with relation to the body, and means for temporarily holding the latch out of engagement with its catch on the body of the perforator."

The first claim of the second Hardison patent is as follows:

"1. A casing perforator comprising a perforating tool carrier furnished with a frictional device for engagement with the well casing, a body with which the carrier is slidingly connected, a perforating tool mounted on the carrier to move laterally and longitudinally of the body, said body being furnished with a guide extending along the body and adapted and arranged to hold the perforating tool out of operative adjustment when said tool is at its lower position and inclined upwardly toward that side of the body from which the perforating tool is to project when in operative position, and means for temporarily holding the body from sliding down the carrier when the apparatus is descending with the frictional device in contact with the well casing."

The trial court found that the appellee had not infringed the claim of either patent, and dismissed the bill.

J. J. Scrivner and Chas. E. Townsend, for appellants.

Frederick S. Lyon, for appellee.

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

GILBERT, Circuit Judge (after stating the facts as above). The construction of the claims of the appellants' patents depends largely upon the question whether or not the inventions are of a primary nature. It becomes necessary, therefore, to consider the prior inventions and the state of the art. On May 27, 1884, A. W. Benson obtained a patent on a well-pipe cutter which exhibits the body provided with an oblique slide or guard, the axle of the perforating-wheel traveling therein, and guided thereby into and out of operative position in the same manner as in the appellants' perforators. The upper end of the slot is at the center of the body of the perforator, and the lower end thereof is toward the periphery thereof, so that as the cutter is moved downward in the slot the periphery of the perforating-wheel is projected beyond the body of the perforator. Bow springs are used as a friction device at the bottom to prevent the movement or turning of the perforator in the well casing. To move the perforator into or out of operative position a screw is used, which projects upward from the slotted piece through a threaded sleeve connected with the wheel carrier by means of a collar.

On April 12, 1898, A. J. Bramlette obtained a patent for a pipe slitter and perforator, which has a body and an oblique slot corresponding with the appellants' perforators. The oblique slot is so placed that its upper end is at the center of the body, and its lower end at or near

the edge of the body, so that the downward travel of the axle of the perforator wheel projects the cutter beyond the body and into operating position. A carrier is connected with the axle of the perforating-wheel, to which is attached a rope or cable leading out of the well. The perforator is lowered into the well to the desired depth, and upon the upward pull of the body the wheel will slide to the bottom of the slot and be brought into operative position. To withdraw the perforator from the well, the rope attached to the carrier will lift the perforating wheel to disengage it from the casing. There is evidence in the record that the Bramlette perforator had been extensively used prior to the time of the Hardison patents, that as many as 500 oil and water wells have been perforated therewith, and that at the time of the taking of the testimony in the court below about 20 well borers were using the same and paying royalty therefor.

Another patent prior to those of the appellants is the Harris patent, issued in 1879, for a device for extracting or splitting tubular casings of oil wells. In that device a swinging knife is pivoted in the body of the tool, and is so weighted as by gravitation to lie in operative position. To insert the tool in the well casing, the cutter is locked in inoperative position by means of a sliding rod, which catches in a notch therein, where it is held against the tension of a spring. The rod is held up in that position by the frictional device of bow springs at its lower end, which prevents the release of the cutter while it is being lowered into the well casing. When the tool has been inserted into the casing and moved downward to the point where perforations are to be made, the body is drawn upward, the friction device holds the rod stationary, whereby it is disengaged from the knife, and the knife instantly resumes its normal position and is brought into engagement with the casing. The perforation is accomplished by forcing the tool downward until the point of the knife is driven through the casing. The tool may be drawn upward a slight distance, and the body again lowered, and this may be continued to form a series of perforations. The effect of raising the tool is to throw the knife within the body of the carrier and out of engagement with the well casing. It is contended that this invention has no place in the prior art, for the reason that it was intended not to perforate, but to split casings, so as to cause them to collapse in order that they might be drawn from a well; but, as we have seen, it is apparent that it can be used for the purpose of perforating, and as it is furnished with a friction device connecting to a rod which engages the cutter and holds it out of engagement with the casing in lowering the tool into the well, and again in throwing it into operative position when the desired point has been reached, it is evident that it is an invention which is to be reckoned with in ascertaining the prior state of the art.

In these three devices which preceded the appellants' patents we find all the elements of the appellants' perforators. In the Benson and the Bramlette patents we find the perforating wheel; the oblique slots guiding the same to and from its operative position. In the Harris and Benson patents we find the use of a frictional device, and in the Harris patent such device is used for the same purpose and in substantially the same manner as in the appellants' perforators. The ap-

pellants lay much stress upon the automatic feature of their perforators, and contend that Hardison was the first to perfect an automatic tool. But it is clear that the Harris device is automatic in the same manner and to the same degree as those of Hardison. In brief, Hardison adopted the friction device of the Harris patent and combined it with the Bramlette patent. He was not the inventor of either a device or a combination that was wholly new, nor did he accomplish a new result. His inventions were mere improvements of what had gone before. They marked an advance in the art sufficient to be patentable and to deserve protection against an infringer who appropriates it or colorably invades it.

We next approach the question of infringement. The issuance of a patent to the appellee creates a prima facie presumption of a patentable difference from the inventions of Hardison. Miller v. Eagle Mfg. Co., 151 U. S. 186, 208, 14 Sup. Ct. 310, 38 L. Ed. 121. The appellee's perforator adopts the body of the Bramlette perforator, as does Hardison, with the exception that the operation is upon the downward instead of the upward stroke. But the appellee uses no friction device. He uses a coiled spring which in its normal position holds the carrier in operating position. When his perforator is once put in operation, the only part in contact with the casing is the body of the perforating wheel. In the place of a latch to lock the body from sliding down the carrier while being lowered into the well, he uses a catch to hold the carrier from sliding up the body, which it would otherwise do under the tension of the coiled spring; but to release that catch no friction device is necessary and none could be used. The Hardison perforators are put into operation by the tension of the friction device holding against the interior of the well casing and keeping the carrier stationary while the body is being pulled up and away from it. To put the appellee's perforator into operative position it is necessary only that it impinge momentarily against the bottom of the well. After that is done the rod below the carrier performs no further function, and at no time is frictional contact utilized. But in the Hardison perforators the function of the friction device is continuous and indispensable throughout the operation, and frictional contact with the interior of the well casing is the law of their operation from the time when the perforators are lowered into the well until they are removed therefrom.

Turning, then, to the claims of the Hardison patents, we have to inquire whether the appellee uses the same or similar means and adopts the substantial manner of co-operation of the means. It is contended that claim 1 of each patent is infringed. Claim 1 of the first Hardison patent specifies, among other elements:

"A friction device connected with the wheel-carrier to engage the casing to temporarily hold the wheel-carrier stationary with relation to the body of the perforator."

Claim 1 of the second Hardison patent specifies:

"A casing perforator comprising a perforating-tool carrier furnished with a friction device for engagement with the wheel-casing."

In both of these claims the combination is explicitly limited to the use of a friction device which at all times bears upon the interior of the well casing, and at all times governs and controls the action of the perforating wheel. In the appellee's perforator, as we have seen, there is and can be no friction device. A mechanical equivalent which may be substituted for an omitted mechanical element in a combination claim is one that performs the same function by applying the same force to the same object through the same means and mode of application. In a combination patent for an improvement in the arrangement or adaptation of old elements, the inventor is not entitled to a broad interpretation of the doctrine of mechanical equivalents, so as to cover a device not specifically included in his claims and specifications. Miller v. Eagle Mfg. Co., 151 U. S. 186, 14 Sup. Ct. 310, 38 L. Ed. 121. Without going further into the specifications of the claims of the appellants' patents, it is sufficient to say that the combinations, as we have pointed out, limited as they are by the prior state of the art, and explicitly stated as they are in the claims, distinguish the appellants' from the appellee's perforators, and the latter, lacking the essential element of the friction device, does not infringe. It is not necessary to inquire whether Hardison has by his claims unnecessarily limited his invention, or whether he might have so worded the same as to cover the combination which was adopted by the appellee. He must be held to the combination which is described and claimed so explicitly. Said Mr. Justice Bradley, in Keystone Bridge Company v. Phœnix Iron Company, 95 U. S. 274, 278, 24 L. Ed. 344:

"When a claim is so explicit, the courts cannot alter or enlarge it. If the patentees have not claimed the whole of their invention, and the omission has been the result of inadvertence, they should have sought to correct the error by a surrender of their patent and an application for a reissue. They cannot expect the courts to wade through the history of the art, and spell out what they might have claimed, but have not claimed. * * * But the courts have no right to enlarge a patent beyond the scope of its claim as allowed by the Patent Office, or the appellate tribunal to which contested applications are referred. When the terms of a claim in a patent are clear and distinct (as they always should be), the patentee, in a suit brought upon the patent, is bound by it. Merrill v. Yeomans, 94 U. S. 568, 24 L. Ed. 235. He can claim nothing beyond it. But the defendant may at all times, under proper pleadings, resort to prior use and the general history of the art to assail the validity of a patent or to restrain its construction. The door is then opened to the plaintiff to resort to the same kind of evidence in rebuttal; but he can never go beyond his claim. As patents are procured ex parte, the public is not bound by them; but the patentees are. And the latter cannot show that their invention is broader than the terms of their claim; or, if broader, they must be held to have surrendered the surplus to the public."

The decree is affirmed.

GENERAL CHEMICAL CO. v. BLACKMORE.

(Circuit Court, S. D. New York. November 20, 1907. On Settlement of Final Decree, November 27, 1907.)

1. PATENTS—INTERFERENCE SUITS—SCOPE OF DECISION.
In a suit under Rev. St. § 4918 [U. S. Comp. St. 1901, p. 3394], for relief against an alleged interfering patent, upon the establishment of an interference, it is the duty of the court to investigate and decide any question concerning the validity of either of the patents raised by the pleadings in the case.

2. SAME—INTERFERENCE—VALIDITY OF REISSUE.
The Blackmore reissue patent, No. 11,995 (original No. 686,022), for a process of making sulfuric anhydrid, claims 6 to 11, inclusive, which were added to those of the original patent, cover the prior invention disclosed by the Knietsch patent, No. 652,119, and are void for interference as against such patent. Such reissue is also wholly void as not authorized by Rev. St. § 4916 [U. S. Comp. St. 1901, p. 3393], because the original patent was not invalid for defective or insufficient description or claims, and because the reissue, moreover, seeks to cover an entirely different alleged invention, namely, that of the Knietsch patent.

In Equity. On final hearing on bill to set aside and declare void certain claims of defendant's patent as interfering. Action brought under section 4918, Rev. St. [U. S. Comp. St. 1901, p. 3394], and the bill further prays that defendant's patent, being a reissue, be declared void under section 4916.

Briesen & Knauth, for complainant.
Charles S. Jones, for defendant.

HOUGH, District Judge. The complainant is the owner by assignment of letters patent No. 652,119, issued June 19, 1900, for a "method of making sulfuric anhydrid," hereinafter called the "Knietsch patent." Defendant is the owner of reissue No. 11,995, granted May 27, 1902, whereof the original patent was No. 686,022, dated November 5, 1901, and both the original and reissue are for a "process of making sulfuric anhydrid," and are hereinafter spoken of as the Blackmore patent and reissue.

The first two claims of the Knietsch patent are as follows:

"1. The process of making sulphuric anhydride which consists in passing a gas containing sulphur dioxide and oxygen through a chamber containing a contact substance while removing from the contents of said chamber excess of heat due to the reaction, substantially as described.

"2. The process of making sulphuric anhydride which consists in passing a gas containing sulphur dioxide and oxygen through a chamber containing a contact substance while maintaining in said chamber a temperature which at the hottest part of said chamber is between the composing and decomposing temperature of the sulphuric anhydride being formed, substantially as described."

And the last six claims of the Blackmore reissue are as follows:

"6. The process of making sulfuric anhydrid, which consists in oxidizing sulfur dioxid while maintaining the temperature below the dissociating-point of sulfur trioxid, substantially as described.

"7. The process of producing sulfuric anhydrid, which consists in conveying sulfur dioxid in contact with an oxidizing agent at a temperature below the dissociating-point of sulfur trioxid, substantially as described.

"8. The process of making sulfuric anhydrid, which consists in subjecting sulfur dioxid to the action of an oxidizing agent while maintaining the temperature below the dissociating-point of sulfur trioxid, substantially as described.

"9. The process of making sulfuric anhydrid, which consists in oxidizing sulfur dioxid and maintaining the temperature below the dissociating-point of sulfur trioxid by refrigeration, substantially as described.

"10. The process of making sulfuric anhydrid, which consists in uniting sulfur dioxid with oxygen while maintaining the temperature between the combining and dissociating point of sulfur trioxid by controlled heat and refrigeration, substantially as described.

"11. The process of making a compound composed of one atom of sulfur and three atoms of oxygen which consists in uniting substances forming the compound while maintaining the temperature below the dissociating-point of sulfuric anhydrid by refrigeration, substantially as described."

Before application made for the patents in suit or any of them, it appears that there were two well-known methods of making sulfuric anhydrid. The chamber process consisted essentially of permitting sulfur dioxid, when introduced into a chamber or retort, to extract the necessary additional atom of oxygen from a substance therein contained, with the result that the dioxid became trioxid, the oxidizing substance undergoing by this chemical process both a chemical and a physical change. The other, or contact, process, consisted essentially in introducing sulfur dioxid and free oxygen (i. e., a gaseous oxidizing agent) into contact with an unchanging or catalytic substance, resulting in the union of the sulfur dioxid and oxygen into sulfuric anhydrid without, so far as known, any change either chemical or physical taking place in the catalytic material. Prior to Knietsch's invention, the chamber process was both scientifically and commercially practiced and practicable, while the catalytic process, though scientifically approved, was not commercially successful. Since Knietsch's invention, it is apparently admitted that the catalytic method has become commercially supreme, because this inventor ascertained that the high temperature resulting from the chemical reaction on union between oxygen and sulfur dioxid was the true cause of the absence of commercial success; and it therefore follows that the essence of Knietsch's patent consists in temperature control at the time and place of reaction, as claimed in the foregoing extract from his patent.

The nature of Blackmore's reissue is to be understood only from an examination of his original patent and the claims thereof and the earlier claims of his reissue which reproduce the latter. By these claims Blackmore asserted title to a modification of the chamber process, i. e., reoxidization of a metallic oxid from which the necessary atom of oxygen had been extracted by sulfur dioxid meeting the same in a retort, accompanied by refrigeration at the time and place of chemical action between the dioxid and the metallic oxid. It does not appear that the refrigeration was to be constant, but only to be applied if necessary, for, as stated in his patent, Blackmore suggests that, "if metallic oxid heats too rapidly during reaction, it may be refrigerated to keep below dissociating point of sulfuric anhydrid." It appears to be proven, therefore, that Knietsch claims and introduced a definite and stated improvement in the catalytic method—i. e., temperature control —and that Blackmore by his patent and the earlier claims of his reis-

sue introduced a definite and stated modification of the chamber process —i. e., reoxidization of the metallic oxid after reaction with sulfur dioxid accompanied by refrigeration if necessary.

It is admitted by Blackmore that the quoted claims of his reissue cover the catalytic process, as well as the chamber method, and do so by covering the whole scheme of temperature control. And it is therefore argued that, since the Blackmore reissue is for a generic invention and the Knietsch patent for a specific one, there can be no interference within the legal meaning of that word. But assertion is not proof, and the defendant has introduced no evidence in this cause; and, if it be shown that the method of producing sulfuric anhydrid shown in claims 6–11 of the Blackmore reissue is consistent only with the catalytic method, then it is plain that such claims interfere with those of Knietsch, which are specifically confined to that method alone. Whether this be true is largely a question of fact, and from the only expert testimony adduced (that of the complainant), and the reading of the claims themselves, I fail to see how sulfur dioxid can be conveyed in contact with an oxidizing agent (claims 6, 7), or how sulfur dioxid can be subjected to the action of an oxidizing agent (claim 8) at a temperature below the dissociating point of sulfuric anhydrid without the presence of a gaseous oxidizing agent at the point of reaction; and this is specifically not Blackmore's invention. And since free oxygen is the only gaseous oxidizing agent shown by the evidence, and sulfur dioxid and free oxygen will not unite into sulfuric anhydrid (commercially at all events), except by the contact method, it follows that the only reasonable interpretation of the quoted claims of the Blackmore reissue renders them a rather obscure description of the Knietsch discovery. I am therefore of the opinion that the patents in suit do contain claims in common and are therefore interfering patents. It appears by the printed copies of the patents and reissue introduced in evidence that Knietsch's application was filed July 14, 1898, that for Blackmore's patent February 16, 1900, and that for the reissue March 29, 1902. On the authority of Drewson v. Hartje Paper Manufacturing Co., 131 Fed. 734, 65 C. C. A. 548, I am of the opinion that the Knietsch patent covers the earlier invention.

Upon the construction of the reissue above made, it appears clear that the Blackmore reissue not only enlarged the claims of the original patent, but sought to cover and does purport to cover an entirely different alleged invention, and is therefore void. I think that the plain language of Rev. St. § 4918 [U. S. Comp. St. 1901, p. 3394), authorizes the court in an action such as this to declare "either of the patents (in suit) void in whole or in part," and does not confine the decision to invalidity for any especial reason; the only limitation of the statutory power being that the adjudication shall not "affect the right of any person except the parties to the suit and those deriving title under them subsequent to the rendition" thereof. An inquiry concerning the validity or invalidity of this reissued patent can affect no one but the parties hereto, and, as to those parties, I think it clearly the duty of the court upon establishment of an interference to investigate and decide any question concerning the validity of either of the patents raised by

the pleadings in the case. Palmer Fire Co. v. Lozier, 90 Fed. 732, 33 C. C. A. 255.

.There will be a decree for the complainant in accordance with the prayer of the bill.

On Settlement of Final Decree.

Defendant's counsel desires to have a record made of the fact that at the hearing herein he did object that the date of application for the Knietsch patent was not properly proven by the introduction in evidence of a printed copy of the specification, claim, and drawings in the usual form. As this event did occur this note is made of it. It is also true that upon this objection being taken counsel for complainant produced and tendered a certified copy of said application for the examination of objecting counsel, who, however, preferred to stand upon his objection. The form of decree propounded by complainant follows that printed in Sturges v. Van Hagen, 6 Fish, Pat. Cas. 572; Fed. Cas. No. 13,570. To this form objection is made because, interference having been found to exist herein between the claims of the Knietsch patent and a part only of the claims of the Blackmore reissue, it is beyond the power of the court to do more than to adjudicate the priority of the Knietsch patent over the interfering claims of the Blackmore reissue, leaving the reissue valid for the claims not interfering; and this result is claimed to flow from Gage v. Herring, 107 U. S. 640, 2 Sup. Ct. 819, 27 L. Ed. 601, as recently interpreted in Rawson v. C. W. Hunt Co., 147 Fed. 239, 77 C. C. A. 381.

The doctrine of these cases I do not think applicable here, because the Blackmore reissue not only added certain claims to the original patent, which added claims are in my opinion void as against the Knietsch patent, but it also embodied in the specification or description many statements utterly unrelated to the original Blackmore patent, obviously intended to cover the new claims here found to be interfering, and from which, if the rule of Seabury v. Am Ende, 152 U. S. 567, 14 Sup. Ct. 683, 38 L. Ed. 553, be applied, the interpreter skilled in the art could infer nothing but an attempt to cover Knietsch's prior invention. If, therefore, I am right in believing that the ascertainment of interference authorizes the court in proceeding to pronounce invalidity of the reissue in suit, I feel clear that the original Blackmore patent was not itself invalid from defective description or insufficient description, or from defective or insufficient claims. There was therefore no right at all to a reissue, and the same must be pronounced wholly void.

I do not wish, however, to compel defendant to exercise unusual haste in taking his appeal, and have therefore enlarged the period for cancellation of defendant's reissue from the 30 days asked for to "three calendar months."

ELECTRIC CANDY MACHINE CO. v. MORRIS.

(Circuit Court, E. D. Missouri. September 22, 1905.)

No. 5,040.

1. PATENTS—CONSTRUCTION OF CLAIMS—PIONEER INVENTION.
A machine for making on a commercial scale and more cheaply an article previously made only by hand is a pioneer invention, and a patent therefor is entitled to a liberal construction.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, §§ 46, 230.]

2. SAME—RULES OF CONSTRUCTION.
Where the validity of a patent is in doubt because the claims are ambiguous, that construction is to be preferred which sustains the patent rather than that which would render it invalid.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, §§ 230, 231.]

3. SAME—USE OF REFERENCE LETTERS IN CLAIM.
The use of reference letters in a claim of a patent does not confine the claim to a part having all of the characteristics of that shown in the drawing, but it covers any equivalent of such part.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 248.]

4. SAME—SUIT FOR INFRINGEMENT—DEFENSES.
It is not a defense to a suit for infringement of a patent that the alleged infringing device was made in accordance with a later patent.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 448.]

5. SAME—ANTICIPATION—DEVICES IN DIFFERENT ARTS.
A patent is not anticipated by prior patents for devices used in different arts which were not intended to accomplish and did not in fact accomplish the objects and purposes of the invention of the patent in suit.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 89.]

6. SAME.
Prior patents which refer incidentally or inferentially to features which take practical form and embodiment in a later patent do not anticipate such later patent where it is the only one which solved the problem.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 79.]

7. SAME.
Anticipation is not made out by the fact that a prior existing device shown in a prior patent may be easily changed so as to produce the same result as that of the patent in suit, where the prior device was in common use, and it did not occur to any one to make the change until it was suggested by the patent in suit.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 66.]

8. SAME—INFRINGEMENT—CANDY MACHINE.
The Morrison and Wharton Patent No. 618,428 for a candy machine for making floss or spun candy was not anticipated, discloses invention, and is entitled to a liberal construction. Claim 1 also held infringed.

In Equity. On final hearing.

Judson & Green, for complainant.
Higdon & Longan, for defendant.

FINKELNBURG, District Judge. The complainant is the owner of letters patent No. 618,428 that were issued on the 31st day of January, 1899, to William J. Morrison and John C. Wharton, of Nash-

ville, Tenn., for improved candy machines, and it brings this suit against the defendant claiming that he has infringed the patent, seeking relief in a suit in equity by injunction, an accounting, etc. The answer disputes the validity of the patent, and denies infringement. The invention of complainant's assignors consists of a machine for making "floss" or "spun" candy, that is, candy consisting of thread-like or silk-like filaments formed from melted sugar or candy. The essential features of the invention are described in the specification as follows:

"Our invention relates to improvements in candy-making, or, as commonly called, 'candy machines,' in which a revoluble or rotation pan or vessel containing candy or melted sugar causes the said candy or melted sugar to form into masses of thread-like or silk-like filaments by the centrifugal force due to the rotation of the vessel. The object of our invention is to obtain an edible product consisting of the said filaments of melted and 'spun' sugar or candy."

The claims are as follows:

"1. The combination, in a candy machine, of a rotative perforated vessel, A', A", C, C', and a heating attachment, or burner m, substantially as shown and for the purpose set forth.

"2. The combination, in a candy machine, of a rotative perforated vessel, a heating attachment, and a heat screen D with flange n, and support F, substantially as shown and for the purpose set forth.

"3. The combination, in a candy machine, of a rotative, perforated vessel, a heating attachment, and a heat screen D, with flange n, support F and fender E, substantially as shown and for the purpose set forth."

It is alleged that defendant's machine infringes the first of these claims, so that only that one claim is directly in issue, and the proper construction of this claim is one of the disputed points in the case. Defendant's counsel contend that because claim 1 in its language refers to "a rotative, perforated vessel A, A', A", C, and C', it must be limited to the precise vessel and shape indicated by these reference letters in the drawings to which they refer. Defendant's counsel also call attention to the fact that in the descriptive part of the letters patent defendant's vessel is described as "essentially a bowl with a flange as shown at A"," etc. In short, it is contended that there can be no infringement of this patent unless an apparatus, precisely as shaped and described in the letters patent, is made use of.

I gather from the evidence that prior to complainant's invention spun candy was made in a limited way only by hand with the aid of a spoon, fork, or brush, as described in a certain cookbook; that this was a slow, tedious, and expensive method; and that by the machine in controversy its manufacture as a commercial product on a larger and cheaper scale was made possible. In this sense the invention would come under the definition of a pioneer invention given in Westinghouse v. Boyden Brake Co., 170 U. S. 537, 18 Sup. Ct. 707, 42 L. Ed. 1136, viz., a device of such novelty and importance "as to mark a distinct step in the progress of the art as distinguished from mere improvement or perfection of what had gone before." But whether strictly a pioneer patent or not, I understand the rule governing the construction of a meritorious patent to be that it should be liberally interpreted in favor of the patentee in so far at least as to sustain the

just claims of the inventor, and that the claims shall be construed if possible to sustain the patentee's right to that which he has invented. Robinson, 735. Swayne, J., in the case of Blandy v. Griffith, 3 Fish. Pat. Cas. 609, 620, Fed. Cas. No. 1,529, says:

"The rights secured by a patent for an invention or discovery are as much property as anything else, real or incorporeal. The titles by which they are held, like other titles, should not be overthrown upon doubts or objections capable of a reasonable and just solution in favor of their validity. This principle should be steadily borne in mind by those to whom is intrusted the administration of civil justice."

And in a very recent decision of the Circuit Court of Appeals in this circuit, Sanborn, J., calls attention to the fact that a patent after all is nothing but a contract; that the rules for the construction of contracts apply with equal force to the interpretation of patents; that the great desideratum is to ascertain the intention of the parties; that this must be ascertained from the entire instrument and not from isolated parts; that when the terms of a patent are clear there is nothing to construe, but when its expressions are ambiguous, and the validity of the patent or of any of the claims in it is doubtful, that construction which sustains and vitalizes the patent or claim, rather than that which paralyzes or destroys them, must be preferred. Jewel Filter Co. v. Jackson (August 26, 1905) 140 Fed. 340, 72 C. C. A. 304. The use of reference letters does not necessarily confine the claim to a part having all the characteristics of the part, which in the drawings is indicated by that letter or numeral, because a claim which expressly covers a particular device impliedly covers any equivalent of that device. Walker on Patents (4th Ed.) pp. 101, 102. "The breadth or narrowness of a claim, as the case may be, does not depend upon any artificial rule of interpretation, and to narrow a broad invention by reference letters or numerals alone, would be to frame and enforce such a rule." Walker on Patents, 117a, and cases there cited.

I do not think that the expression "the pan A is essentially a bowl with a flange," etc., confines the patentee to the precise bowl shape shown in the drawing. I think the word "essentially" is used as synonymous with "practically" or "substantially," and not in the sense that this precise bowl shape is indispensable. Besides, as pointed out by complainant's expert, "in this one line he sees fit to call it a 'bowl,' in 8 or 10 other places he calls it simply a 'pan,' while in a dozen or 15 other places he called it a 'vessel.' In the claims it is simply referred to as a 'vessel.'" And in another place in the patent it is stated that "we do not confine ourselves to the exact construction of the machine as shown in the drawings, as it is obvious that various forms might be given to the essential parts." As to this question of limitation by reference letters, I am impressed also with the views expressed by Sanborn, J., in the case of National Hollow Brake Co. v. Interchangeable Brake Co., 106 Fed. 693, 696, 45 C. C. A. 565, 566, and my conclusion on this branch of the case is that claim 1 of the complainant's patent is not limited so as to exclude mechanical equivalents.

On the question of infringement, authorities concur that the substantial equivalent of a thing in the sense of the patent law is the same as the thing itself; so that if two devices do the same thing in substan-

tially the same way, and accomplish substantially the same result, they are the same, even though they differ in name, form, or shape. Machine Co. v. Murphy, 97 U. S. 120, 24 L. Ed. 935. As to the fact of infringement itself, the court agrees with the following statement of complainant's expert witness:

"I find that the essential things indicated in this first claim are all found in this Morris machine, and for this reason: The first claim states as follows: 'The combination of a candy machine of a rotative perforated vessel.' I find here a rotative perforated vessel. I find in this claim a heating attachment, and I find in this machine a heating attachment precisely—or burner. Those two things are all that is claimed in the first claim, and I find them both here and in the same relationship to each other as in the letters patent which I hold in my hand. There is, of course, a difference in the proportions, in shapes, but they are only such differences as naturally arise in building a vessel of various shapes and dimensions, and in constructing a burner of various shapes and dimensions, and of producing rotations by various devices."

"In each machine there is a bottom and a top to the vessel, which is to hold the sugar and the melted sugar. In each machine the top is fastened to the bottom by means of adjustable fastenings—in the one case screws, in the other case clamps. In each machine there is an inverted cylinder to contain the hot gases. In each machine the intensest heat would occur just at the circumference of the vessel where the thickness of the material to be melted is the least, and where the melted sugar would immediately find exit through the perforations on the circumference. In each machine it is so supported that in the center the material would be relatively cool. The fact that in the Wharton patent the upper and the lower surfaces are curved, while in the Morris patent they are in the one case nearly plain and in the other conical, is an immaterial point. The vessel could be shaped in a hundred different ways without in any way departing from the principles involved. And for this reason I find in the Morris machine exactly what is claimed in the first claim of the Wharton."

But defendant claims that this machine is constructed in accordance with a later patent (Kochs' patent, No. 792,710, June 20, 1905). This patent was not issued until after the hearing of this case, but evidence was introduced that the application was allowed August 6, 1904. Some question has been made as to the technical sufficiency of the proof of this application and allowance; but, assuming the evidence to be sufficient, the question remains in how far complainant can be affected in his rights by a later patent issued by the Patent Office. Defendant's counsel in their brief emphasize the fact that a patent is a contract between the government and the inventor based on a valuable consideration. This being so, it goes without saying that the patentee's rights cannot be taken away or curtailed by any subsequent act of the Patent Office. It has become the property of the patentee, and as such is entitled to the same legal protection as other property. McCormick Harvesting Machine Co. v. Aultman-Miller Co., 169 U. S. 606, 608, 18 Sup. Ct. 443, 42 L. Ed. 875. But it is claimed that the Kochs' patent raises a prima facie presumption that there is a patentable difference between defendant's machine and complainant's machine. But this presumption does not exclude the fact that the later patent may embody things which are the exclusive property of the complainant under a prior patent. In other words, it may be that Kochs' patent contains improvements which this complainant cannot use, but it does not follow that therefore Kochs' patent also absorbs improvements theretofore in-

vented by and patented to complainant's assignors. If, therefore, as the court has found, defendant's machine infringed on certain essential features of complainant's machine, the mere fact that it is constructed in accordance with a subsequent patent issued to another party is no defense. Blanchard v. Putnam, 8 Wall. 420, 19 L. Ed. 433; Norton v. Eagle Co. (C. C.) 59 Fed. 138.

In regard to the proceedings in the patent office, while Morrison and Wharton's application was pending, as disclosed by the "file wrapper" introduced in evidence, defendant claims that their abandonment of original claim 7 estops complainant from making its present claim under claim 1. I find on examination of the file wrapper that the original 7 was for a "combination, in a candy machine, of a rotative, perforated vessel, and a rotative shaft J propelled by any suitable motor substantially as shown and for the purpose set forth." The combination with a rotative shaft propelled by a motor, here referred to, does not appear in claim 1, and therefore I do not see how its abandonment affects the proper construction of claim 1. Nor do I find anything in the other rejections, modifications, or withdrawals of claims in the patent office which militates against complainant's present demands; nor in the fact that complainant in this suit confines himself to claim 1, and does not rely on claims 2 and 3. After all, a patent was granted to complainant's assignors, and complainant is entitled to stand on any one of the claims embodied in it.

Now as to the prior state of the art and anticipation by prior patents. It is an old saying that there is nothing new under the sun, and in a certain general sense this may be true. But certain elements and forces of nature, though always in existence, have lain dormant until called into use by inventive genius, and from time to time they are turned to new uses by further inventions. Centrifugal force, produced by rapid revolution, is old, as complainant's expert witness says: "It is as old as the solar system." It cannot be monopolized, but its application to new uses from time to time may nevertheless be patented. Most machines have predecessors in the same or some other sphere of usefulness which more or less approach or lead up to the new machine. By an ingenious and acute process of analysis nearly everything may be resolved into elements which are old. But I apprehend that for purposes of the patent law we must take a more practical view of what is old and what is new. A patent is not anticipated by prior patents or devices used in different arts, which did not solve the problem of the invention covered by the patent in suit, and which were not intended to accomplish, and did not in fact accomplish, the objects and purposes of the invention of the patent in suit. Prior patents which refer incidentally or inferentially to features which take practical form and embodiment in a later patent do not anticipate such later patent, the later patent being the only one which successfully solved the problem. See Barbed Wire Cases, 143 U. S. 275, 12 Sup. Ct. 443, 36 L. Ed. 154. "It may be laid down as a general rule, though perhaps not an invariable one, that if a new combination and arrangement of known elements produce a new and beneficial result never attained before, it is evidence of invention. Webster Loom Co. v. Higgins, 105 U. S. 580, 591, 26 L. Ed. 1177. Nor is an anticipation made

out by the fact that a prior existing device, shown in a prior patent, may be easily changed so as to produce the same result as that of the device of the patent in suit where the prior device was in common use without it occurring to any one to adopt the change suggested by the patent in the suit. Heath Cycle Co. v. Hay (C. C.) 67 Fed. 246; Griswold v. Harker, 62 Fed. 389, 10 C. C. A. 435. Time does not permit me to review in detail each of the numerous patents referred to by defendant as anticipating complainant's patent, or showing the prior state of the art. None of them is for a candy machine, and, in my opinion, none of them is of sufficient practical similitude to invalidate the Morrison and Wharton patent.

Other points in this controversy have received attention, though not herein specially mentioned. It follows from the foregoing that the complainant is, in my opinion, entitled to a decree, and such a decree in the usual form may be drawn and entered.

SWANSON v. ATLANTIC, GULF & PACIFIC CO.

(District Court, S. D. New York. September 24, 1907.)

DEATH—STATUTORY ACTION FOR WRONGFUL DEATH—LIMITATION.

The right to recover for a wrongful death occurring in Maryland is governed by Code Pub. Gen. Laws Md. 1904, pp. 1553, 1554, art. 67, §§ 1, 2, which provides that an action thereunder must be brought within 12 months, and such an action cannot be maintained in a federal court in another state after such time, though the defendant may not have been suable in Maryland.

[Ed. Note.—What law governs actions, see note to Burrell v. Fleming, 47 C. C. A. 606.]

In Admiralty. On exceptions to libel.

Martin A. Ryan, for libellant.
James R. Soley, for respondent.

ADAMS, District Judge. This action was brought by Ole Swanson, a brother of Charles Swanson, deceased, as administrator of the goods &c. of the said Charles, against the Atlantic, Gulf & Pacific Company, to recover the damages caused by the drowning of the said Charles on the 23rd day of December, 1903. It is alleged that both were employed on a dredge, bound in a tow in charge of the tug Britannic, from New York to Washington, D. C., and while on the Potomac River, within the State of Maryland, a small boat in which the decedent, in company with two other seamen employed with him, was returning from a scow about 300 feet in the rear of the dredge to the latter, and upset in consequence of the negligence of the respondent.

The respondent excepted that the action was too late and that an administrator could not maintain the action. The answer also denied any negligence on the part of the respondent.

The first exception is as follows:

"First: The respondent excepts to the said libel and complaint, because the said cause is barred by the Statute of Limitations for the following rea-

'son: because in pursuance of the statute of the State of Maryland in such case made and provided, it is required that such a cause shall be commenced within twelve calendar months after the death of the deceased person."

The libel was filed on the 13th of January, 1905, and it appears that according to the provisions of the Maryland Act, the libellant was at least a month late in bringing his action.

It is agreed that this accident is governed by the law of Maryland, in which state it occurred. The Maryland Code, Pub. Gen. Laws, provides:

Volume 2 (1904), pp. 1553–1554, art. 67:

"Section 1. Whenever the death of a person shall be caused by wrongful act, neglect or default, 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, the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured and although the death shall have been caused under such circumstances as amount in law to felony."

Code Pub. Gen. Laws 1888, art. 67, § 1; Code Pub. Gen. Laws 1860, art. 65, § 1; Laws 1852, c. 299, § 1.

"Sec. 2. Every such action shall be for the benefit of the wife, husband, parent and child of the person whose death shall have been so caused and shall be brought by and in the name of the State of Maryland for the use of the person entitled to damages; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought, and the amount so recovered from the defendant shall be divided amongst the above mentioned parties, in such shares as the jury by their verdict shall find and direct; provided, that not more than one action shall lie for and in respect of the same subject matter of complaint; and that every such action shall be commenced within 12 calendar months after the death of the deceased person."

Code Pub. Gen. Laws 1888, art. 67, § 2; Code Pub. Gen. Laws 1860, art. 65, § 2; Laws 1852, c. 299, § 2.

Volume 2 (1904) p. 1460:

"Sec. 5. If any person liable to any action shall be absent out of the State at the time when the cause of action may arise or accrue against him he shall have no benefit of the limitation herein contained if the person who has the cause of action shall commence the same after the presence in this state of the person liable thereto within the terms herein limited."

Code Pub. Gen. Laws 1888, art. 57, § 5; Code Pub. Gen. Laws 1860, art. 57, § 5; Laws 1765, c. 12.

The right of recovery in a case of this kind is altogether dependent upon statute (Williams v. Quebec S. S. Co. [D. C.] 126 Fed. 591), and the failure of the libellant to bring his action within the limited time operates as a complete bar, notwithstanding the respondent had no place of business in the State of Maryland. Speaking for the Circuit Court of Appeals, Judge Wallace, in an action brought upon a New Jersey statute (International Nav. Co. v. Lindstrom, 123 Fed. 475, 477, 60 C. C. A. 649, 651), said:

"As the statute creates a new liability with a right to its enforcement, provided an action is brought within 12 months, the time is made of the essence of the right, and a federal court sitting in New York must treat it as such, and not as an ordinary statute of limitations."

The fact that the respondent had no place of business in Maryland seems immaterial. It had at the time of and after the accident an of-

fice in New York, where the action could have been brought in season to have saved the right to sue.

This conclusion renders a discussion of the other points in the case unnecessary.

The libel is dismissed.

NESBIT v. NORTH GEORGIA ELECTRIC CO.

(Circuit Court, N. D. Georgia. September 10, 1907.)

1. CREDITORS' SUIT—EQUITY JURISDICTION—ADEQUATE REMEDY AT LAW.
   A creditors' bill against a corporation, which shows that complainant is merely a simple contract creditor, being the owner of a note given by the defendant, and which further discloses that such note is indorsed by a third party, without showing that either maker or indorser is insolvent, does not state a case within the jurisdiction of a federal court of equity.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Creditors' Suit, §§ 5–8.]

2. CORPORATIONS—RECEIVER—POWER OF OFFICER TO CONSENT TO APPOINTMENT.
   In a suit against a corporation, a consent to the appointment of a receiver, signed by the president, will not be recognized, where it appears from the pleadings that he has an interest adverse to the corporation, and no authority from the directors to give the consent is shown.

In Equity. On motion for appointment of receiver.

Brown & Randolph and Mr. Bowden, for complainant.

SHELBY, Circuit Judge. This is a bill filed by John A. Nesbit, a citizen of Ohio, in his own behalf and in behalf of all other creditors of the North Georgia Electric Company, a corporation organized under the laws of Georgia. The only claim that the complainant asserts against the defendant is that the defendant is indebted to him in the sum of $5,000 upon a promissory note, dated August 1, 1905, and due two years after date, bearing interest at the rate of 6 per cent. per annum. The note is described as having been signed by the defendant company by its then president, A. J. Warner, and made payable to D. M. Stewart or order, and indorsed by D. M. Stewart in blank. There is no averment that the complainant has ever sued at law upon the note and obtained judgment. He sues, in fact, as a simple contract creditor without a lien. The bill contains averments showing that the defendant company owns property of great value. The bill admits ignorance of the value of some of the property. It states on information and belief the value of part of the property. The allegations as to the value of the defendant's property and the amount of the defendant's indebtedness are very indefinite. It does not appear certain from the averments of the bill that the defendant corporation is even insolvent, but, if the bill can be construed as showing the insolvency of the defendant corporation, I do not think that the complainant, as a simple contract creditor, can come into a court of equity to enforce his claim without having first reduced it to judgment. There is nothing in the averments of the bill which takes it out of the operation of the general rule that a plaintiff must exhaust his remedies at law before he can proceed in equity. It further ap-

pears from the bill that one D. M. Stewart is an indorser on the note, and there is no averment of any kind as to his solvency or insolvency. So far as it appears from the averments of the bill, the complainant can collect his $5,000 by a suit at law against Stewart, and he certainly has no proper standing in equity unless he makes it appear by his bill that he cannot collect his note by a suit at law.

It is said that a receiver should be appointed anyway, because there is attached to the bill an agreement or consent, signed by the defendant company by "D. M. Stewart, President," that a receiver be appointed. We are not informed as to the authority of the president to make such consent. It does not appear that there has been any meeting of the board of directors at which a resolution was passed consenting to the appointment of a receiver or conferring authority upon the president to make such consent. The D. M. Stewart who is president of the company is the indorser of the note sued on. It appears therefore that he has an interest in the suit adverse to the company, and if, under ordinary circumstances, he had the power to consent to the appointment of a receiver, such power ought not to be recognized in this case.

The bill on its face, as framed, does not, in my opinion, confer jurisdiction in equity, as it shows that the complainant has an adequate remedy at law.

For these reasons an order will be entered overruling the motion to appoint a receiver.

THE BODO.

(District Court, S. D. New York. September 24, 1907.)

1. SHIPPING—LOSS OF CARGO—LIABILITY OF VESSEL UNDER CHARTER PARTY.

A vessel *held* liable to a charterer under a clause of the charter party, which was for the carriage of bananas, providing that should the vessel be stranded or exposed to other perils resulting in jettison, and the vessel be saved, the owners should pay for the bananas jettisoned 50 cents per stem. The claim that prior to the stranding of the vessel the bananas had become frozen and worthless *held* not sustained by the evidence, even if such fact would constitute a defense.

[Ed. Note.—Loss by perils of the sea, see notes to The Dunbritton, 19 C. C. A. 465; Southerland-Innes Co. v. Thynas, 64 C. C. A. 118.]

2. INSURANCE—MARINE INSURANCE—RIGHT OF SUBROGATION.

The insurer of a cargo is not subrogated to the right of the owner to recover from the vessel for its loss unless it has paid the loss in full.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 1506–1508.]

In Admiralty. Suit for loss of cargo.

Wheeler, Cortis & Haight, for libellant.
Butler, Notman & Mynderse, for claimant of steamer.
Anthony M. Menkel, for intervenor.

ADAMS, District Judge. This action was brought by the Atlantic Fruit Company to recover from the steamship Bodo the sum of $6,884, for the loss of a cargo of bananas caused by the stranding of the steamship, while on a voyage from Jamaica to New York, on the south shore

of Long Island, during the month of March, 1906, where the bananas were jettisoned to save the said vessel. The claim is made under the following provision of the charter party, dated August 12th, 1905:

"22. Should the vessel be stranded or exposed to other perils resulting in jettison of bananas, and the vessel be ultimately saved the shipowners agree to pay to the Charterers for the bananas jettisoned 50 cents United States currency per stem of bananas, and further to assume all liability for the banana cargo's contribution to general average and salvage expenses."

The answer admits the stranding but denies the right to recover because the whole cargo was frozen and became entirely worthless in consequence of said stranding, the temperature in the holds of the steamer becoming inevitably reduced so that the freezing and the consequent spoiling of the fruit was not covered by the said clause and according to its true intent and meaning there could be no recovery for frozen or worthless bananas when jettisoned but only for merchantable fruit.

The Mannheim Insurance Company was the insurer of the said cargo and filed a petition alleging such fact and asking permission if there should be a recovery to intervene and collect the sum of $5,045.60 paid to the libellant in consequence of the disaster, by reason of its rights of subrogation. The libellant answered the petition alleging that the value of the lost cargo was upwards of $13,000, and denied the right of subrogation.

The testimony shows that the steamer became stranded on the beach March 20th through the navigator mistaking lights on the Long Island shore for lights on the New Jersey coast and acting upon that supposition the steamer was put full speed ahead. The weather had been hazy but cleared up about this time and a course was taken N. ¼ E. with the expectation that it would carry her to the channel but about 1 A. M. breakers were observed ahead and a reversal of the engine proved insufficient to prevent the stranding. About 1.15 A. M. she struck at a point on Jones' Beach off Amityville, and was turned by the seas so that her port side was exposed to the southerly gale which then prevailed.

The cargo was shipped in good order and was in merchantable condition at the time of stranding. Steam had been turned on the forehold on the 19th to keep the temperature at the proper state, which was from 55 to 60 degrees. The temperature of the fruit itself was sufficient to keep it warm, with the closing of the apertures to the outer air, the ventilators and hatches. There was no steam in the after hold, or facilities for using it there.

The master of the steamer telegraphed to a wrecking company in New York for assistance which was received by that company about 6.30 A. M. of the 20th. The steamer Chapman and Merritt was accordingly sent and arrived at the Bodo at 12.45 P. M. She found her high and dry and subsequently proceeded to save her by jettisoning the cargo in the way stated, supposing it was then frozen and spoiled.

The controverted question in the case with respect to the condition of the fruit when the vessel stranded is determined in favor of the libellant as the testimony convinces me that it remained in a merchantable state for several days. The wrecking people supposed it to be spoiled

when they took it out and doubtless at that time it was somewhat injured but such fact has little bearing upon condition at time of stranding. It was very cold weather and a few hours of exposure would have had such an effect. A portion of the fruit was taken out of the vessel by a number of entirely disinterested people who testified that it was then good and remained so until eaten when taken care of by avoiding too much exposure to the cold air. Some taken out by others was exposed to the air and very soon was spoiled, so that these parties testified it was frozen when they took it out and doubtless supposed so but the preponderance of the testimony shows that at the time of stranding, there could scarcely be a question as to its being in a condition to bring the above quoted clause of the contract into operation. The cargo was all discharged by the 24th and the vessel saved and taken to New York on the 27th.

If the contract required that the cargo should be in merchantable condition at the time of stranding, then the testimony shows that such condition existed. It is doubtful, however, if it was incumbent upon the libellant to establish that fact. The contract provided absolutely for the payment of 50 cents per stem in case of jettisoning and it is difficult to see how the liability of the ship is affected by the condition. If the parties chose to make such an agreement why should they not be bound by it? I have been referred to no qualification of the absolute agreement in the contract and there does not appear to have been any. It was the fault of the steamer, not in any way of the charterer, that the loss occurred and she should pay for it.

On the question of the right of the insurance company to intervene and participate in the libellant's recovery that must follow from the foregoing conclusion, the right of subrogation has been invoked but that right cannot exist unless the payment by the underwriter was in full of the loss. Sheldon on Subrogation, § 127. No proof of value has been given in the case as that question was deemed by the court as one for a commissioner. It will be necessary therefore that a reference be had to determine the value of the bananas at the time of stranding.

Decree for the libellant with an order of reference.

WOOD v. GENERAL ACCIDENT INS. CO. OF PHILADELPHIA.

(Circuit Court, W. D. Pennsylvania. November 14, 1907.)

No. 6.

INSURANCE—CONSTRUCTION OF ACCIDENT POLICY—PERSON RIDING AS PASSENGER.

A provision of an accident policy insuring against accidental death or injury of the person insured "while actually riding as a passenger in or on any regular passenger conveyance provided by a common carrier" is to be construed in accordance with the ordinary meaning of its terms, and the indemnity applies only to the case of a passenger in the ordinary, common, everyday use of the word, and to an injury received while such person was in or on a regular passenger conveyance. As so construed, the insurer is not liable for the death of the insured resulting from the wrecking of a railway postal car in which he was riding in the performance of his duties as a postal clerk.

[Ed. Note.—Accident insurance, risks and causes of loss, see note to National Accident Soc. of City of New York v. Dolph, 38 C. C. A. 3.]

At Law. On motion for judgment non obstante veredicto.

Edmond Englert, for plaintiff.

Wishart & Dickie, for defendant.

BUFFINGTON, Circuit Judge. The defendant insurance company in this case issued, on November 23, 1905, a general accident policy to Douglas C. Wood, the plaintiff. The beneficiary named in the policy was Ira H. Wood, a brother of the insured. The policy provided:

"In case a beneficiary other than the insured or his legal representatives is specifically named in the schedule of warranties indorsed on this policy, then and not otherwise this policy shall also, in consideration of the premium, insure the person named as beneficiary in the said schedule as follows: Against any one of the following losses, resulting within ninety days from date of accident and caused solely and exclusively by injuries covered by this policy and sustained by said beneficiary while actually riding as a passenger in or on any regular passenger conveyance provided by a common carrier, * * * in the following sums: Payment for loss of life, $5,000."

On September 10, 1906, Ira H. Wood was a railway postal clerk in the service of the United States Post Office Department. In the discharge of his official duty he made a run in a postal car of the Atchison, Topeka & Santa Fé Railroad, and while actually engaged in his duties as mail clerk on said run the train was wrecked, the postal car derailed, and he was killed. This suit was brought by Douglas C. Wood to recover the $5,000 indemnity provided in case of the death of Ira H. Wood, the beneficiary. The insurance company defended on the ground that Ira H. Wood was not killed while "actually riding as a passenger in or on any regular passenger conveyance provided by a common carrier."

We are here dealing with a contract, and the rights of these parties turn on what their contract provides. In construing this contract, its words and terms are to be given the meaning they bear in ordinary common use. The pertinent question is: "What was the understanding of the parties, or, rather, what understanding must naturally have been derived from the language used?" Ripley v. Assurance Company, 83 U. S. 336, 21 L. Ed. 469. Now, to us it is clear that the words "actually riding as a passenger" and "actually riding as a passenger in or on any regular passenger conveyance" meant the indemnity should apply to the case of a passenger in the ordinary, common, everyday use of that word, and to an injury received while such person was in or on a regular passenger conveyance. So understood (and any other construction is to inject into the words used a meaning that is not their common, ordinary meaning), we are clear the beneficiary in this case was not within the indemnity provision of this contract when he met his death.

The motion of the defendant for judgment non obstante veredicto is granted, and judgment will be entered accordingly for defendant.

NEW YORK CENT. & H. R. R. CO. v. MAINE S. S. CO.

(District Court, S. D. New York. October 3, 1907.)

SHIPPING—INJURY OF VESSEL BY SWELL—IDENTIFICATION OF OFFENDING STEAMER.

Evidence *held* insufficient to establish the claim that a steamer which, in passing through a narrow channel in East river at a high rate of speed, created a swell by which libelant's lighter lying at a wharf was injured, was one owned by respondent; it being shown affirmatively that none of its vessels was in the vicinity at the time of the injury.

[Ed. Note.—Liability of vessel for injuries caused by creation of swell, see note to The Asbury Park, 78 C. C. A. 3.]

In Admiralty.

Butler, Notman & Mynderse and Anthony M. Menkel, for libellant.
James J. Macklin and La Roy S. Gove, for respondent.

ADAMS, District Judge. The New York Central & Hudson River Railroad Company, the owner of the hoisting lighter or barge Sampson, brought this action against the Maine Steamship Company to recover the damages caused to the lighter by swells from one of the latter's steamers while the lighter was lying at the railroad company's wharf at Port Morris on the East River on the 28th day of July, 1903, taking marble on board. The defence is that the steamer of the respondent which passed the place in question on that day was the North Star and she was proceeding at a low rate of speed; that she did not produce any unusual swell when she passed and "was nowhere near the point where said lighter was lying at the time mentioned in said libel."

The testimony shows that a large steamer, similar to the respondent's, did pass the place at a high rate of speed between 2 and 3 o'clock in the afternoon of said day and cause some damage by her swells. The channel at the place is about a quarter of a statute mile wide and the testimony shows that it is necessary for large steamers to proceed at a moderate speed in order to avoid creating swells which would be dangerous to vessels lying at the said dock. The steamer that passed was rather on the Port Morris side of the channel, and did create swells which injured libellant's lighter quite seriously and the question in the case, was it one of the respondent's.

The master of the lighter testified that the accident happened about 2:40 o'clock P. M. and he only saw the steamer when she was abreast in passing, but did not see her name; that she was going very fast, 10 or 12 miles an hour, and soon was out of his sight by reason of becoming obscured from him by the marble on his boat. He identified her by a black hull, white bulwarks and black painted funnel. Another witness, presumably disinterested, saw the accident from the dock near by; he did not see the name of the steamer but said he knew the steamers of the Portland Line and this was one of them; that the accident happened between 2 and 3 o'clock; he also identified her by the same painting. He evidently did not see her for any length of time as when he first observed her she was coming around North Brother Island. Another witness testified to the same effect.

In the absence of contradictory testimony, what the libellant's witnesses have testified to might suffice to establish a case against the respondent, but its testimony shows that at the time it only had two steamers in operation, the North Star and the Horatio Hall, and that neither of them was in the vicinity of Port Morris at the time. The North Star was lying at her pier, No. 32, East River, Manhattan, until several minutes after 5 o'clock, when she proceeded about 7 or 8 miles an hour in the centre of the channel and passed Port Morris bound for Portland about 6 o'clock. She met the Hall near Vineyard Haven proceeding to New York. It seems to be clearly established that neither of these vessels was near the place of accident at the time it happened. This conclusion has been reached without recourse to the logs, which were marked tentatively in evidence when the testimony was taken de bene esse.

Libel dismissed.

McCOY et al. v. GILL.

(Circuit Court, D. Massachusetts. November 14, 1907.)

No. 183.

INTERNAL REVENUE—LEGACY TAXES—WILL OF DECEDENT.

Where a writing offered as the will of a decedent was not admitted to probate, but contested proceedings therefor were compromised, as authorized by the statutes of Massachusetts, and the estate was distributed in accordance with the compromise decree, such compromise must be deemed the will under which the property passed, for the purposes of War Revenue Act June 13, 1898, c. 448, §§ 29, 30, 30 Stat. 464, 465 [U. S. Comp. St. 1901, pp. 2307, 2310], and the tax due thereunder determined accordingly.

Wm. M. Richardson, for plaintiff.

The United States Attorney, for defendant.

LOWELL, Circuit Judge. This is a suit to recover part of a legacy tax paid under protest. Payment was demanded by virtue of sections 29 and 30 of the war revenue act (Act June 13, 1898, c. 448, 30 Stat. 464, 465 [U. S. Comp. St. 1901, pp. 2307, 2310]), passed June 13, 1898.

Jordan died September 29, 1898. A writing purporting to be his will, wherein the plaintiffs in this suit were named executors, was offered for probate. Jordan's widow and son duly contested the probate, alleging that Jordan was of unsound mind and unduly influenced. The probate court allowed the will. An appeal was taken therefrom to the Supreme Court, wherein issues for a jury were framed, and at the trial the jury found a verdict in favor of the will. Exceptions taken at the trial by the contestants were later sustained by the Supreme Court, and the verdict was set aside. Thereafter, pursuant to the statutes of Massachusetts (Rev. Laws, c. 148, § 15), a compromise was duly entered into, by which the estate was distributed in a manner other than that provided in the writing above mentioned. The legacy tax, properly assessed according to the disposition made by the original writing offered for probate, was $3,060.67. If assessed according to the disposition made by the compromise, its amount

was $1,781.25. For the difference, viz., $1,279.42, the plaintiffs sue in this action.

The statute of Massachusetts above mentioned is as follows:

"The Supreme Judicial Court shall have jurisdiction in equity to authorize the persons named as executors in an instrument purporting to be the last will of a person deceased, or the administrators with such will annexed, to adjust by arbitration or compromise any controversy between the persons who claim as devisees or legatees under such will and the persons entitled to the estate of the deceased under the statutes regulating the descent and distribution of intestate estates, to which arbitration or compromise the persons named as executors, or the administrators with the will annexed, as the case may be, those claiming as devisees or legatees whose interests will in the opinion of the court be affected by the proposed arbitration or compromise, and those claiming the estate as intestate, shall be parties."

Section 29 of the war revenue act provides:

"That any person or persons having in charge or trust as administrators, executors or trustees any legacies or distributive shares arising from personal property * * * passing * * * from any person possessed of such property either by will or by the intestate laws of any state or territory * * * shall be, and hereby are made subject to a duty or tax."

The government contends that the tax should be assessed according to the tenor of the writing offered for probate, on the ground that this is the will of Jordan, rather than the compromise subsequently effected by those interested in his estate. But, whether the compromise be deemed a will or not in the purview of the war revenue act, under no circumstances can a writing which has not been admitted to probate in the proper court of Massachusetts be made the basis of an inheritance tax in the federal courts. Only by probate is a writing in its nature testamentary established in Massachusetts as the will of its maker. The Circuit Court of the United States is not a court of probate, and is without jurisdiction to determine that a writing which for any reason has failed of probate in the proper state court is the last will of Jordan. Either the compromise is to be deemed his will within the purview of the war revenue act, or he must be deemed to have died intestate. This was the view necessarily taken by the government itself. In collecting the tax the government necessarily set up the compromise. It did not seek payment from the persons named as executors in the original writing. They never had in charge any distributive shares of personal property. It sought payment from the persons appointed executors by the probate court by virtue of the compromise, inasmuch as the latter made distribution of Jordan's estate. A writing, which may have been in Jordan's possession, does not become his will merely because it has been vainly offered for probate. There is some difficulty, indeed, in holding that a compromise which has been made by the parties to the controversy, and has been approved by the supreme court of probate, is thereby made the will of Jordan. Unless, however, the shares distributed in accordance with its provisions be deemed for the purposes of the war revenue act to pass "by will or by the intestate laws," the United States can collect no tax whatsoever upon the shares. This result seems inadmissible.

As Jordan's executors never had in charge legacies or distributive shares which passed according to the writing originally offered for probate, they were not liable for any tax thereupon.

There will be judgment for the plaintiffs.

UNITED STATES v. WALKER.

(Circuit Court, E. D. New York. June 26, 1907.)

ALIENS—OFFENSES AGAINST CHINESE EXCLUSION ACTS—LIABILITY OF MASTER OF VESSEL.

An indictment charging the master of a vessel with a violation of Act Sept. 13, 1888, c. 1015, § 9, 25 Stat. 478 [U. S. Comp. St. 1901, p. 1316], which makes it a misdemeanor if the master of any vessel "shall knowingly bring within the United States on such vessel and land, or attempt to land, or permit to be landed any Chinese laborer or other Chinese person in contravention of the provisions of this act," must aver that defendant "knowingly" permitted such Chinese person to be landed.

On Motion to Quash Indictment.

William J. Youngs, U. S. Atty.

J. Parker Kirlin, for defendant.

HOLT, District Judge. The defendant, the captain of a steamship, was indicted for violating section 9 of chapter 1015 of the Laws of 1888, entitled "An act to prohibit the coming of Chinese laborers to the United States." Act Sept. 13, 1888, 25 Stat. 478, c. 1015 [U. S. Comp. St. 1901, p. 1316]. Section 9 provides that the master of any vessel who shall knowingly bring within the United States on such vessel, and land, or attempt to land, or permit to be landed, any Chinese laborer or other Chinese person, in contravention of the provisions of this act, shall be deemed guilty of a misdemeanor. The indictment alleged that the defendant did unlawfully allow and permit a certain Chinese sailor, and a member of the crew of the steamer, to land in and to be landed in the United States, at the borough of Brooklyn. The indictment did not allege that the master knowingly permitted him to be landed, and the motion is made to quash the indictment on that ground.

In my opinion it is essential that the indictment should allege that the master of the vessel knowingly permitted the person to land. The district attorney asserts that it is extremely difficult to obtain proof in any case that the master knowingly permitted such act. What degree of proof is necessary to establish knowledge on the part of the master is a question which must be determined in each case as it arises, but the statute provides that knowledge is essential to guilt, and, in my opinion, it would be extremely unjust to permit a master of a vessel to be convicted of a misdemeanor for an act done absolutely without his knowledge and against his most strenuous efforts to prevent it.

The motion is granted, and the indictment quashed.

HAYDOCK v. FISHERIES CO.

(Circuit Court, D. Maine. October 31, 1907.)

No. 614.

CORPORATIONS—ANCILLARY RECEIVERSHIPS.

Where a Circuit Court of the United States for the district in which a corporation has its domicile has, in accordance with the local statutes, acquired jurisdiction of a bill in equity to wind up the affairs of the corporation, and has appointed a receiver thereon, the Circuit Court of the United States for the District of Maine will assist by the appointment of an ancillary receiver, first, unless for special reasons, requiring public notice of the application therefor. Hutchinson v. American Palace Car Co. (C. C.) 104 Fed. 182, and Conklin v. United States Shipbuilding Company (C. C.) 123 Fed. 913, applied.

In Equity. On application for appointment of receiver.

Bird & Bradley, for complainant.

PUTNAM, Circuit Judge. This is an application for a receivership of the property in this district of the Fisheries Company ancillary to a receivership constituted by the United States Circuit Court for the District of New Jersey. Such public notice of the application as the court deemed necessary has been given, and no person has intervened to object to the application.

The Fisheries Company was incorporated under the laws of New Jersey; and, on inspection of the bill filed in the District of New Jersey and the relief prayed therein, it appears that the alleged purpose was to secure a receivership and the winding up of the corporation in accordance with the statute laws of that state. The statutory relief being of an equitable character, it is well settled that the federal court in the district of New Jersey had jurisdiction to grant it. The circumstances and the statutory law are in all respects the same as they were in Conklin v. United States Shipbuilding Company (C. C.), in which we appointed an ancillary receiver, as appears in 123 Fed. 913, and 124 Fed. 1020, and we have full regard to the views expressed by us in Hutchinson v. American Palace Car Co. (C. C.) 104 Fed. 182. We are of the opinion that the Circuit Court of the District of New Jersey had jurisdiction in the matter, and that we should co-operate with it as now asked of us.

The order asked for must provide that a detailed inventory of the property covered by it, with a detailed estimate of values, shall be filed in this court by the receivers within two weeks after they are constituted such; and it must also reserve to this court full authority to make all such supplemental orders as to priorities and other incidental equities. It must also provide for a reasonable surety bond to be given by the receivers.

It is ordered that an ancillary interlocutory receiver may be constituted in accordance with our opinion passed down this day.

ACORD et al. v. WESTERN POCAHONTAS CORPORATION.

(Circuit Court, S. D. West Virginia. November 22, 1907.)

1. EQUITY—BILL OF REVIEW—GROUNDS.

A bill of review is maintainable after the term of entry of final decree generally for two reasons: First, for error therein apparent upon its face; and, second, on account of newly discovered evidence, material in character, that could not earlier have been discovered with due diligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 1078–1094.]

2. SAME—ERROR OF LAW.

Where error of law is the ground assigned in a bill of review, it must be shown from the pleadings, proceedings, and decree, without reference to the evidence, and no other question is open.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 1075–1082.]

3. SAME—DEMURRER TO BILL OF REVIEW.

To a bill of review for errors of law a demurrer is both admissible and proper; and, as questions of fact are not open for re-examination on such a bill of review, the truth of any fact averred in the bill inconsistent with the decree is not admitted by a demurrer. Since no error can be assigned on such fact, it is not properly pleaded.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 1125.]

4. SAME—LEAVE TO FILE—NEW MATTER.

A bill of review for errors of law can be filed without leave of the court, but one based on newly discovered evidence only by such leave, which rests in the sound discretion of the court; and even if such evidence would have changed the decree the court may refuse to reopen the decree, if productive of mischief to innocent parties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 1111.]

5. SAME—NEWLY DISCOVERED EVIDENCE.

To sustain a bill of review based on newly discovered evidence, such evidence must be new, or else such as the party could not by diligence have known, and the failure to produce it, if existent at the time of the decree must be accounted for. It must be controlling, not merely cumulative, not mere impeachment of witnesses, nor only increasing doubt as to the real truth.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 1091–1094.]

6. SAME—JOINDER OF GROUNDS.

The two grounds of error of law in a decree and newly discovered evidence may be joined in the same bill of review, which in such case may be filed by leave of the court; the objection of multifariousness, if urged, being largely within the sound discretion of the court and dependent to a very considerable extent on the particular facts of each case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 1123.]

7. SAME—DECREE REVIEWABLE.

Under the practice of the federal courts a bill of review based on newly discovered evidence will lie, although the decree was entered by default.

8. SAME—INSUFFICIENCY OF BILL—PRACTICE.

Where neither error of law nor newly discovered evidence is shown by a bill of review, leave to file it may be refused, or, if granted, the bill may be dismissed because leave to file was improvidently granted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 1113.]

9. SAME—NATURE OF REMEDY.

A bill of review for error of law is in the nature of a writ of error, and must be governed practically by the same rules governing appellate courts in considering writs of error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 1065–1069.]

10. SAME—OBJECTION TO EQUITY JURISDICTION—WAIVER.

Failure to make objection to equitable jurisdiction because of an adequate remedy at law before final hearing is a waiver thereof, and authorizes the court to retain the cause if the case be one of such a nature that equity might give the relief asked, or any part of it, or if the question of equitable jurisdiction be even a doubtful one; and such rule is applicable where the objection is made for the first time in a bill of review for errors of law in a decree entered on default, and the question for determination in such case is whether the bill upon which the decree was based, taking its allegations of fact to be true, stated cause of action for equitable relief.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 119, 120.]

11. QUIETING TITLE—JURISDICTION—CLOUD ON TITLE—CANCELLATION OF INSTRUMENTS.

A bill which alleges that complainant is the absolute owner of certain lands, that defendants were in possession thereof as tenants of complainant under written leases and having no other right or title thereto, and that they conspired together to defraud complainant of such lands, and in pursuance of such conspiracy executed deeds to one another purporting to convey title to specific parts of such lands, which deeds they caused to be recorded, states a cause of action cognizable in a federal court of equity for the cancellation of such deeds as clouds upon complainant's title.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Quieting Title, §§ 69–77.]

12. SAME—NATURE OF INSTRUMENT.

Any deed, devise, or other instrument, judgment, or decree not void on its face, which purports to convey any interest in or makes any charge upon land of the true owner, and the invalidity of which must be established by extrinsic evidence, or which, if left undisturbed, may ripen into a perfect title, is a cloud upon the legal title of the owner in possession under the law of West Virginia, and a suit in equity for its cancellation may be maintained in a federal court in that state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Quieting Title, §§ 14–33.]

13. SAME—PERSON ENTITLED TO MAINTAIN SUIT—ESTOPPEL.

The institution of an action in ejectment in a federal court in West Virginia, which, being governed by the state law and practice, may be maintained, although the plaintiff is not out of possession, is not an admission by such plaintiff that he is not in possession, so as to preclude him from maintaining a suit in equity against the defendant to remove a cloud on his title to the same lands.

14. COURTS—JURISDICTION—FEDERAL COURTS.

The jurisdiction of a federal court of equity is not ousted because a state statute has given complainant a remedy by an action at law.

[Ed. Note.—Jurisdiction as affected by state laws, see note to Barling v. Bank of British North America, 1 C. C. A. 513.]

15. SAME—FRAUD ON JURISDICTION.

The facts that a domestic corporation permitted a mortgage on lands owned by it to be foreclosed, and that another corporation having in part the same officers and stockholders was organized in another state, which purchased such lands at the sale and also the stock of the former cor-

poration, which was thereafter dissolved, *held* not sufficient to establish a collusive transfer of the lands, for the purpose of enabling a suit in respect thereto to be brought in a federal court, such as deprived it of jurisdiction of such suit.

16. SAME—OBJECTION TO JURISDICTION—TIME OF TAKING.
Objection to the jurisdiction of a federal court in a suit on the ground that a collusive transfer of the property which is the subject of the suit was made for the purpose of conferring such jurisdiction cannot be taken for the first time in a bill of review after final decree has been entered and the term has ended.

17. EQUITY—BILL OF REVIEW—NEWLY DISCOVERED EVIDENCE.
A bill of review based on newly discovered evidence *held* insufficient in its showing of due diligence, where the facts existed before the entry of the decree assailed, and were largely shown by public records, and the only excuse for the nondiscovery was the poverty and ignorance of the parties filing the same and the default of their own counsel, not claimed to have been fraudulent or collusive.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 1091–1094.]

In Equity. On demurrer to bill of review.

On June 16, 1906, in term, the Western Pocahontas Corporation presented its bill in this court against Abraham Acord and some 71 others, in which it alleged itself to be a corporation under the laws of Virginia and the defendants named to be citizens and residents of West Virginia; that it was the owner of 28,113 acres of land, situate in Wyoming and Raleigh counties, derived by it through mesne conveyances from two patents issued by the commonwealth of Virginia, the one on February 11, 1797, to James Welch for 90,000 acres, and the other on June 25, 1795, to Wilson Carey Nicholas for 500,000 acres; and in support of this allegation it filed with said bill, as parts thereof, office copies of conveyances and other records showing a perfect chain of title from said patentees to it for said 28,113 acres. The bill then alleges that in the year 1884 plaintiff's predecessors in title took the actual adversary possession of said tract of land and placed thereon some 73 tenants under written leases, copies of which are exhibited as parts of the bill, which tenancies, created from that year to the year 1892 and continued uninterrupted until the present time, embraced each part and all of said land, whereby actual, continuous, peaceable, exclusive, notorious, hostile, and adversary possession of said tract of land has been maintained by plaintiff and its predecessors in title from said year 1884 to the present time; that all taxes assessed and assessable against said land have been paid; that the tract has been duly and regularly entered on the land books of the proper counties, and has never become forfeited; that plaintiff is the owner in fee simple, and has the open, notorious, exclusive, hostile, peaceable, and adverse possession thereof; that on or about April 1, 1905, certain of said tenants of plaintiff, named, entered into an agreement among themselves and with the other tenants, named, to combine for the purpose of attempting to take from the plaintiff certain portions of its said land, and for that purpose they, with others, defendants named, met and organized a lodge or society called the "Citizens Union," adopted articles of agreement or association, elected officers, selected a meeting place, levied and collected and still continue to levy and collect monthly dues from the membership in aid of this organization, charged to be a secret one, guarded by an oath of secrecy administered to each one at the time of becoming a member thereof; that in pursuance of said combination the members of said "Citizens Union" agreed among themselves to execute deeds, one to the other for such parts or parcels of plaintiff's said land, in their possession as its tenants, as each one desired to possess, and engaged the county surveyor of Wyoming county and another to survey out the particular portions each desired, so that the boundaries thereof could be defined, which surveying was done, and deeds of conveyance, one to the other, were executed and placed upon record for each one's selected parcel. Copies of these deeds,

more than 50 in number, are exhibited with the bill. It is further charged that no surrender was made by said tenants prior to the taking of said deeds by them of the premises held by them, but they immediately began to assert hostile claims to such lands; that they have no right and never had any claim of title whatever except as contained in these deeds made by them when tenants of plaintiff one to the other. The bill then charges that, so soon as informed and advised of these proceedings, it instituted on the law side of this court an action of ejectment against said defendants, which is pending; that in the ordinary course of procedure it would be impossible to try more than one or two of defendant's claims in any one trial, and that to prosecute said action of ejectment to a final conclusion would require from 25 to 30 years; that the costs and expenses would ultimately exceed the value of the land in controversy; that judgment for costs could not be collected, and that by intervention on the part of equity a great multiplicity of suits would be avoided, enormous costs saved, and an adequate relief obtained, which could not be obtained at law; that said surveys and said deeds made of said parcels by such tenants one to the other and to those in collusion with them, so admitted to record, have created clouds upon plaintiff's title, greatly depreciating its market value; that the making thereof under said combination and conspiracy called the "Citizens Union" was fraudulent; that no part or parcel of lands claimed by defendants under these deeds had ever been assessed upon the land books and no taxes ever paid; that these defendants applied to Stewart, county clerk of Wyoming county, to have these parcels placed upon such books, but he, knowing they had no title, refused to enter the parcels; that in the year 1905, however, when reassessment of the lands of the state under legislative act was made, the reassessor listed these parcels and placed them upon the land books, and that Stewart, clerk, unless enjoined, will extend them on the land books and they will be assessed with taxes for the year 1906; and, finally, that some of the defendants have been and are cutting timber upon said parcels, some have contracted to sell to the Welch Lumber Company the timber on such parcels, as shown by deeds made by them to such company, it well knowing, when it took such deeds, that they had no title and no right to sell. The prayer of this bill was that process issue; that certain defendants, officers of the "Citizens Union," be required to file its constitution, by-laws, and acts, with a list of its membership; that a decree be entered adjudging title to said 28,113 acres of land to be in plaintiff, free and acquit from all claims of defendants; that all of said deeds to defendants be canceled and set aside as clouds upon plaintiff's title; that said "Citizens Union" be decreed to be a fraudulent conspiracy against plaintiff, and be dissolved, and each member thereof be restrained from carrying out its purposes and from further asserting title to plaintiff's land; that Stewart, clerk, be enjoined from placing said parcels of land on the land books for taxation purposes; that the possession of the defendants be decreed to be the possession of plaintiff; that they be enjoined and restrained from cutting and removing timber from said lands and for general relief.

This bill was by order filed, remanded to rules, process issued thereon, was served upon defendants, and, no appearance having been entered by them thereto, at August rules, 1906, an order was entered taking the bill pro confesso against them. On the 28th day of September, following, the cause having been set down for hearing on that day, and no appearance or proceeding having been entered or taken by the defendants, a final decree was entered therein which decreed: (1) That an organization, comprised of defendants and others, known as the "Citizens Union," existed, and that it was an illegal and fraudulent conspiracy against plaintiff and against its title to and use and enjoyment of its land. (2) That the deeds executed by defendants, one to the other, conveying parts of plaintiff's land, were made in pursuance to and to carry out the illegal and fraudulent purposes for which said conspiracy was formed; that both grantor and grantee in said deeds knew that they and neither of them had any right, title, or interest in the land purporting to be conveyed thereby. (3) That the plaintiff is in the actual possession of all of its said land, under and by virtue of the tenancies created by the leases filed with its bill, and that the possession of the defendants (naming them) under and by virtue of the leases and subleases held by them, as well as under said

that on June 24, 1902, Crawford and others organized under the laws of West Virginia the Western Pocahontas Coal & Lumber Company, with an authorized capital stock of $2,000,000; that on January 29, 1903, the said Maben and his co-trustee, Bell, conveyed to said Western Pocahontas Coal & Lumber Company the 28,113 acres of land in controversy, for an alleged consideration of $801,220.50, of which $150,000 is alleged to have been paid down and a mortgage given upon the land to secure the balance, represented by two bonds, for $350,585.25 each, due February 1, 1904, and 1905, with interest; that prior to April 1, 1905, the plaintiffs in this bill of review were in possession and asserting hostile claims to this land, and the Western Pocahontas Coal & Lumber Company was seeking to either oust them or compel them to acknowledge its title; that its agents did obtain the marks and signatures to leases by false representations and through the ignorance of their rights of said plaintiffs; that they at the time had a complete defense to any action said company might have brought, although they were ignorant of the character of such defense; that in this condition of affairs the officers and stockholders of the Western Pocahontas Coal & Lumber Company entered into a combination with those interested in the Chesapeake & Ohio Railroad Company to bring about a condition of affairs by which they could institute an action in the United States court, which combination and conspiracy has been discovered by said plaintiffs since said decree, although pre-existent; that at the time the Western Pocahontas Coal & Lumber Company was solvent, had a capital of $2,000,000, was in position to secure the money to pay off the mortgage debt to Maben and Bell, and could have placed bonds upon said lands for that purpose; that in pursuance of the plan to secure jurisdiction in the United States court it refused to pay said indebtedness, Maben and Catlett, trustees (Catlett having been appointed in place of Bell, deceased), about April 1, 1905, filed a bill in the circuit court of Raleigh county to enforce said mortgage, to which bill the Western Pocahontas Coal & Lumber Company filed an answer admitting the indebtedness, and on July 21, 1905, a decree was entered in favor of Maben and Catlett, trustees, therefor, and subsequently an order of sale was entered, which order appointed the attorney bringing the suit special commissioner to sell, and said sale was advertised to be made at public auction on the 16th of October, 1905; that on October 5, 1905, there was organized under the laws of Virginia, by the officers of the Chesapeake & Ohio Railway Company and others, among whom was Joseph U. Crawford, president of the Western Pocahontas Coal & Lumber Company, and James Knox Cain, who became secretary of the new corporation, a corporation styled the Western Pocahontas Corporation, with a capital of $250,000, whose object was to acquire 30,000 acres of land in West Virginia; that the first president of this new corporation was Crawford, president of the West Virginia corporation, but he was soon succeeded by Decatur Axtell, vice president of the Chesapeake & Ohio Railway Company, and James Knox Cain, the first secretary, was soon succeeded by C. E. Wellford, secretary of the railway company, and the officers of this new Virginia corporation were the officers of the Chesapeake & Ohio Railway Company; that Cain, secretary of this new corporation, filed a sworn statement with the Virginia Corporation Commission on October 10, 1905, in which he stated that the money raised from the stock issued was being used to purchase all the outstanding stock and in the payment of the debts of the Western Pocahontas Coal & Lumber Company owning the equity of redemption in "coal lands in Raleigh county, W. Va., containing approximately 28,000 acres, known as the 'Maben and Bell tract'"; that the Virginia corporation on October 10, 1905, owned all the stock and debts of the West Virginia corporation, and substantially both were controlled by the president and officers of the railway company; that the railway company agreed to guarantee bonds of the Virginia corporation to the extent of $750,000, to be secured upon the lands in controversy; that the West Virginia corporation, with $2,000,000 capital, was better able to issue this $750,000 of bonds than the Virginia corporation, with only $250,000 capital, and the railway company could have more safely guaranteed them; that on the day of sale the bid of the Western Pocahontas Corporation was the only one made; that it was $750,000, and was accepted by the commissioner, who received no cash; that said sale was confirmed by the circuit court of Raleigh county, and a deed was made by the com-

fraudulent deeds, is the actual possession of plaintiff of each and every part of its said land covered by said leases, subleases, and said deeds. (4) That the defendants have not any estate, right, title, or interest whatever in the tract of land of 28,113 acres; that plaintiff's title thereto is a good, valid, subsisting, and fee-simple one; that the defendants be and are forever enjoined and restrained from asserting any claim thereto adverse to plaintiff, and that certain defendants named, having forfeited their leases and subleases, surrender possession of the land held by them, whenever required by written notice so to do, under penalty of contempt. (5) That the several deeds, set forth and described in said decree, executed under and by virtue of said conspiracy, be and are, and each of them is, canceled, annulled, set aside, and held for naught, and the cloud created thereby upon plaintiff's title is removed, and plaintiff is quieted in its title and possession of said lands; that Stewart, clerk, aforesaid, is enjoined from placing or continuing said parcels or any of them upon the land books for taxation; that plaintiff recover costs from defendants. This decree, by the ending of the term at which it was rendered on November 19, 1906, became absolute and final under equity rule 19. In consequence, a motion to set it aside made by the defendants at the following term was overruled.

Thereupon in March, 1907, the defendants, Abraham Acord and 50 others, presented and were granted leave to file against the plaintiff, the Western Pocahontas Corporation, this bill of review and supplement, in which they allege that said decree is erroneous, and should be reversed and set aside, because: (1) That if the allegations of the original bill be true, and the leases set up were valid, then the relation of landlord and tenant was created, and as an action wherein a landlord is claiming land is an action at law, under section 723 of the Revised Statutes [U. S. Comp. St. 1901, p. 583], this court of equity was without jurisdiction to entertain said bill and enter said decree. (2) That the allegations of the original bill, if true, touching the alleged combination under the name of the "Citizens Union," are not acts that would give equity jurisdiction, as all could be as well remedied at law as in equity; that such acts as alleged do not warrant the decree finding such "Citizens Union" to be a fraudulent conspiracy, and in this particular it is erroneous. (3) That the allegations set forth in said original bill are insufficient to cause equity to take jurisdiction for the purpose of avoiding a multiplicity of suits. (4) That the allegations of said original bill do not show any cloud on title to the land of the plaintiff therein for the removal of which equity would have jurisdiction. (5) That under the allegations of said bill it appears that the plaintiff therein had a full and adequate remedy at law. Then by way of supplement this bill of review charges that since the entry of said decree complained of they have discovered new evidence not in the cause, but material and relevant, discovered since the entry, which could not have been discovered before by diligence, which is not cumulative, but existed prior to the decree's entry, although not discovered until afterwards. Condensing the allegations of this bill touching this new matter and the reasons why it was not discovered and presented, it is alleged that these original defendants, now plaintiffs in this bill of review, were poor and ignorant, living in a mountain section, far from the place where this court was held; that they had been living, and those in privity with them by contract, estate, or blood, upon the lands for periods from 10 to 50 years, under claim or color of title, in actual, adverse, exclusive, and uninterrupted possession, fixed as to boundaries and location; that, being served with summons in the original cause, they employed an attorney to defend their rights, furnished him with papers and information, and paid him a large sum of money; that their counsel lulled them to fancied security by informing them their interests were safe, so that they knew nothing of the entry of said decree until four months thereafter; that they then secured their present attorney to make investigation, and through his investigation ascertained and discovered the new matter aforesaid, which could not have been discovered by them alone with reasonable diligence because of its character.

This new matter of defense so discovered is alleged to be: That on April 4, 1902, J. O. Brown, agent for Joseph U. Crawford and others, contracted with one J. C. Maben, trustee, for not more than 35,000 acres of land in Raleigh and Wyoming counties, W. Va., at an alleged price of $28.50 per acre;

missioner to the Virginia corporation. It is then charged that this sale was a nullity, and was not in fact made; that the whole proceeding was for the purpose of fraudulently invoking the jurisdiction of this court; that so soon as discovered these plaintiffs in this bill of review, at the term following said decree, by motion and affidavit presented the facts to this court; that they do not file this bill for delay; and that this court had no jurisdiction of said original cause.

To this bill of review the defendant, the Western Pocahontas Corporation, has filed a demurrer, assigning nine grounds, and the plaintiffs have tendered nine separate written motions to strike out these grounds of demurrer for reasons therein set forth, and upon this demurrer and these motions this hearing is had.

Arthur English, for plaintiffs.

J. Lewis Bumgardner, Vinson & Thompson, and Simms & Enslow, for defendant.

DAYTON, District Judge (sitting specially, after stating the facts as above). All possible questions, technical or otherwise, I think, that could arise in this case, have been argued at great length and with ability, both orally and in briefs filed by counsel. I am not inclined to regard it necessary to enter into an extended consideration of the technical and formal requirements of the demurrer involved in the statement of its nine grounds and the nine written motions to exclude. The law is well settled that a bill of review is maintainable after the term of entry of final decree generally for two reasons: First, for error therein apparent upon its face; and, second, on account of newly discovered evidence, material in character, that could not earlier have been discovered with due diligence. Bank of U. S. v. Ritchie, 8 Pet. 128, 8 L. Ed. 890; Clark v. Killian, 103 U. S. 766, 26 L. Ed. 607; Osborne v. San Diego, etc., Co., 178 U. S. 22, 20 Sup. Ct. 860, 44 L. Ed. 961; Hill v. Phelps, 41 C. C. A. 569, 101 Fed. 650; Beard v. Burts, 95 U. S. 434, 24 L. Ed. 485.

Where error of law is the ground assigned, this must be shown from the pleadings, proceedings, and decree, without reference to the evidence. No other question is open. Putnam v. Day, 22 Wall. 60, 22 L. Ed. 764; Willamette Co. v. Hatch, 125 U. S. 1, 8 Sup. Ct. 811, 31 L. Ed. 629. To such bill of review for error of law a demurrer is both admissible and proper, and it only admits such facts as are properly pleaded. As questions of fact are not open for re-examination on a bill of review for errors in law, the truth of any fact averred in that kind of a bill of review, inconsistent with the decree, is not admitted by a demurrer, because no error can be assigned on such a fact, and it is, therefore, not properly pleaded. Shelton v. Van Kleeck, 106 U. S. 532, 1 Sup. Ct. 491, 27 L. Ed. 269.

When such bill of review is based upon newly discovered evidence, it can only be filed by leave of the court in its sound discretion, cautiously and sparingly exercised; and, even if such evidence would change the decree, the court may refuse to reopen the decree, if productive of mischief to innocent parties. Thomas v. Harvie's Heirs, 10 Wheat. 151, 6 L. Ed. 287; Rubber Co. v. Goodyear, 9 Wall. 805, 19 L. Ed. 566; Ricker v. Powell, 100 U. S. 104, 25 L. Ed. 527; Craig v. Smith, 100 U. S. 226, 25 L. Ed. 577. The evidence must be new,

or else such as the party could not by diligence have known. The failure to produce it, if existent at the time of decree, must be accounted for. It must be controlling, not merely cumulative, not mere impeachment of witnesses, or only increasing doubt as to the real truth. Beard v. Burts, 95 U. S. 434, 24 L. Ed. 485; Rubber Co. v. Goodyear, 9 Wall. 805, 19 L. Ed. 566; Easley v. Kellom, 14 Wall. 279, 20 L. Ed. 890; Freeman v. Clay, 2 C. C. A. 587–593, 52 Fed. 1; Southard v. Russell, 16 How. 569, 14 L. Ed. 1052; Society of Shakers v. Watson, 23 C. C. A. 263, 77 Fed. 512.

A bill of review for errors of law can be filed without leave of the court, but on account of newly discovered evidence only by such leave. The two grounds may be joined, but in such case the bill can only be filed by leave. Ricker v. Powell, 100 U. S. 104, 25 L. Ed. 527; Whiting v. Bank, 13 Pet. 13, 10 L. Ed. 33. The ground of error in law, with that of impeachment for fraud, it is true, is doubted in Kimberly v. Arms (C. C.) 40 Fed. 548–559, where Judge Jackson points out that a bill of review to impeach for fraud designs a destruction of the decree in toto, while one based on errors of law has no other scope than to correct such errors. In fact, a bill to impeach for fraud should be considered generally as an original bill. Where the grounds are to correct errors or modify the decree, either by reason of errors on its face or on account of newly discovered evidence, no good reason, it seems to me, is apparent why the two grounds should not be joined and the bill filed by leave of the court. If the objection of multifariousness be urged, it is always to be remembered that the determination of the question of whether a bill is multifarious is one largely within the sound discretion of the court, and dependent to a very considerable degree upon the particular facts of each case. United States v. Bell Telephone Co., 128 U. S. 315, 9 Sup. Ct. 90, 32 L. Ed. 450; Walker v. Powers, 104 U. S. 245, 26 L. Ed. 729; Brown v. Trust Co., 128 U. S. 403, 9 Sup. Ct. 127, 32 L. Ed. 468; South Penn Oil Co. v. Calf Creek Co. (C. C.) 140 Fed. 507–516.

Under the ruling of Camden v. Ferrell, 50 W. Va. 119, 40 S. E. 368, it is held that a bill of review based on newly discovered evidence does not lie to a decree by default; but I agree with plaintiffs' counsel that this distinction is not made in federal practice, as shown by ruling in Thomson v. Wooster, 114 U. S. 104, 5 Sup. Ct. 788, 29 L. Ed. 105. Finally, it may be stated as a well-settled rule that, if neither error of law nor new evidence be shown, leave to file it may be refused, or, if granted, the bill may be dismissed, because leave to file was improvidently granted.

With these well-settled principles before us, the grounds set forth in this bill of review for reversal of the decree can be reduced to two propositions: First, error in law, for that it is alleged the original plaintiff, having an adequate remedy at law, had no standing in equity; second, error in fact, in that a fraud upon the jurisdiction of this court was committed, the evidence of which existed at the time, but was not discovered until after the entry of said decree.

Considering the first proposition, it is well settled that a bill of review for errors of law is in the nature of a writ of error, and must be governed practically by the same rules governing appellate courts

in considering writs of error. Story's Equity Pleading, § 403. It has been held that where the subject-matter of a suit belongs to the class over which a court of equity has jurisdiction, and the objection that the complainant has an adequate remedy at law is not made until the hearing in the appellate tribunal, such objection is too late. Reynes v. Dumont, 130 U. S. 354, 9 Sup. Ct. 486, 32 L. Ed. 934; Tyler v. Savage, 143 U. S. 79, 12 Sup. Ct. 340, 36 L. Ed. 82. Also, failure to make before final hearing the objection of equitable jurisdiction because of an adequate remedy at law is a waiver thereof, and authorizes the court to retain the cause, if the case be one of such a nature that equity might give the relief asked, or any part of it, or if the question of equitable jurisdiction be even a doubtful one. Waite v. O'Neil (C. C.) 72 Fed. 348. In this last case Judge Hammond points out that only one other case (Dederick v. Fox [C. C.] 56 Fed. 714) applied this rule, relating generally to such objection in appellate courts, to courts of original jurisdiction, yet he reasons very forcibly that the rule was imported into the appellate courts of this country from the English High Court of Chancery and other courts of original cognizance, and therefore no sound reason exists for limiting the rule to appellate courts alone. However this may be in ordinary cases, I feel sure that the strongest reason exists for the application of such rule in a case like this, where the defense is set up for the first time in a bill to review a decree based upon a bill taken for confessed, and that the question narrows itself down to one of simply determining whether the original bill on its face would have been subject to demurrer as absolutely void of equitable jurisdiction. Its allegations of fact must be taken as absolutely true, because confessed; and it becomes, therefore, in a sense immaterial whether the exhibits in the nature of evidence be considered as parts of the bill or not. It is proper to state in that connection, however, that to hold that they are not, as contended for by plaintiffs' counsel, would be to hold counter to a practice in this court and the courts of this state maintained without question for very many years.

From these allegations of fact we must hold (a) that the Western Pocahontas Corporation is a Virginia corporation; (b) that the defendants to said original bill were all residents of West Virginia; (c) that the amount in controversy exceeded $2,000 in value; (d) that the corporation had absolute fee-simple title to the 28,113 acres of land in controversy, and (e) was in full and complete possession of the tract and every part of it; (f) that the defendants had no right, title, color, or claim of title whatever to it or any part of it; (g) that their possession was not adverse, but solely that of tenants for the corporation under written leases legally executed; (h) that, being so in possession, they unlawfully combined, confederated, and conspired together to defraud the corporation and secure illegally its said land; (i) that in pursuance of such combination and conspiracy they as tenants, in violation of their legal duty and obligation as such, executed many deeds one to the other of various parcels of said lands, which said deeds purported to convey and vest in the grantees therein full legal title to the parcels conveyed by specified metes and bounds fully descriptive of such parcels, and whereby they could be identified; and

(j) that they caused these deeds to be placed upon the public records and said parcels of land upon the assessment books for taxation purposes in the counties where said lands were situate.

Leaving out of consideration the further allegations of the bill touching multiplicity of suits, do not these facts present a basis for equitable intervention? I think clearly so. There is no better established ground for equitable jurisdiction than an appeal to remove cloud from and quiet title to real estate. It is recognized, not alone by decisions of the federal and state courts, but by federal statute as well. It is not only so recognized, but favored, for by Act March 3, 1875, c. 137, § 8, 18 Stat. 472 [U. S. Comp. St. 1901, p. 513], express exception to the law limiting jurisdiction of federal courts to civil suits brought in the district whereof the defendant is an inhabitant is made of suits "to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon, the title to real or personal property," which suits may be brought in the district wherein such property is situate.

The contention that these deeds, having no antecedent source of title, were void, and therefore constituted no clouds upon the title of the corporation, is wholly untenable. I entirely agree with counsel for the corporation that any deed, devise, or other instrument, judgment, or decree, not void on its face, which purports to convey any interest in or makes any charge upon land of the true owner, the invalidity of which requires proof by extrinsic evidence, is a cloud upon the legal title of the owner in possession. And, futher, any pretended conveyance which, if left undisturbed, may ripen into a perfect title, must necessarily create a cloud upon the true title. Statutes and decisions of courts of last resort of the several states defining what may or may not constitute cloud on title, what may or may not constitute title itself or claim or color of title, and what may by possession ripen into good title, although void in initio, are parts of the substantive law of such states, affecting real estate therein, and therefore are of controlling influence in federal courts held within such states, under well-settled authority. Looking to the decisions of the West Virginia Supreme Court of Appeals to guide us, we find the foregoing definitions of what may constitute cloud on title to be fully established by such cases as Smith v. O'Keefe, 43 W. Va. 172, 27 S. E. 383; Waldron v. Harvey, 54 W. Va. 608, 46 S. E. 603, syl. 21, 102 Am. St. Rep. 959; Robinson v. Lowe, 50 W. Va. 75, 40 S. E. 454; Bennett v. Pierce, 50 W. Va. 604, 40 S. E. 395; Ambler v. Leach, 15 W. Va. 677; Garrett v. Ramsay, 26 W. Va. 345; Moore v. McNutt, 41 W. Va. 695, 24 S. E. 682. There can be no question, therefore, that these deeds did constitute such clouds upon title as would warrant an appeal to equity to remove them.

But it is insisted that equity can only remove such clouds when the plaintiff asking such removal is in possession, and that on the face of this bill the plaintiff corporation admitted that it had instituted an action of ejectment against defendants therein, which could only be brought by one out of possession and which by the averments of its declaration declared itself to be out of and said defendants in possession. The first part of this contention, that equity can intervene only

in behalf of a plaintiff in possession, is true beyond question; but the latter part, that such intervention is barred by the institution of the action of ejectment is untenable for two reasons:

First, because the action of ejectment, being an action at law, federal practice follows that of the state, and in West Virginia that practice, regulated by express statute, does not require a person to be out of possession in order to institute it. As pointed out by Judge Brannon in Moore v. McNutt, 41 W. Va. 695, 24 S. E. 682, by the Code of 1849 the writ of right was abolished and the action of ejectment was made applicable to perform its function of trying title. It became a "statutory action of ejectment." As such, under chapter 90, Code W. Va. 1906, regulating it, it is expressly provided that it may be brought in every case where writ of right prior to 1850 could be brought. This writ, when in existence, could be brought, regardless of possession, to try title. It further prescribes in section 7 of that chapter the requisite averments for the declaration in ejectment, to the effect that, plaintiff being possessed of the premises on a certain day, the defendant entered into such premises and unlawfully withholds from the plaintiff the possession thereof, thereby retaining the old common-law form. Under such circumstances the institution of such a statutory action with such scope, but bounded by such form, could not constitute an estoppel to the owner to claim title and possession. Again, the defendant's possession under many circumstances may be a limited possession, and not hostile and adverse. There can be no question, I think, under the wide scope given it by this statute, that this action can be brought by the landlord to recover possession from a tenant whose lease has expired, or who has violated its conditions, although the action of unlawful detainer may practically be more expeditious and less expensive.

But, second, the right to equitable intervention is not destroyed because, as Judge Brannon says in Moore v. McNutt, supra: "The plaintiff being in possession, had the right to go into equity. Even if he could maintain ejectment, that would not debar him from chancery, because the jurisdiction in such case in chancery, having been established long before the Code of 1849, which is the first time the right to maintain ejectment by one in possession arose, the jurisdiction of chancery would not be ousted by the new act." To the same effect is the ruling of this court in Lasher v. McCreery (Judges Goff and Jackson sitting together) 66 Fed. 834, at pages 842, 843, and in Miller v. Ahrens, 150 Fed. 644. See, also, Smythe v. Henry, 41 Fed. 705. The conclusion follows that this bill of review cannot be maintained for the alleged errors of law.

As to the supplemental matter, it is to be borne in mind that the facts are presented solely to show that this court did not have jurisdiction; that a fraud had in fact been committed upon its jurisdiction, in that the transfer of this tract of land was effected from the Western Pocahontas Coal & Lumber Company, the West Virginia corporation, to the Western Pocahontas Corporation, the Virginia corporation, solely to enable the suit to be brought in this, instead of the state, court. It is claimed the facts presented by this supplement bring this case squarely within the principles of a class of cases of which the

case of Lehigh Mining & Mfg. Co. v. Kelley, 160 U. S. 327, 16 Sup. Ct. 307, 40 L. Ed. 444, may be taken as the best example. I have gone over time and again these facts as presented here, each time with an increased conviction that in very many and very material particulars they do not coincide with those of the Lehigh Case, and it must be conceded, in the very nature of things that the facts in each case are all essential to determine whether the principles enunciated there are applicable. In the Lehigh Case the agreed facts show that the conveyance from the Virginia to the Pennsylvania corporation was made direct, that the stockholders were the same in both companies, that the organization of the Pennsylvania corporation and the conveyance to it were expressly made to secure jurisdiction in the federal court over the controversy, and that both corporations are existent. Here the conveyance was not voluntarily and directly made. On the contrary, it is conceded that the West Virginia corporation was indebted for purchase money due and unpaid for the land more than $700,000; that a valid mortgage subsisted upon the land to secure this indebtedness; that suit, with process regularly served, was instituted in the circuit court of Raleigh county, W. Va., to foreclose this mortgage by the trustees to whom the debt was due and payable; that the debtor, the West Virginia corporation, answered the bill, admitting the indebtedness and decree of sale was entered, and sale publicly made and regularly confirmed by this state court of competent jurisdiction.

In the second place, it is not charged that the stockholders in the Virginia corporation, which became the purchaser, are precisely the same as in the West Virginia corporation, although the officers are said to have been at the time of organization of the former identical. On the contrary, it is charged that officers of the Chesapeake & Ohio Railway Company, not stockholders of the West Virginia company, organized, dominated, and controlled the Virginia company; that the stock issue of this latter was fixed at $250,000, and was used, pending the foreclosure suit, in the purchase of the stock and payment of the debts of the West Virginia company having the equity of redemption in said land; that the new company executed its bonds for $750,000, which were guaranteed by the Chesapeake & Ohio Railway Company, with which the purchase price at the foreclosure sale was settled. It is true it is charged that the West Virginia corporation, with its large authorized capital, could as well have floated these bonds, and the railway could as securely have guaranteed its bonds as those of the Virginia corporation. This may have been true; but there was no obligation upon the railway company to indorse the bonds of either, and, if it was willing to indorse those of the one and not those of the other, no fraud can be imputed to its action on that account.

Finally, it appears by the public records of this state, of which I must take judicial notice, that in February, 1906, substantially four months before the institution of the original suit herein, the Western Pocahontas Coal & Lumber Company, the West Virginia corporation, was wholly dissolved and ceased to have any existence whatever. See West Virginia Corporation Report of Secretary of State, March 4, 1905, to March 1, 1907, page 874 (under head of dissolutions). Un-

der these entirely different conditions I do not think the principles laid down in the Lehigh Case can apply. It is to be remembered that in that case an able dissenting opinion was filed by Mr. Justice Shiras, in which two other members of the court joined, from which we may reasonably assume that the facts as therein presented made the question a close one. I am therefore convinced, after a long and careful study of the facts presented by this bill of review, that they are not sufficient to establish a collusive transfer to make parties, such as is contemplated by the inhibition of the acts of Congress of 1875, 1887, and 1888, and that I therefore originally erred in granting leave to the plaintiffs herein to file it.

But, in addition to this, I am convinced that to raise this question of jurisdiction for the first time by bill of review comes entirely too late. I carefully considered this question in Briggs v. Traders' Co. (C. C.) 145 Fed. 254, and there pointed out the fact that prior to the act of 1875 the common-law rules touching the necessity of a plea in abatement to the jurisdiction prevailed in the federal courts, and a filing of a plea or answer to the merits waived the question of jurisdiction, as held in Farmington v. Pillsbury, 114 U. S. 138, 143, 5 Sup. Ct. 807, 29 L. Ed. 114; that this act of 1875 did not change the general scope of the rule enunciated in Farmington v. Pillsbury, but authorized the court as of right and duty without plea or motion, at any time during the progress and pendency of the suit, to stop all proceedings and dismiss the cause the moment a fraud on its jurisdiction was discovered, as held in Hartog v. Memory, 116 U. S. 588, 590, 6 Sup. Ct. 521, 29 L. Ed. 725, and Williams v. Nottawa, 104 U. S. 209, 211, 26 L. Ed. 719. A thorough reconsideration of the question convinces me that the provisions of this act do not either require or warrant the exercise of this power to the extent of reversing a final decree in an ended cause by reasons of extrinsic facts presented for the first time in a bill of review.

But, to go a step farther, if I had this power, I am finally convinced that the allegations of this bill as to diligence in discovering these facts fall short of the requirements of the law. It is admitted that they all existed prior to the entry of the decree and largely depended upon matters of public record. The essence of the reason assigned for their nondiscovery by these plaintiffs is their own poverty and ignorance and the default of their own counsel. No matter how much sympathy courts may have for the poor and ignorant, they must remember that they are to administer justice without respect to persons, and do equal right to the poor and to the rich according to fixed laws and rules, ignorance of which can excuse no one, rich or poor, wise or ignorant. It is too well settled to need discussion that default, negligence, or misconduct on the part of counsel toward his client will not excuse that client of neglect to meet the law's requirements, unless the attorney's conduct be in fraud and collusion with his client's adversary. No such charge is made here, and it is very apparent that when present counsel, employed after the decree complained of was entered, made his careful and searching investigation, he was able to discover these pre-existing facts.

Therefore in any and all phases of the case I must hold that the

demurrer to this bill of review, because of alleged errors apparent upon the face of the decree complained of, must be sustained, and as to the supplement the facts set forth therein are insufficient, and the leave to file the same was improvidently granted; and the bill in its entirety must be dismissed.

GAGE et al. v. RIVERSIDE TRUST CO., Limited, et al.

(Circuit Court, S. D. California, S. D. December 10, 1906.)

No. 1,223.

1. PROCESS—SUBSTITUTED SERVICE—POWER OF FEDERAL COURT TO AUTHORIZE.
On motion to vacate an order for substituted service made in a suit purporting to have been brought under Federal Judiciary Act March 3, 1875, c. 137, § 8, 18 Stat. 472 [U. S. Comp. St. 1901, p. 513], which authorizes such service in local actions relating to property within the district, the court must examine the bill, and the order should be set aside unless the bill affirmatively shows sufficient grounds for relief under such statute and complainants' right to maintain the suit.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Process, § 221.]

2. CORPORATIONS—EQUITY—JURISDICTION—ADMINISTRATION OF ESTATE OF CORPORATION.
A court of equity can administer the property of a corporation as a trust fund for the benefit of stockholders and creditors only when the corporation is insolvent.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 1574, 1575.]

3. PROCESS—SUBSTITUTED SERVICE—CONSTRUCTION OF STATUTE.
Statutes authorizing substituted service are to be strictly construed.

4. CANCELLATION OF INSTRUMENTS—PLEADING—SUFFICIENCY OF BILL.
A bill in equity for the cancellation of a trust deed and mortgages, on the ground of fraud and conspiracy, *held* not to allege sufficient facts to authorize such relief.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Cancellation of Instruments, §§ 66-81.]

5. CORPORATIONS—STOCKHOLDERS' SUITS—FAILURE TO COMPLY WITH EQUITY RULE 94.
Without a compliance with equity rule 94 a stockholder can no more maintain a suit in equity in a federal court founded upon rights which may properly be asserted by the corporation, than an entire stranger to the corporation and its property; and a failure to comply with the rule is available against an order for substituted service on defendants, as well as on the merits, where it affects the alignment of the parties, and in that way the court's jurisdiction.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 777, 778.]

6. COURTS—JURISDICTION OF FEDERAL COURT—DIVERSITY OF CITIZENSHIP.
To confer jurisdiction on a federal court, where there are several plaintiffs and defendants, all necessary parties on one side must be citizens of a state, and all on the other side must be citizens of another state or foreign country.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 855.]

7. SAME—SUIT BETWEEN ALIENS.
The federal courts are without jurisdiction of a suit between aliens, where no federal question is involved.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 847.]

8. SAME—ALIGNMENT OF PARTIES.
In determining the question of federal jurisdiction, where it depends solely on diverse citizenship, it is the duty of the court to arrange the parties on the one side or the other according to their interests or the facts, regardless of the places they occupy in the pleadings as plaintiffs or defendants.

9. SAME—STOCKHOLDERS' SUIT.
In a stockholders' suit in a federal court to remove an alleged fraudulent lien from the property of the corporation, where the complainant has not complied with equity rule 94, the corporation will be aligned on the side of the complainant.

10. DISMISSAL—WANT OF JURISDICTION.
Where the jurisdiction of a federal court of a suit in equity depends alone on diversity of citizenship, and a proper realignment of parties discloses its want of jurisdiction, it is the court's duty to dismiss the suit on its own motion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Dismissal and Nonsuit, § 160.]

In Equity. On motions to vacate order for substituted service.

Purington & Adair and J. S. Chapman, for complainant.
M. B. Kellogg, John G. North, and Hunsaker & Britt, for defendants.

WELLBORN, District Judge. Said motions involve and depend largely upon the construction of section 8 of Act March 3, 1875, c. 137, 18 Stat. 472 [U. S. Comp. St. 1901, p. 513], which provides, among other things, as follows:

"That when in any suit, commenced in any circuit court of the United States, to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of, or found within, the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendants to appear, plead, answer, or demur, by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks. But said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district."

There is no question but that, on a motion to vacate an order for substituted service made under said section, the court must examine the bill in order to ascertain whether or not the case is within the statute; and the first question to be determined on this hearing relates to the scope or extent of such examination. Is it sufficient for the complainant, with such facts alleged in his bill as indicate his good faith and relieve the case from a charge of frivolousness, to pray for one or more of the objects enumerated in said section, or must he also show himself entitled to such relief?

I am of opinion, that an affirmative response to the last clause of this question embodies the law. Certainly substituted service would not be authorized in a case where the bill, although specifically demanding the relief mentioned in the statute, clearly negatived complainant's right

thereto; and it seems to me, after careful consideration of the statute, its phraseology and manifest purpose, that such service ought not to be had in any case unless the complainant affirmatively shows his right to the relief, which alone justifies the service. It would be illogical and unreasonable to hold that a statute designed solely to enable a complainant to accomplish certain specified objects includes a case where, from complainants' own showing, it does not appear that either of said objects is attainable. I am forced to conclude that to justify an order for substituted service the bill, if the suit be in equity, should show: First, sufficient grounds for the relief mentioned in the statute; and, second, complainant's right to maintain the suit.

This conclusion is in no way impaired by the contention that it is the office of a general demurrer to determine the sufficiency of a pleading. Nonresident defendants may, unquestionably, if they see fit to do so, thus contest the equities of a bill, but, if the service upon them be invalid, it is no answer to a motion to set it aside to say that the grounds of the motion involve objections, which might, under other procedure, be appropriately raised at a later stage of the case. Nor is such an objection, when made by a defendant, on a motion to vacate an order for substituted service, a general appearance, because, if a plaintiff, to avail himself of the procedure which the statute affords, but expressly limits to particular relief, must, as I have held, show on the face of the bill his right to such relief, then facts, which would otherwise be heard only on the merits, must necessarily be considered in determining the legality of the service.

The authorities cited in complainants' brief do not, so far as I have been able to discover, militate against the views above expressed. From Greeley v. Lowe, 155 U. S. 75, 15 Sup. Ct. 28 (39 L. Ed. 69), complainants quote as follows:

"These objections, however, are not within the question certified to us for decision, which is that it had been 'adjudged and decreed that this court has not jurisdiction over all of the defendants to this action because they are not all citizens and residents of the district in which the land sought to be partitioned lies, and are not all found in said district at the time of service of process, although they are all residents and citizens of other states than that in which complainants have residence and citizenship.' The objections go not to the jurisdiction of the federal court as such, but to the maintenance of such a bill in any court of equity in the state of Florida."

Even a cursory examination, however, of that case, shows that the jurisdictional question there involved concerned solely the residences of defendants, while in the case at bar the question of jurisdiction depends entirely upon the stating part and prayer of the bill. The two cases therefore are readily distinguishable, and the quotation from the former is inapplicable to the latter.

Another rule to be observed on this hearing is that a court of equity can administer the property of a corporation as a trust fund for the benefit of stockholders and creditors only when the corporation is insolvent. Mellen v. Moline Malleable Iron Works, 131 U. S. 352, 9 Sup. Ct. 781, 33 L. Ed. 178. It must also be borne in mind that statutes authorizing substituted service are to be strictly construed. Galpin v. Page, 85 U. S. 350, 21 L. Ed. 959; Earle v. McVeigh, 91 U. S.

503, 23 L. Ed. 398; Settlemier v. Sullivan, 99 U. S. 444, 24 L. Ed. 1110; Woolridge v. McKenna (C. C.) 8 Fed. 680; Batt v. Procter (C. C.) 45 Fed. 516; Winter v. Koon, Schwarz & Co. (C. C.) 132 Fed. 27.

In Galpin v. Page, supra, the Supreme Court said:

"When, therefore, by legislation of a state, constructive service of process by publication is substituted in place of personal citation, and the court upon such service is authorized to proceed against the person of an absent party, not a citizen of the state nor found within it, every principle of justice exacts a strict literal compliance with the statutory provisions. And such has been the ruling, we believe, of the courts of every state in the Union. It has been so held by the Supreme Court of California in repeated instances."

In Earle v. McVeigh, supra, the same high authority declared:

"Doubtless constructive notice may be sufficient in certain cases, but it can only be admitted in cases coming fairly within the provisions of the statute authorizing courts to make orders for publication, and providing that the publication, when made, shall authorize the court to decide the decree."

In Woolridge v. McKenna, supra, at page 680 of 8 Fed., the rule of strict construction is announced as follows:

"These provisions for substituted process are not favored, and are nowhere more strictly construed than by the federal courts."

In Batt v. Procter, supra, at page 517 of 45 Fed., the court said:

"Ordinarily in the adjudication of causes courts have before them all parties, either personally or through their representatives, whose interests are to be directly affected by the litigation; and the dictates of justice, equally the policy of the law, requires their presence whenever it is practicable to obtain it. Statutes therefore, which confer the power to proceed to an ex parte hearing in the absence of personal service, as the present one does under certain circumstances, should not be construed with any degree of liberality in favor of him who seeks the exceptional mode of service."

Applying the foregoing principles, and others which can be more conveniently noted later on, my conclusions are:

First. The bill, so far as it seeks an accounting, injunction, and receiver, affords no ground for substituted service, since, in these respects, it is a proceeding in personam and not in rem. Ellis v. Reynolds (C. C.) 35 Fed. 394.

Second. The service cannot be upheld on the theory that the suit is one to subject the property of the Riverside Trust Company, as a trust fund, to the claims of stockholders and creditors, for the reason that the company is not insolvent.

Third. So far as the Northern Counties Investment Trust, Limited, and Waterhouse and Winterbotham are concerned, the bill does not seek to enforce a claim or lien, or to remove an incumbrance or lien or cloud; nor does it contain allegations which would justify such relief, and, moreover, my conclusion, hereinafter announced, as to equity rule 94, applies to the mortgage held by Waterhouse and Winterbotham.

Fourth. There remains for consideration only those parts of the bill concerning the mortgage executed by complainants to Newton and the trust deed and mortgages executed by the trust company to

Crewdson, Fowler, and Harrison. Complainants pray for the cancellation of these instruments, and, if the prayer of the bill was justified by its allegations, there would be a sufficient showing for substituted service. It is manifest, however, from the bill, that the mortgages held by Newton were given to secure an actual loan, still unpaid, of $150,000 made to Matthew Gage, and those held by Crewdson, Fowler, and Harrison also secure valid and outstanding debentures of the trust company. The bill neither offers payment, nor alleges facts to dispense with it, and therefore fails to state a case for cancellation or removal of the liens.

While the conditions of said deed and mortgages are complained of as being oppressive and having been made for a purpose other than securing the indebtedness of the company, there is no charge that the trustees or mortgagees have sought to avail themselves of these conditions or even to enforce the securities, and they cannot do so so long as the trust company fulfills its obligations to the holders of the debentures.

Furthermore, the parties to said trust deed and mortgages, as well as other debenture holders, whose acceptance of said instruments will be presumed, were under no contract with Gage for a change in the directors or policies of the company, and the general allegations of fraud and conspiracy made in the bill are not sufficient grounds for cancellation.

Again, the bill fails to show that complainants have taken any of the steps required by equity rule 94. So far as said trust deed and mortgages are concerned, the bill is simply a stockholder's bill, and the authorities are agreed that such a suit cannot be maintained without strict compliance with said rule. Corbus v. Gold Min. Co., 187 U. S. 455, 23 Sup. Ct. 157, 47 L. Ed. 256; Davis & Fernum Mfg. Co. v. Los Angeles, 189 U. S. 207–220, 23 Sup. Ct. 498, 47 L. Ed. 778; Quincy v. Steele, 120 U. S. 241, 7 Sup. Ct. 520, 30 L. Ed. 624; Hawes v. Oakland, 104 U. S. 450, 26 L. Ed. 827; Church v. Citizens' St. R. Co. (C. C.) 78 Fed. 526; Robinson v. W. Va. Loan Co. (C. C.) 90 Fed. 770; Squair v. Lookout Mountain Co., 42 Fed. 729; Macon, D. & S. R. Co. v. Shailer, 141 Fed. 585, 72 C. C. A. 631. A defense under said rule does not deny the alleged grievances of the corporation, but the stockholder's authority to redress them. It does not contest the existence of a cause of action, but complainants' right to sue for its enforcement. Without complying with this rule, a stockholder can no more maintain a bill founded upon rights which may properly be asserted by the corporation, than an entire stranger to the corporation and its property.

The availability of said defense against an order for substituted service is well illustrated in defendants' brief filed June 13, 1906, at pages 45 and 46, as follows:

"If complainants here should set forth in the bill that defendant Newton had a mortgage upon the Tajo Building in the city of Los Angeles, that the mortgage was obtained by fraud, or that the consideration had wholly failed, and should pray to have the mortgage canceled, nothing what ever appearing in the bill to show that either of the complainants had any interest whatever in the Tajo Building, or in the mortgage, is it possible that a court of equity would compel defendant Newton to defend such an action, brought by a

stranger to the property or the security, or else submit to a decree pro confesso, rendered upon substituted service and decreeing his mortgage void?

"If complainants here had brought suit against defendants Crewdson, Fowler, and Harrison, alleging that said defendants held a mortgage upon the property of the Southern Pacific Railroad Company in California, without alleging or showing that complainants or either of them were stockholders or had any interest in that company, or in the mortgage, and the bill should allege that the mortgage was obtained by fraud, or that the consideration had wholly failed, is it possible that a court of equity could compel defendants Crewdson, Fowler, and Harrison to defend the suit brought by strangers to the property or the security, or to enter a general appearance therein, or submit to a decree rendered upon substituted service, declaring their mortgage void?"

The failure, in the case at bar, to comply with equity rule 94, considering the failure merely as a defense on the merits, which would render the bill obnoxious to general demurrer, is, under the rule I have already announced, fatal to the order for substituted service. I am of opinion, however, for the reasons below stated, that, in the present case, the failure to comply with equity rule 94 not only affects the merits, but determines the proper alignment of the parties, and thus indirectly goes to the question of federal jurisdiction.

Where there are several plaintiffs and defendants, all necessary parties on one side must be citizens of a state, and all on the other side must be citizens of another state or foreign country. Tracy v. Morel (C. C.) 88 Fed. 101; Merchants' Cotton Press Co. v. N. A. Ins. Co., 151 U. S. 368–386, 14 Sup. Ct. 367, 38 L. Ed. 195; Con. Water Co. v. Babcock (C. C.) 76 Fed. 243–248. The federal courts are without jurisdiction of a suit between aliens where no federal question is involved. Pooley v. Luco et al. (C. C.) 72 Fed. 561.

In determining the question of federal jurisdiction, where it depends solely upon diverse citizenship, it is the duty of the court to arrange the parties on the one side or the other according to their interests and the facts, regardless of the places they occupy in the pleadings as plaintiffs or defendants. Cilley v. Patten (C. C.) 62 Fed. 498; Board of Trustees v. Blair (C. C.) 70 Fed. 414–417; Consolidated Water Co. v. Babcock, supra; Reavis v. Reavis (C. C.) 98 Fed. 145–147; Elkins v. Chicago (C. C.) 119 Fed. 957; Boatman's Bank v. Fritzlen, 135 Fed. 650–658, 68 C. C. A. 288.

In a stockholders' suit to remove an alleged fraudulent lien from the corporate property, where equity rule 94 has not been complied with, the corporation will be placed on the side of the complainant. This alignment results from the facts that the interests of the complainants and the corporation are obviously the same, and, as the corporation can be placed in a hostile attitude to the complainants only by a compliance on their part with equity rule 94, the corporation is not shown to be inimical to their case. Elkins v. Chicago, supra; Groel v. United Electric Co. (C. C.) 132 Fed. 252. Adopting, in the case at bar, this principle of alignment, and placing the Riverside Trust Company, Limited, on the side of the complainants, the suit is one between aliens, and not of federal cognizance. Pooley v. Luco et al., supra.

Illinois Central Ry. Co. v. Adams, 180 U. S. 28, 21 Sup. Ct. 251, 45 L. Ed. 410, cited in plaintiffs' brief, filed December 1, 1906, does

not antagonize such an alignment. In the first place, the case was not a stockholders' suit. At page 33 of 18 U. S., page 253 of 21 Sup. Ct. (45 L. Ed. 410), the court says:

"Plaintiff is averred to be a citizen of Illinois, and all the defendants citizens of Mississippi; but it further appears that the Illinois Central Company claims the right to bring the bill upon the ground that it is the lessee of the property and a creditor and a mortgage bondholder of the Canton, Aberdeen & Nashville Railroad Company, whose property is sought to be taxed."

In the next place, the fact that the plaintiff was a stockholder in the Canton, Aberdeen & Nashville Company did not appear until it was set up in the affidavit of one of the defendants, Wirt Adams, filed in the Supreme Court after the case had been there docketed.

Furthermore, a careful reading of said case shows that the question of arranging the parties according to their interests and the facts, differently from their places in the pleadings, was not in the mind of the court, but diverse citizenship as it appeared from the designations of the parties in the complaint was assumed, and it was on this assumption that the court declared that a defense under equity rule 94 did not go to the jurisdiction, but only to the merits. That diverse citizenship was accepted by the court as an undisputed fact is conclusively shown by the following extract from the court's opinion, underscoring mine:

"Assuming, under the affidavit of Adams, though made only upon information and belief, that the plaintiff, the Illinois Central, owns a majority of the stock of the Canton Company, we are still of the opinion that the defense set up under the ninety-fourth rule does not raise a question of jurisdiction, but of the authority of the plaintiff to maintain the bill. Jurisdiction is the right to put the wheels of justice in motion and to proceed to the final determination of a cause upon the pleadings and evidence. It exists in the Circuit Courts of the United States under the express terms of Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508], *if the plaintiff be a citizen of one state, the defendant a citizen of another*, if the amount in controversy exceed $2,000, and the defendant be properly served with process within the district. Excepting certain quasi jurisdictional facts, necessary to be averred in particular cases, and immaterial here, these are the only facts required to vest jurisdiction of the controversy in Circuit Courts."

Had the question of aligning the parties according to their interests and the facts been called to the attention of the Supreme Court, undoubtedly the Canton, Aberdeen & Nashville Company would have been aligned with the plaintiff, because the interests of the two companies were identical, and the Canton, Aberdeen & Nashville Company must have been in sympathy with plaintiff's case, because, as shown by the affidavit of Adams, which is the basis of the court's discussion of equity rule 94, plaintiff owned a majority of the stock of the Canton, Aberdeen & Nashville Company.

It must be borne in mind here that, in cases involving a federal question, or where diverse citizenship exists, no matter how the parties be aligned, failure to comply with equity rule 94 goes only to the merits, and that it can affect the question of federal jurisdiction only where a jurisdictional arrangement of the parties is required. For instance, if, in the case of Illinois Central Ry. Co. v. Adams, now under review, the Canton, Aberdeen & Nashville Company had been a Tennessee corporation, federal jurisdiction would have existed

no matter on which side said corporation might be placed, and failure to comply with equity rule 94 would not have raised any question of jurisdiction, but simply have gone to the merits; and since, as I have already shown, the fact that an alignment of the parties different from that made in the bill would defeat the claim of diverse citizenship was never considered by nor called to the attention of the court, its discussion of equity rule 94 must be confined to cases where diverse citizenship exists no matter how the parties are arranged, as above illustrated, or where the controversy involves a federal question, as in case No. 79, decided at the same time with Illinois Central Railroad Company v. Adams, 180 U. S. 29, and last paragraph of opinion, at page 41, 21 Sup. Ct. 251, at page 256 (45 L. Ed. 410).

The stipulation of March 3, 1906, signed by complainants' attorneys, extending until the 2d day of April, 1906, the time for the Northern Counties Investment Trust, Limited, to file its appearance, cannot be considered a general appearance. So far from being an appearance, said stipulation expressly extends the time for that purpose, and it is not an unfair inference that said stipulation was given in order to afford said defendant further opportunity to enter its special appearance. This view is fully confirmed by the subsequent order of the court of March 29, 1906, extending the time of appearance until the decision of the court upon the motion now under consideration to vacate the order for substituted service.

Under section 5 of the Act of March 3, 1875, it is the duty of the court, whenever satisfied that it is without jurisdiction of a suit, to dismiss or remand the same on its own motion. Mansfield, C. & L. M. R. Co. v. Swan, 111 U. S. 379, 4 Sup. Ct. 510, 28 L. Ed. 462; McCormick v. McDonald (C. C.) 110 Fed. 50; Barth v. Coler, 60 Fed. 466, 9 C. C. A. 81; U. S. v. Crawford (C. C.) 47 Fed. 561; Williams v. Notawa, 104 U. S. 209, 26 L. Ed. 719.

The motions to vacate order of service are allowed, and, unless complainants desire leave to amend, the suit will be dismissed for want of jurisdiction, and without prejudice.

MACON GROCERY CO. et al. v. BEACH.

(District Court, S. D. Georgia, N. D. October 1, 1907.)

BANKRUPTCY—ACTS OF BANKRUPTCY—PAYMENT WITH INTENT TO PREFER CREDITOR.

Under Bankr. Act July 1, 1898, c. 541, § 3a (2), 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422], which makes it an act of bankruptcy if a debtor shall have "transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors," there is a presumption that a debtor in making such a transfer intended the natural consequences of his act; but the presumption of an intention to give a preference within the meaning of the act may be affected by the amount of the property transferred, and the payment by an insolvent, whose indebtedness amounted to $13,000, of the sum of $2.75 in settlement of a current store bill, in the usual course, cannot be held to raise such a presumption which will overcome his testimony that the payment was not made with any such intention.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 137.]

In Bankruptcy. Petition in involuntary bankruptcy. On exceptions to report of special master.

Olin J. Wimberly, for petitioners.
John P. Ross, for defendant.

SPEER, District Judge. The Macon Grocery Company and other creditors made petition, by which it was sought to obtain an adjudication of involuntary bankruptcy against Asa N. Beach. The indebtedness of Beach amounted to about $13,000. The amount of his assets is not stated, and the proceeding is obviously brought as a basis for an equitable application to the bankruptcy court, designed to subject large values which in one way and another had been conveyed by Beach to a Miss Julia Dixon, whose agent for a long time he had been. Miss Dixon is an aged and infirm lady, and Beach was the adopted child of her parents. Her property consisted of plantations, other real estate, and money. It is contended by the petitioning creditors that, while Beach pretended to be the agent for Miss Dixon, they both entered into a general scheme to defraud his creditors. This, it is insisted, was evidenced through the execution by Beach of mortgages to Miss Dixon to secure an alleged indebtedness to her of $11,817. To give the court jurisdiction to make a decree or decrees canceling the conveyances of Beach to Miss Dixon, and recovering for the benefit of creditors the property he conveyed, it must first be made to appear that Beach is a bankrupt as alleged.

To accomplish this, the plaintiffs make four averments of bankruptcy. The first is that Beach, while insolvent, drew a draft on Little, Williams & Co., cotton brokers, in favor of the Louisville Drug Company, for $19.85, and that this payment was made on October 1, 1901, with intent to prefer the drug company over other creditors. The second is that the defendant did on the same date pay to J. J. Keith, one of his creditors, the sum of $2.75, with intent to give him a preference. The third is an alleged preference given to R. L. Bostick, by draft on Little, Williams & Co. for $100. This was paid on September 17, 1901. The fourth is an alleged preference in favor of the Bank of Louisville by the payment of $500. To these charges Beach made answer. The answer did not admit insolvency; but this was admitted in judicio by his attorney, and also by his brief presented to the court. He denied that the acts specified were acts of bankruptcy. The first, third, and fourth payments, he alleged, were made by him as the agent of Miss Dixon, and with her means. As to the second charge, he admitted the payment of the $2.75 to Keith, but denied that this was done with intent to give him a preference. He also answered that he was chiefly engaged in farming and the tillage of the soil, and for this reason insisted that he could not, in terms of the law, be adjudged an involuntary bankrupt.

On the issues thus made much testimony was taken by the contending parties. Finally, by agreement and consent of counsel, the evidence and the issues presented were referred to J. N. Talley, Esq. (who is the standing master in chancery), as special master, with direction to report "his findings and the conclusions upon the law

and the evidence, for such action of the court in the premises as shall seem proper." In an elaborate report, scrutinizing every phase of the controversy, the master finds, first, that Beach is not entitled to exemption from the operation of the bankruptcy law and that he is not chiefly engaged in agriculture. He then sustains the contentions of Beach as to the first, third, and fourth alleged acts of bankruptcy, and finds that such payments were made in behalf of Miss Dixon, and not by Beach from his own assets. The counsel for both parties probably recognizing that by their consent reference they have designated a tribunal whose findings on the facts will rarely be disturbed by the court (Chicago Motor Vehicle Co. v. American Oak Leather Co., 141 Fed. 520, 72 C. C. A. 576, Kimberly v. Arms, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764), no exception is made by the defendant to the finding that Beach is not exempt from the operation of the law because of his contention that his chief pursuit is agriculture, and none by the petitioners to the findings on the first, third, and fourth grounds, that the several payments were made as agent for Miss Dixon.

The master, however, finds that Beach, while insolvent, committed an act of bankruptcy, as set forth in the second charge, for the reason that while insolvent, and within four months prior to the filing of the petition in bankruptcy, he paid the sum of $2.75 to J. J. Keith, one of his creditors. This payment is not denied. It is evidenced by the receipt from Keith, which recites the items of the account. This is as follows:

"Louisville, Ga., Jan. 22, 1902.

"Mr. A. N. Beach, to J. J. Keith, Dr. Fancy Groceries, Finest Soda Water and Cream.

1901.			
June	13	To Soda Water	$ 05
	22	" Bar Soap	05
July	6	" Lemonade	05
	"	" Soda	05
	9	" Lemonade	05
	"	" Soda	05
	20	" Lemonade	05
	"	" Coca Cola	05
	24	" Lemonade	05
August	26	" "	05
Sept.	5	" "	05
	6	" "	05
	7	" 1 Dressed Doll	2 15
			$2 75

"Received from A. N. Beach cash for above acct.
"Oct. 7th, 1901. J. J. Keith, Jne."

The question to be determined, then, is: Does this payment by Beach, while insolvent, constitute an act of bankruptcy? The oral evidence in the record with regard to this alleged preference is found solely in the testimony of Beach himself, as follows:

"On October 7, 1901, I paid $2.75 to J. J. Keith. It was my debt. The consideration of the debt is shown by the items on the receipted bill. * * * I got the dressed doll for a present. When I paid this little bill to J. J. Keith on October 7, 1901, I owed for mercantile debts something like

$13,000, including the debts due the petitioning creditors. In addition to those of petitioning creditors, I owed several thousand dollars of other debts. When I paid this debt to J. J. Keith, I did not have in mind any of my mercantile and other creditors. I did not pay this debt to J. J. Keith in order to prefer him over my other creditors. In paying this account, it was not my purpose to give J. J. Keith an advantage over my creditors. I did not consider the amount paid Keith a debt."

The relating statutory clause is section 3a (2) of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422]), as follows:

"Acts of bankruptcy by a person shall consist of his having * * * (2) transferred, while insolvent, any portion of his property to one or more of his creditors, with intent to prefer such creditors over his other creditors."

Can it be, in view of the trivial amount paid by Beach, the character of his purchases, and the general aspect of the transaction, that this must be regarded as a transfer of a portion of his property to a creditor, with intent to prefer such creditor over his other creditors, which will cast his entire estate into bankruptcy. Very great respect should be accorded to the finding of the master, who resolved this question in the affirmative. His report was thoroughly considered, and his reasoning is impressive. It is also true that to adopt literally the deliverances of many courts of acknowledged authority would be to sustain his finding. The strong consensus of opinion on this topic among the courts is clearly stated in Webb v. Sachs, 15 N. B. R. 171, Fed. Cas. No. 17,325. The decision is by the District Court of Oregon. There it was held that:

"If a debtor, with knowledge of his insolvency, does an act which operates as a preference to one of his creditors, he is presumed to have so intended, as that is the necessary consequence of his act; and the additional fact that such debtor was really moved to give such preference for any other or particular reason, such as to save costs or satisfy the solicitations of an importunate creditor, or preserve his good will, or keep up his business, does not affect such presumption. Whatever the debtor's motive may be, he is presumed to intend the natural and necessary consequences of his acts."

See, also, Johnson v. Wald, 93 Fed. 640, 35 C. C. A. 522, 2 Am. Bankr. Rep. 84 (opinion by Circuit Judge Shelby of the Fifth Circuit); Morgan & Co. v. Mastick, 2 N. B. R. 521, Fed. Cas. No. 9,803; Miller v. Keys, 3 N. B. R. 224, Fed. Cas. No. 9,578; In re Smith, 3 N. B. R. 377, Fed. Cas. No. 12,974; In re Silverman, 4 N. B. R. 523, Fed. Cas. No. 12,855; In re Oregon Printing Co., 13 N. B. R. 503, Fed. Cas. No. 10,559.

It is also held, with strong reason, that the testimony of a party himself that he had not a preferential intent is entitled to very little weight, where such intent is plainly presumable. Oxford Iron Co. v. Slafter, 13 Blatch. 455, 14 N. B. R. 380, Fed. Cas. No. 10,637; In re Wright Lumber Co. (D. C.) 114 Fed. 1011. Many other authorities might be cited to the same tenor and effect. It will be found, however, that in each of these cases a substantial preference had been made, that the preferential intent was always inferable, and that the consequent injury to other creditors was significant and distinct. The basic reason upon which all of these determinations are founded is substantially that every person of a sound mind is presumed to in-

tend the necessary, natural, and legal consequences of his deliberate acts. In each case the insolvency of the bankrupt was conceded or proven. Then, when he has made a payment to a particular creditor, he is presumed to have the intent to prefer him, as it will enable that creditor to obtain a greater percentage of his debt than will inure to others. But if the payment on the debt is of that infinitesimal sort that it can have no perceptible consequence, is an intent to prefer a necessary, natural, and legal consequence of such payment? It would seem that the substantial or important character of a payment or transfer must ex necessitate possess large evidential effect to show the intent to prefer. This may be gathered from the statement of Mr. Justice Field, in Toof v. Martin, 13 Wall. 40, 20 L. Ed. 481. Speaking for the court in that case, that great jurist declares:

"It is a general principle that every one must be presumed to intend the necessary consequences of his act. The transfer in any case by the debtor of a large part or all his property while he is insolvent to one creditor, without making provision for an equal distribution of its proceeds to all his creditors, necessarily operates as a preference to him. * * *"

If this is true, the converse would seem also true. If the alleged bankrupt, although aware of his insolvency, should make a payment of an amount not a large part of his means, but utterly trivial—a payment to which no creditor, in the absence of litigation, would possibly object—it is at least debatable whether such payment must necessarily demonstrate the unlawful intent to give a preference to one creditor to the injury of others. The doctrine which we are discussing, and which the courts have so strongly stated, presupposes that the payment is injurious to the other creditors. But where the facts show that no injury, of which the law would or could take an account, would result, the reason of the rule ceasing, it seems that the rule itself would cease. This is illustrated by the remarks of Judge Bellinger in Re Gilbert, 112 Fed. 951, 8 Am. Bankr. Rep. 101, in the District Court of Oregon, decided in 1902. The case was a petition for involuntary bankruptcy, and the learned judge observed:

"The presumption arising from the transfer of property is affected by the amount of such transfer. Thus, where the transfer was of all one's property, this was held to afford a violent—almost conclusive—presumption of an intent to prefer, where other creditors were unprovided for. * * * In this case the transfer was of a comparatively small part of the property of A. T. Gilbert—so small that the expediency of resorting to a bankruptcy court, rather than permit a distribution of the assets of the bank through the pending proceedings in the state court, may be doubted. If the preferences complained of are set aside, it will add not more than 1 per cent. to the dividends to be paid the general creditors."

Again, in Re Douglass Coal & Coke Co. (D .C.) 131 Fed. 769, it was held that the small size of the payment may be looked to as a circumstance, in connection with others, to justify the conclusion that no preference was intended. The language of the court is as follows:

"Payments of comparatively small sums of money by an insolvent corporation to each of a number of its creditors, made in the usual course of business, do not raise a presumption of an intent to prefer such creditor

over its other creditors, so as to establish an act of bankruptcy by a transfer of property with intent to prefer, within [the] bankruptcy act. * * *"

A fortiori, would one trifling payment to one creditor fail to evoke such presumption. The ruling in that case was by the referee, but the District Court of the Eastern District of Tennessee, in affirming the referee, while recognizing the insolvency of the defendant, observed:

"I nevertheless do not think that a presumption of intent to prefer should be indulged against an insolvent debtor by the mere act of paying certain creditors small sums in the usual course of business, and apparently in the effort to keep its business going, unless there is other and further evidence showing a specific intent to thereby give such creditors an undue preference over others, although such might be the effect of the payment."

Again, in Driggs v. Moore, 3 N. B. R. 602, Fed. Cas. No. 4,083, it was held that payments, made in the usual and ordinary course of trade, and at the time the debt matures, and in the usual mode of paying debts, are prima facie valid.

These citations are perhaps ample to show that the authorities are not in entire accord upon this question. From their consideration we have reached the conclusion that even though a bankrupt has knowledge of his insolvency, if the payment is trivial and is made for the current and obvious expenses of one's daily life and habits, there is no hard and fast rule which will oblige the court to regard the transaction inimical to the bankruptcy law; nor, by parity of reasoning, do we deem the court obliged to conclude, because the other creditors might each have received an infinitesimal benefit, if the payment had not been made, that such payment necessarily, naturally, and logically shows an intent to prefer such creditor over the other creditors. Indeed, the payment here upon which the creditors rely seems to afford a fit occasion for the application of the maxim, "De minimis non curat lex." Since the debts of Beach amounted to $13,000, and since his payment to Keith was of only $2.75, the disadvantage which each creditor suffered because of such payment was less than $1/4000$ of his debt. For instance, one of the petitioning creditors, whose claim amounts to $84, would receive but a fraction over 1 cent. Can such a payment, then, justify the presumption that Beach intended a preference? We do not think so. The transaction was a bagatelle. It was neither immoral nor fraudulent. To apply the general presumption here would make it dangerous for a person in insolvent circumstances to buy and pay for a sack of flour, a flitch of bacon, or a bag of potatoes. To avoid bankruptcy, his family must starve. The soda water and lemonade to the value of 50 cents, with which Beach allays the thirst proper to his clime, were inexpensive refreshments, as innocuous as the "cup which cheers, but not inebriates." More debatable is the effect of coca cola. But his purchase of this mysterious elixir amounted to only 5 cents. The bar of soap, worth five cents, is without the pale of judicial discussion. It is true that there was a dressed doll, the price of which was more extravagant. This was $2.15. Beach testifies that it was "for a present." The evidence fails to disclose upon whom this marvel of art and fashionable millinery was bestowed. It, however, appears that Beach, is a bachelor—an "old bachelor," we may presume—and perhaps the "dressed doll" made happy the heart of some tiny maiden, whose lovely

face and graceful form brought back to the veteran and hapless heart of the alleged bankrupt the memory of features which "love used to wear," in the words of Ossian, "sweet and sad to the soul, like the memory of joys that are gone."

We conclude, therefore, that the payment of 60 cents for soda water, coca cola, and one bar of soap, and $2.15 for a dressed doll, in the absence of all other evidence to that end, does not raise the presumption of an intent to give to the creditor paid a preference over his other creditors. Since it appears from the record that this is the only transaction upon which bankruptcy is now charged or assigned, the finding of the master on the second alleged ground of bankruptcy, namely, the payment to Keith of $2.75, is overruled.

A decree will be entered accordingly.

BAGLIN v. CUSENIER CO.

(Circuit Court, S. D. New York. January 7, 1905.)

No. 8,949.

TRADE-MARKS AND TRADE-NAMES—ABANDONMENT—RIGHTS OF PUBLIC.

A proprietor of a trade-mark does not lose his rights to the same in the United States because the French government seizes such proprietor's property, including his trade-marks, that it may find in France.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, § 36.

Abandonment, see note to Saxlehner v. Eisner & Mendelson Co., 33 C. C. A. 294.]

In Equity. On motion for preliminary injunction.

Reversed on appeal 141 Fed. 497. For decision on the merits, see 156 Fed. 1016.

Philip Mauro, C. A. L. Massie, and Ralph L. Scott, for complainant.

Howson & Howson, for defendant.

LACOMBE, Circuit Judge. The French government may, no doubt, seize such property of the Carthusian monks as it may find in France, including trade-marks: but I am at a loss to see how it can give to any one, liquidator or not, the right to sell in this country Chartreuse cordial not made by the said monks, packed, marked, and labeled with the marks and devices which for more than a generation have identified and guaranteed their product. Maybe the monks have lost the right to use their old trade-marks, but it does not follow that some one else can use them here on goods which they do not make. To offer for sale cordial made by Mr. Leconturier as cordial made by the monks of La Grande Chartreuse is a fraud upon the public in this country, which even the authority of the French government cannot permit.

Complainant may take a preliminary injunction against the selling and offering for sale of any cordial not made by the Carthusian monks, in packages which, by the collocation of emblems and inscriptions ground on the bottle with the yellow label, lettered, etc., and the cir-

cular cork label, lettered, etc., imposed on brown wax, simulate the well-known packages in which complainant's association have heretofore offered their cordial for sale in this country.

BAGLIN v. CUSENIER CO.

(Circuit Court, S. D. New York. November 18, 1907.)

1. TRADE-MARKS AND TRADE-NAMES—NAME SUBJECT TO APPROPRIATION—"CHARTREUSE."

The name "Chartreuse" is not a place name, but a French term denoting a Carthusian monastery, and is a proper subject of appropriation as a trade-mark. In the United States it has been long and widely known and is registered as a trade-mark denoting a liqueur made and sold by the Carthusian monks.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, § 13.

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

2. SAME—INFRINGEMENT—INJUNCTION.

For many years the order of Carthusian monks established at La Grande Chartreuse, in France, made and sold a liqueur under the name "Chartreuse," claimed to have been made by a secret process. Such liqueur has long been sold and has become well known under such name in the United States, where the name is registered as a trade-mark. The order having been expelled from France by the government, a receiver was appointed who took possession of their property, including their liqueur factory and, as it appears, their trade-mark. Such receiver, although having no knowledge of the secret formula, commenced the manufacture of a similar liqueur, which he sold under the name "Chartreuse," using the same bottles and labels as had been used by the monks. In the meantime, the monks established a factory in Spain and continued to manufacture the liqueur in accordance with the original formula, using, however, a different label and style of package. *Held*, that the action of the French government and court did not affect the trade-mark rights of the Carthusian monks in the United States; that such rights were not dependent on the place or country in which their business was conducted; that the receiver did not succeed to such rights, but became their competitor; and that they were entitled to an injunction restraining the sale of his products in this country in competition with their own under their trade-mark and dress and as the original and genuine Chartreuse.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, § 110.

Unfair competition, see notes to Scheuer v. Muller, 20 C. C. A. 165; Lare v. Harper & Bros., 30 C. C. A. 376.]

In Equity. Suit for infringement of trade-mark.

For decision on preliminary injunction, see 156 Fed. 1015, which was reversed by the Circuit Court of Appeals in 141 Fed. 497.

Philip Mauro, C. A. L. Massie, and Ralph L. Scott, for complainant.
Howson & Howson, for defendant.

HOUGH, District Judge. Prior to 1901, the Carthusian monks, of whom the complainant herein is the Father Superior, conducted a manufacture of liqueurs near their chief monastery and not far from

Grenoble, France. The history of this business is sufficiently set forth in Bauer v. Order of Carthusian Monks, 120 Fed. 78, 56 C. C. A. 484, and it is for the purposes of this case sufficient to state that the evidence herein supports the statement of fact there made.

In the United States, the liqueurs in question have long been known, traded in, and consumed by the name "Chartreuse." This word is not a place name, and never was. It is the French term for a kind of building, i. e., a Carthusian monastery; but for American commercial purposes it means, and long has meant, a certain drinkable manufactured by that branch of the Carthusian order living near Grenoble in La Grande Chartreuse, i. e., the monastery occupied by the Father Superior. Cf. Siegert v. Gandolfi, 149 Fed. 100, 79 C. C. A. 142; Bauer v. Siegert, 120 Fed. 81, 56 C. C. A. 487.

On July 2, 1901, the French "Loi relative au contrat d'association" became effective. By that statute the ecclesiastical association which had for hundreds of years occupied the Grande Chartreuse, and for a considerable fraction of that time manufactured liqueurs near by, became unlawful. Under French law the effect of such illegality was to disable the association as a legal entity, or any trustee (personne interposeé) for the associators, either to obtain or retain property for association purposes. In order, therefore, to conserve such property for the persons entitled thereto, a receiver (liquidateur) was appointed, who seized what he could discover, including the liqueur factory near Grenoble. The persons entitled to the seized property, parts of which seem to have belonged to the order for centuries, do not appear in the evidence, further than that neither the individual monks nor any of them were so entitled, unless it should ultimately be directed either by judicial or legislative action that the proceeds of the sale of the seized property be applied to defray such pensions as might be payable or thereafter granted to indigent surviving monks.

This exposition of the law of France is given by defendant's witness M. Millerand, Minister of Commerce at the time the law was enacted, a member of the Chamber of Deputies, an attorney at law and counsel for the receiver. It does not appear that the receiver ever obtained any judicial authority to continue or revive the business of manufacturing liqueurs, nor is it clear that French law requires such authorization. Before the receiver assumed possession the monks had departed, leaving behind as little as possible, and especially taking with them all certain knowledge of the formula or recipe for their liqueurs. The receiver, however, seems under the law of France to have become possessed of the trade-mark "Chartreuse," although he found no business to accompany it and had no ability to make, or knowledge of making, the article covered by such trade-mark. He thereupon employed men of science, who by analysis and experiment produced a liqueur which may be identical with, and certainly closely resembles, the monkish cordial, and this he sold under the same labels and in the same bottles as had long been used by the Carthusians. Thus the liqueur of the receiver, whose title is that of the defendant, is in appearance and style of wrapping identical with that of the monks, solely excepting the mark of the printers of the label, in which particular a variance exists, but only because the firm which had printed for the complainants re-

fused the receiver's repeatedly proffered trade. The Carthusians, being thus dispossessed, removed their ecclesiastical establishment to Italy, but set up in Spain their cordial factory, importing from the neighborhood of Grenoble certain herbs locally grown and constituting one of the known ingredients of their liqueurs.

This action is brought, in substance, to enjoin the receiver's assignee from vending the liqueur in the United States under the old labels, and the defense has two branches: First, that the French proceedings above outlined have vested in defendant title to the old trade-mark; and, second, that the complainants have either abandoned such trade-mark or estopped themselves from asserting it by the course and conduct of their business in Spain.

The first defense rests upon the assumption that what was done in France did or could possess extraterritorial validity, or affect any property of complainants in the United States. It is not denied that on July 2, 1901, complainants possessed a valuable asset in this country, i. e., the right to vend their produce under certain brands and labels and in bottles of certain size, shape, and marking, which right had long existed, had received the recognition of federal trade-mark registration, and been vindicated in our courts. Bauer v. Order of Carthusian Monks, supra; Grezier v. Gerard, unreported and decided in this court April 13, 1876.

This American property did not pass to the receiver, and could not inure to his benefit or that of his assignee by any proceeding taken against complainants in France. Some strength might be found in defendant's argument had the receiver become possessed of the business that produced the product indicated by the trade-mark. This he did not do. A business does not inhere in a place or a building, nor depend for validity upon continuance in one locality or country. When the monks fled from the rigor of French law, they took their business with them. The testimony shows that it exists to-day in Spain, and, while they continue to transact it there or elsewhere, no law but that of the United States can deprive them of the lawful fruits thereof in this country.

The second defense is based upon the admitted fact that, finding the French market for Chartreuse made in Spain and bearing the old labels closed to them by French law, complainants devised a new form of package, wholly unlike the old, and have for some years pressed that upon the market both in Europe and America, at the same time warning the public by advertisement that the old label and bottle no longer denotes the genuine Chartreuse of the Carthusians. This is all true, with the addition that complainants have taken care to put up some liqueur under the old label and vend it, in order to negative intentional abandonment while litigations more or less resembling this cause have been pending in most countries other than France.

The defense now under consideration is affected by the same fallacy as the first, viz., the thought that the liquidateur is the successor of the monkish industry. Nothing could be further from the truth. He and all claiming under him are rivals in business, enjoying the advantage of governmental protection in the country of his appointment. If one entitled to a trade-mark does abandon it, that does not justify a rival

in appropriating the same and using it to induce the public to believe that the rival's product sold under the old label is the same thing so long and favorably known thereunder and still being sold under the new label by the original proprietor. The result of a suit to enjoin such competition cannot I think be doubted. The only difference between the case supposed and that at bar is that the rival's right to the label and the use thereof arises from the coercion of a foreign statute and proceedings thereunder, with which from a foreign point of view we are not concerned, but which by every canon of American law amount to confiscation.

Decree for complainants.

BAGLIN v. CUSENIER CO.

(Circuit Court, S. D. New York. November 2, 1907.)

APPEAL—RECORD—PAPERS PERTAINING TO RULING NOT REVIEWABLE.

The ruling of a federal court refusing to permit a party to a suit in equity to introduce further evidence after the time for taking testimony had expired, being discretionary, and not reviewable, the motion papers on which such ruling was made are not properly a part of the record of the case for final hearing.

On Motion to Strike Papers from Record for Final Hearing.

Ralph Lane Scott, for the motion.
Howson & Howson, opposed.

WARD, Circuit Judge. After the time for taking testimony in this case had expired, Hough, J., refused to permit the defendant to offer in evidence the Law Times report of the British decision. This was discretionary with him, and, as no appeal would lie to his action (Ingle v. Jones, 9 Wall. 486, 19 L. Ed. 621), the motion papers on which he acted are not within the rule laid down in Blease v. Garlington, 92 U. S. 1, 23 L. Ed. 521.

The motion to require the defendant to strike the motion papers from its printed record is therefore granted.

THE PERSIANA (two cases).

(District Court, S. D. New York. November 20, 1907.)

1. SHIPPING—DAMAGE TO CARGO—IMPROPER STOWAGE.

A vessel is liable for damage to wool cargo by whale oil which leaked in large quantities from barrels in an adjoining compartment when the wool was raised but little if any above the deck in stowing, and the facts that whale oil barrels always leaked, and that there was an excessive leakage during the voyage, were known to the navigators, and no steps were taken to discharge the oil from the bilges where it had accumulated to a depth of more than two feet, and from which it was liable to and did escape into the compartment where the wool was stowed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, § 454.]

2. SAME—NOTICE OF CLAIM—VESSEL OPERATED BY CHARTERER.
Where a vessel was being operated by time charterers, and bills of lading were issued by the master under the terms of the charter, the charterers became agents of the owners for the purpose of receiving notice of a claim for damage to cargo required to be given by a bill of lading.

3. SAME—TIME OF NOTICE—REQUIREMENT OF BILL OF LADING.
Notice of a claim for damage to cargo given by the consignee as soon as the cargo was delivered and the damage was known, and while the vessel was still in port, is sufficient where the damage was already known to the owners of the vessel or their agents, notwithstanding a provision of the bill of lading that the owners should not be liable "for any damage to any goods * * * notice of which is not given before the removal of the goods"; such provision not being binding unless under the circumstances it was reasonable.

In Admiralty. Suit for damage to cargo.

Kneeland & Harison, for libelants.
Convers & Kirlin, for claimant.

HOUGH, District Judge. The injury complained of consists of staining most, if not all, of the lower tier of a consignment of bags of wool with whale oil.

The wool was on one side of a wooden bulkhead, and the whale oil on the other. The oil was well stowed and dunnaged, and no weather was encountered, and no occurrences appear in the testimony explaining satisfactorily the enormous leakage which undoubtedly took place. The weight of evidence is that some shrinkage of the barrels in which the whale oil was contained (and consequent leaking) must be accounted for by the stowage of sugar in the same compartment with the whale oil. The sugar generated heat, raised the temperature of the hold, and tended to dry out the barrels. But it also appears that whale oil always leaks, some leakage was to be expected, and it follows that especial care was necessary to prevent injury to cargo in its neighborhood. From the construction of the vessel, it is, I think, clear that any considerable leakage from this whale oil would naturally tend to get into the subcompartment in which the wool was stowed. There is conflict of evidence as to the height at which the lower tier of wool was raised above the deck. I cannot believe that it was elevated as much as six inches. The testimony to the effect that it was scarcely raised at all above the deck, taken in conjunction with the undoubted damage, leads me to believe that the lower elevation or absence of all elevation is the truth.

But the conclusive fact is that the excessive leakage of oil was known, and the oil permitted to rise to the height of two feet and six inches in the bilges at a time when the vessel was encountering reasonably heavy weather and rolling and pitching a good deal. This is quite enough to account for the condition in which the wool was found, and to render it probable that at one time the entire floor of the wool compartment was covered with oil, perhaps rising to the height of several inches, because those in charge of the vessel did not wish to pump so much valuable oil overboard. In effect the vessel chose to carry oil stowed in her bilges, and that of itself was negligent stowage. Such conduct is not within the protection of the Harter act. The case is far more plainly outside that protection than

was that of the Botany Worsted Mills v. Knott, which caused this court "no little embarrassment." 76 Fed. 583.

The vessel at the time of this damage was under time charter. The injury to the wool was discovered before the goods left the ship, but was not known to libelants until a lighterage delivery had been made. The bill of lading under which the goods were carried provides that the owners shall not be liable "for any damage to any goods * * * notice of which is not given before the removal of the goods." As soon as libelants discovered their injury, they gave notice to the time charterers of the vessel. This was after the goods had been delivered, but within a few days of the steamer's arrival, and long before she left port.

It is contended: (a) That any notice to the charterers was insufficient; and (b) that the notice given (assuming it to be otherwise sufficient) was given too late. The libelants had done all their business with the time charterers and knew them as managers of the line or system of transportation in which the Persiana was then operating. The master issued the bills of lading herein under the terms of the charter party, and it seems to me that for purposes such as this the charterers became the duly authorized agents of the owners, and that notice to them, if otherwise sufficient and seasonable, was valid; and for this conclusion I consider The Niceto (D. C.) 134 Fed. 655, as authority—not that the facts are the same, but that the same reasoning is applicable.

With respect to the time of notice, the claimant's legal position is that notice before removal of the goods is a condition precedent to recovery; but, as was remarked in The Westminster, 127 Fed. 680, 62 C. C. A. 406, to sustain such a bill of lading clause "as a binding condition in any given case, it must appear from the circumstances which there prevail that it was just and reasonable."

Under the circumstances shown in this case, it seems to me clear that every just and reasonable requirement is satisfied by what the libelants did, i. e., they gave notice as soon as they learned of the damage, and of a damage which was already known to the claimants or their agents, and did this while the vessel was still unloading.

Decree for libelants in both cases, with an order of reference if the amount of damages be not agreed upon.

MEMORANDUM DECISIONS.

ATLANTIC COAST LINE R. CO. v. UNITED STATES. (Circuit Court of Appeals, Fourth Circuit. November 22, 1907.) No. 754. In Error to the District Court of the United States for the Eastern District of North Carolina. For opinion below, see 153 Fed. 918. Geo. B. Elliott, for plaintiff in error. L. M. Walter, Sp. Asst. U. S. Atty., and Harry Skinner, U. S. Atty. Before PRITCHARD, Circuit Judge, and MORRIS and WADDILL, District Judges.

PER CURIAM. Upon an inspection of the record in this case it appears that the writ of error was improvidently granted, in that there was no final

judgment in the court below. The writ of error is therefore dismissed, and the District Court will proceed with the case according to law.

CHOUQUETTE v. MEXICAN CENT. RY. CO., Limited. (Circuit Court of Appeals, Fifth Circuit. November 26, 1907.) No. 1,477. In Error to the Circuit Court of the United States for the Western District of Texas. Geo. E. Wallace and J. A. Buckler, for plaintiff in error. T. A. Falvey and Waters Davis, for defendant in error. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The judgment of the Circuit Court is reversed, and the cause is remanded, with instructions to dismiss the suit, without prejudice to an action in any court willing and competent to administer relief under the laws of Mexico. See Mexican Central Railway Company, Ltd., v. J. W. Eckman, Guardian, etc., 205 U. S. 538, 27 Sup. Ct. 791, 51 L. Ed. 920; Slater v. Mexican Central National Railroad Company, 194 U. S. 120, 24 Sup. Ct. 581, 48 L. Ed. 900. The costs of this court to be paid by the plaintiff in error.

CONTINUOUS GLASS PLATE CO. v. PRESSED PRISM PLATE GLASS CO. (Circuit Court of Appeals, Third Circuit. October 2, 1907.) No. 1,077. Appeal from the Circuit Court of the United States for the Western District of Pennsylvania. Thomas W. Bakewell, for appellee. Cause dismissed, under rule 16. See 150 Fed. (C. C.) 355.

LOUISVILLE & N. R. CO. v. LACY. (Circuit Court of Appeals, Fifth Circuit. November 18, 1907.) No. 1,730. In Error to the Circuit Court of the United States for the Southern District of Alabama. G. L. Smith and H. T. Smith, for plaintiff in error. J. W. McAlpine, E. M. Robinson, and C. E. Hamilton, for defendant in error. Before PARDEE and SHELBY, Circuit Judges, and BURNS, District Judge.

PER CURIAM. This case was submitted to the jury in accordance with the opinion and judgment of this court in Lacy v. Louisville & Nashville R. Co., 152 Fed. 134, 31 C. C. A. 352; and we find no reversible error assigned or apparent in the proceedings of the trial court in the last trial of the case, and we therefore affirm the judgment rendered.

LUTCHER & MOORE LUMBER CO. v. KNIGHT et al.* (Circuit Court of Appeals, Fifth Circuit. December 10, 1907.) No. 1,629. In Error to the Circuit Court of the United States for the Western District of Louisiana. J. D. Wilkinson and Geo. E. Holland, for plaintiff in error. A. J. Murff and M. J. Cunningham, Jr., for defendants in error. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. After a thorough and attentive consideration of the questions raised on this writ, we are of opinion that the matters of defense relied upon by plaintiff in error on the trial below, in so far as they were not given consideration, were of an equitable nature, not cognizable in a court of law, we therefore affirm the judgment of the Circuit Court.

METROPOLITAN LIFE INS. CO. v. TALBOTT. (Circuit Court of Appeals, Fifth Circuit. December 3, 1907.) No. 1,660. In Error to the Circuit Court of the United States for the Northern District of Texas. Maurice E. Locke and Eugene P. Locke, for plaintiff in error. Wendel Spence, for defendant in error. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The judgment of the Circuit Court is affirmed. See 142 Fed. 694, 74 C. C. A. 26.

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*Rehearing denied January 21, 1908.

MEXICAN CENT. RY. CO., Limited., v. ECKMAN. (Circuit Court of Appeals, Fifth Circuit. November 26, 1907.) No. 1,475. In Error to the Circuit Court of the United States for the Western District of Texas. T. A. Falvey and Waters Davis, for plaintiff in error. Geo. E. Wallace, for defendant in error. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. Considering the answer of the Supreme Court of the United States to the questions heretofore certified in this case (see Mexican Central Railway Co., Ltd., v. J. W. Eckman, Guardian, etc., 205 U. S. 538, 27 Sup. Ct. 791, 51 L. Ed. 920, and the case of Slater v. Mexican Central National Railroad Company, 194 U. S. 120, 24 Sup. Ct. 581, 48 L. Ed. 900), the judgment of the Circuit Court is reversed, and this cause is remanded, with instructions to dismiss the same at the costs of the plaintiff below, but without prejudice to an action in any court willing and competent to administer relief under the laws of Mexico.

ROLLER v. BURKETT et al. (Circuit Court of Appeals, Fifth Circuit. November 26, 1907.) No. 1,553. Appeal from the Circuit Court of the United States, for the Eastern District of Louisiana. Thos. J. Gibson, Hiram Glass, W. L. Estes, Jno. J. King, and C. K. Bell, for appellant. Chas. S. Todd, for appellees. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. This appeal is dismissed, on the authority of Menge v. Warriner, 120 Fed. 816, 57 C. C. A. 432, and Cay v. Vereen, 144 Fed. 839, 75 C. C. A. 667, and authorities there cited.

WAGGONER et al. v. NATIONAL BANK OF COMMERCE et al. (Circuit Court of Appeals, Fifth Circuit. November 26, 1907.) No. 1,718. Appeal from the Circuit Court of the United States for the Northern District of Texas. W. O. Davis and Sam J. Hunter, for appellants. J. H. Barwise, Jr., Geo. E. Miller, and F. E. Dycus, for appellees. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. This is the second appeal in this case. The decree now before us seems to be in accordance with our views as expressed in our former opinion (143 Fed. 53, 74 C. C. A. 207), and in the matters not passed upon in the former appeal seems to be correct. It is, however, somewhat involved, and, as it is suggested that under one aspect of the decree, it might permit a double recovery on the Coffey-Neal chattel mortgage, it is amended by limiting the full recovery by the National Bank of Commerce and the Bank of America, as against W. T. Waggoner and Robert Houssels, to the sum of $13,337.50, together with 10 per cent. interest thereon from date of decree, that being the full amount secured by said chattel mortgage; and, as thus amended, the decree is affirmed.

ZARAFONITIS et al. v. UNITED STATES.* (Circuit Court of Appeals, Fifth Circuit. December 10, 1907.) No. 1,717. In Error to the Circuit Court of the United States for the Northern District of Texas. Yancey Lewis and Nelson Phillips, for plaintiffs in error. Wm. H. Atwell, U. S. Atty. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. Notwithstanding the exhaustive brief filed, we adhere to our conclusions in this case when it was before the court at a former term (United States v. Zarafonitis et al., 150 Fed. 97, 80 C. C. A. 51); and the judgment of the Circuit Court is affirmed.

*Rehearing denied January 21, 1908.